Institut de Droit international
Annuaire, Volume 66, Tome I
Session de Lisbonne, 1995
Travaux préparatoires

Institute of International Law
Yearbook, Volume 66, Part I
Session of Lisbon, 1995
Preparatory works

Institute of International Law

Yearbook

Volume 66, Part I

Session of Lisbon, 1995

Preparatory works

Justitia et Pace

Editions A. Pedone - 13, rue Soufflot - Paris

Institut de Droit international

Annuaire

Volume 66, Tome I

Session de Lisbonne, 1995

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, chemin des Limites
CH-1293 Bellevue
Tél. (+41-22) 774.18.43

M^me^ Hans Wehberg
Conseillère
1, avenue de Frontenex
CH-1207 Genève
Tél. (+41-22) 736.26.20

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

Trésorerie :

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

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

Printed in France by Bosc Frères, Oullins.
ISBN 2 233 00278-4

Table des matières

Problèmes découlant d'une succession de conventions de codification du droit international sur un même sujet

Problems arising from a succession of codification conventions on a particular subject

Première Commission

Rapporteur : Sir Ian Sinclair

Les conséquences juridiques pour les Etats membres de l'inexécution par des organisations internationales de leurs obligations envers des tiers.

The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties

Cinquième Commission

Rapporteur : Mme Rosalyn Higgins

Problèmes découlant d'une succession de conventions de codification du droit international sur un même sujet

Problems arising from a succession of codification conventions on a particular subject

*Première Commission**

Rapporteur : *Sir Ian Sinclair*

* La Première Commission comprenait, au 15 avril 1994, Sir Ian Sinclair, *Rapporteur,* MM. Ago, Conforti, Crawford, Kooijmans, Marotta Rangel, Mosler, Münch, do Nascimento e Silva, Pastor Ridruejo, Rosenne, Schindler, Sucharitkul, Torres Bernardez, Wolf.

Preliminary Communication

April 1987

Chers Confrères,

I owe you all an explanation for the somewhat unusual form and content of this communication. It does not of course constitute a preliminary exposé, accompanied by a specific questionnaire, within the meaning of Article 4.1 of the Rules of the Institute. It is rather a letter designed to share with you my initial reflections on the scope of the topic and the manner in which it should be tackled, in the anticipation that we may be able to have a meeting of the Commission at Cairo.

The topic which we are called upon to study «Problems arising from a succession of codification conventions on a particular subject» does not have a self-evident and clearly defined scope. It is accordingly necessary to delimit it more closely. The brief debate at Helsinki confirms that the *Commission des travaux*, in proposing this topic for study, had in mind particularly the problems which arise, or might arise, from successive conventions on the law of the sea (*Annuaire* I.D.I., vol. 61, Part II, 1985, p. 60), and their relationship with customary law. It was however stressed that the study should not be limited to the law of the sea, but should equally take account of corresponding problems arising from successive codification conventions on other subjects, for example in the field of diplomatic law (*loc. cit.*, pp. 61, 63).

This gives us some general guidance. But there is a need for still greater precision. What for example is meant by the term «codification convention» ? It clearly embraces the major codification conventions adopted by plenipotentiary conferences convened by the United Nations to consider draft articles on particular topics prepared by the International Law Commission, that is to say :

A. Geneva Convention on the Territorial Sea, 1958 ;
B. Geneva Convention on the High Seas, 1958 ;
C. Geneva Convention on the Continental Shelf, 1958 ;
D. Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 ;
E. Vienna Convention on Diplomatic Relations, 1961 ;
F. Vienna Convention on Consular Relations, 1963 ;
G. Convention on Special Missions, 1969 ;

H. Vienna Convention on the Law of Treaties, 1969 ;
I. Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975 ;
J. Vienna Convention on Succession of States in respect of Treaties, 1978 ;
K. Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983 ;
L. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

It will be noted that this list does not include all conventions adopted on the basis of draft articles or particular topics prepared by the International Law Commission. It does not, for example, include the Convention on the Reduction of Statelessness (1961), nor the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973), since it is highly doubtful, to say the least, whether either of these Conventions can truly be classed as a «codification convention».

To this basic list of twelve codification conventions there must of course be added the United Nations Convention on the Law of the Sea, 1982. Whatever view one may take of that Convention and of the circumstances in which it was negotiated, there can be no doubt that it constitutes, at least in part, an exercise in the progressive development and codification of international law. The preamble to the 1982 Convention expresses *inter alia* the belief that «... the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights ...» (seventh preambular paragraph). An authoritative commentary on the preamble by a member of our Commission (Shabtai Rosenne) states :

> «In the seventh preambular paragraph attention must be drawn to the use of the formula «codification and progressive development» of the law of the sea. This expression, adapted from Article 13 of the Charter itself, did not give rise to controversy, and it undoubtedly gives expression to a truth. Its legal implications go further, however. By deliberately mirroring (as do other major codification conventions, except the 1958 Conventions on the law of the sea), the double formula of Article 13 of the Charter (amplified and defined in Article 15 of the Statute of the International Law Commission), this paragraph of the preamble puts the interpreter on notice that the Convention as a whole was not, on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorized as being wholly one of codification, simply re-stating in written form what the customary law is, nor wholly

one of progressive development constitutive of rules to be binding upon States which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention» : *United Nations Convention on the Law of the Sea 1982 : A Commentary* (ed. Nordquist), Vol. I (1985), pp. 462-3.

We must therefore take it that the 1982 Convention is to be regarded as a «codification convention» within the terms of our remit, notwithstanding that the International Law Commission was in no way involved in the preparatory work preceding the convening of UNLOSC in 1973. This conclusion is reinforced by the consideration that our mandate is to study the topic with particular reference to the law of the sea.

The question remains : should our mandate be taken as extending beyond the list of codification conventions (in the strict sense) so far identified ? There is one particular field — the field of the humanitarian law of armed conflicts — where there exists a considerable body of practice concerning the impact and legal effect of successive conventions on the same subject-matter. I refer of course to the relationship between Additional Protocol I (of 1977) to the Geneva Conventions of 12 August 1949, as relating to the protection of victims of international armed conflicts, and the 1949 Geneva Conventions themselves, and indeed to the relationship between the 1949 Geneva Conventions and earlier conventions, such as the 1929 Geneva Convention on (a) the amelioration of the condition of the sick and wounded and (b) the treatment of prisoners of war, and the 10th Hague Convention of 1907. That the 1949 Geneva Convention can be regarded as an exercise in the progressive development and codification of international law is attested to by no less an authority that our late lamented Confrère, Sir Hersch Lauterpacht, who took the view that :

« ... a large part of the law of war — by far its larger part — has been revised, developed and codified on an imposing scale by the four Geneva Conventions of 1949» : 29 *B.Y.I.L.* (1952), p. 379.

Whether Additional Protocol I can be so characterized is much more open to question, at least as regards its more controversial provisions ; but it is noteworthy that the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts records, as one of the reasons for inviting selected national liberation movements to the Conference, that « ... the progressive development and codification of international humanitarian law applicable in armed conflicts is a universal task in which the national liberation movements can contribute positively». Your Rapporteur is inclined to the view that, for the purposes of our mandate and without taking any position on whether Additional Protocol I can strictly be characterized as a «codification convention», it would be desirable to take into account,

in our study, the problems arising from successive conventions bearing on international humanitarian law applicable in armed conflicts. But he would welcome the views of others on this point.

By way of contrast, your Rapporteur is unpersuaded that the study should be so extended as to encompass the legal problems which arise out of so-called «chains of conventions» as suggested by Professor Dinstein at the Helsinki session (*Annuaire* I.D.I., vol. 61, Part II, 1985, p. 63). Numerous such «chains of conventions» exist, notably in the fields of international telecommunications or postal law. They give rise to complex legal problems, not all of which are capable of solution within the framework of the rules laid down in Articles 30, 41 and 59 of the Vienna Convention on the Law of Treaties. But the conventions tend to be highly specialized and the problems which they raise are technical problems of treaty law. Some of these problems we will encounter even if the field of study is restricted to codification conventions *stricto sensu* ; but the significant feature of codification conventions is that they will, at least in part, be declaratory of, or may generate, rules of customary international law, and it is this feature which tends to distinguish them from chains of technical conventions.

The suggestion was also made at the Helsinki session (*loc. cit.*, p. 63) that the study should embrace the relationship between the codified law of the sea and maritime law conventions, such as conventions on the carriage of goods by sea. Your Rapporteur is of the view that the study will have to cover the relationship between the codified law of the sea and existing or future conventions on the protection of the marine environment (*e.g.* pollution conventions), since the new Convention on the Law of the Sea contains a provision bearing directly on this issue (Article 237). On the other hand, he is much more dubious about enlarging the scope of the topic to include a study of *all* successive conventions in the broad field of maritime law (*e.g.* conventions on maritime liens and mortgages, bills of lading, carriage of goods by sea, stowaways, carriage of passengers and luggage by sea, collision, salvage, the liability of operators of nuclear ships and limitation of liability for maritime claims), save to the extent that provisions contained in such conventions may be seen to provide solutions for some of the problems which will be identified in the course of the study.

Without at this stage seeking to identify all the problems which arise or may arise from a succession of codification conventions on a particular subject, your Rapporteur would suggest that, generally speaking, the study should concentrate on :

(a) the general principles of the law of treaties relating to the application of successive conventions on the same subject-matter ;

(b) the general principles of international law concerning the relationship between codification conventions and customary law.

Under head (a), the study will have to consider the inter-action between Articles 30, 41 and 59 of the Vienna Convention on the Law of Treaties, considered in the light of the legislative history of those provisions in the records of the International Law Commission and illustrated by reference to particular treaty provisions bearing on the relationship between earlier and later conventions. In the context of the law of the sea, attention would be focused on those provisions of the new Law of the Sea Convention which refer to earlier or later conventions, notably Articles 311 and 237 and (in a narrower context) Article 35(c). Under head (b), the study should, in the view of your Rapporteur, be directed towards distilling the general principles concerning the relationship between codification conventions and customary law, illustrated, so far as the law of the sea is concerned, by judicial pronouncements directed towards establishing that a particular provision of the new Law of the Sea Convention may be declaratory of a rule of customary law in the sense of the Convention provision, or may have generated such a rule. The study should also, in the view of your Rapporteur, take into account under both heads the problems which arise when an attempt is made to establish uniform rules governing a specific, but clearly defined, element of existing codification conventions containing slightly differing rules on that element. An example is afforded by the current work of the International Law Commission on the status of the diplomatic courier and diplomatic bag unaccompanied by courier, where the attempt is being made to establish uniform rules applicable to all types of couriers and bags for which provision is made in the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in their relations with International Organizations of a Universal Character, and where the existing conventional provisions on the courier and bag display variations.

I apologise again for the informal style and content of this communication, and you will find hereafter a brief list of questions which could perhaps serve as an agenda for a first meeting of our Commission to be held in Cairo, in the expectation that, with your collaboration, such a meeting will help to clarify the scope and content of the study to be undertaken.

Annex : Questionnaire

1. Do you consider that, in principle, the scope of the topic should be limited to problems arising out of a succession of major codification conventions, including not only those adopted on the basis of draft articles prepared by the International Law Commission but also the U.N. Convention on the Law of the Sea, 1982 ?

2. Do you consider that, in addition, the study should include problems arising out of successive conventions in the field of the humanitarian law of armed conflicts ?

3. Do you consider that, in addition, the study should include problems arising out of «chains of conventions» generally, including international postal and telecommunications conventions and intellectual property conventions ?

4. Do you consider that, so far as the law of the sea is concerned, the study should concentrate on the relationship between the U.N. Convention of the Law of the Sea Convention, 1982, and prior or subsequent conventions relating to matters covered by the 1982 Convention (*e.g.* the 1958 Geneva Convention and pollution conventions) or should also encompass the relationship between the 1982 Convention and maritime law conventions generally ?

5. So far as the substance of the proposed study is concerned, do you agree that attention should primarily be directed to (a) the general principles of the law of treaties relating to the question of successive conventions on the same subject-matter and (b) the general principles of international law concerning the relationship between codification conventions and customary law ?

6. Do you have any alternative views on the scope of the study or on the manner in which it should be conducted ?

Réponses et observations des membres de la Commission

1. Réponse de M. James Crawford

1st May 1987

Dear Ian,

I read with interest and general agreement your memorandum on the topic. The topic is a complex one which amply justifies a reflective rather than expository paper at the initial stages. One problem with the topic is that, although it appears to involve the difficult issues raised by a succession of legislative or law making treaties (a category which includes but is not limited to codification conventions) the topic itself *is* limited to codification conventions. Accordingly it seems that the Commission is called on to examine that which is specific or particular to the relationship between successive codification conventions, rather than examining more broadly the relationship between successive conventions of a general legislative character.

The question therefore becomes what is there specific about the relationship between codification convention that raises special legal difficulties, apart from the difficulties raised by the relationship between multilateral treaties of a legislative character generally. Those special features can presumably only be found in the notion of the codification convention, that is to say, of a convention which is some has special relationship to general international law.

On the other hand, clearly the Commission is not asked to investigate all the specific legal issues that can be discovered as to the relationship between particular codification conventions. To do that would encompass all or most of the substantive law of the sea (in relation to the law of the sea conventions), all or most of the law of diplomatic, consular or state immunity (in relation to the existing and proposed conventions in that area) and all or most of the law of war. Presumably we are asked to look at the general issues of technique which arise in this area, and some of the more specific questions of the relationship between treaties and international law that successive codification convention raise, but

without dealing in detail with substantive legal issues involved in the particular case.

On this basis I would answer your questions in the Annex as follows.

1. Yes but subject to the *proviso* that, since we are asked to look at questions of method and of the relationship between conventions as sources of law (whether treaty law or otherwise), we should not restrict ourselves to the listed conventions, if other examples of codification conventions can be found which raise illuminating or novel issues.

2. Yes, to the extent that it can be said that the conventions in question are, overall, codification conventions. Some of the conventions dealing with specific issues in the area of international humanitarian law cannot be said to be codification conventions even in a broad sense, but is sufficiently clear that the two 1977 Protocols, and the 1949 Conventions, so qualify.

3. No, for the reasons stated.

4. Yes. However I would not categorically exclude reference to conventions dealing with specific areas maritime law, if these can properly be said to be codification conventions bearing on legal issues dealt with in the major law sea treaties. For example, there is an important gap in the Brussels Convention on the Arrest of Seagoing Ships of 1952, which makes no reference to the question of the lawfulness of the arrest of a ship in the exercise of civil jurisdiction while the ship is in innocent passage. This is a matter specifically regulated by the 1958 and 1982 Conventions, and to which some attention could well be given. It is a good example of sort of conflict on particular issues which does raise questions of technique. In my view, a State party to the 1952 Convention could not properly treat its silence on the question of innocent passage as a justification for asserting jurisdiction to arrest in innocent passage, other than as allowed in the major multilateral conventions which refer to innocent passage.

5. Yes.

6. As a study in legal technique rather than specific rules of law, the work of the Commission is more than usually, I should think, a matter for your guidance and judgement. A number of specific issues occur to me, however, which you may wish to include in a general outline of the problems raised :

(1) To what extent is a State entitled to rely on an earlier codifying convention, as against non-parties to that convention, or former parties who have since ratified a subsequent convention stating the rule in a different way ? (It should be noted that ratification of a new codifying

convention is by no means always accompanied by a denunciation of the earlier one).

(2) The meaning of the obligation, in article 18 of the Vienna Convention on the Law of Treaties, not to defeat the object in purpose of a codifying treaty after signature and prior to ratification or its entry into force, in the case where the treaty in question is a subsequent codifying convention varying in material respects the provisions of an earlier one.

(3) The extent to which judicial decisions based upon an earlier codifying convention are subject to a sort of tacit *rebus sic stantibus* when a subsequent convention is adopted. I am thinking in particular of the Statement of the International Court in the *North Seas Continental Shelf* case that articles 1 to 3 of the 1958 Convention on the Continental Shelf constitute general international law. To what extent is that statement now authoritative, in view of the significant changes in formulation in the 1982 convention ?

I look forward to seeing you again in Cairo

With best wishes.

Yours sincerely,

James Crawford

2. *Réponse de M. Shabtai Rosenne*

14 May 1987

My dear friend and Confrère,

As I am not sure at present how long I will be able to remain in Cairo, owing to a series of pressing commitments, may I reply now to your interesting «communication» circulated by our Secretary-General on 14 April. I think you have chosen an appropriate form for «sharing thoughts» at this stage of your difficult task.

I am convinced that we must have a clear idea of what we mean by the two expressions «succession» and «codification conventions».

I understand «succession» to refer to the situation which is addressed by article 30 of the Vienna Convention. May I therefore draw attention to its emphasis on «rights and obligations» under treaties, in paragraph 1. I believe that you are familiar with my attempt to distinguish between the treaty as an instrument and the treaty as an obligation, the latter aspect being closely tied in with the topic of international responsibility. Given the language of article 30, it seems that we have to focus on the obligation aspect.

There is also a temporal element which your expression «successive conventions» underlines, namely succession by reference to time rather than by reference to subject-matter of the obligation. I am thinking of where the later treaty impinges upon something with which the earlier treaty deals but which is not necessarily the subject-matter of one or other of the treaties. It is here that I feel that the law of the sea may come in.

I have no clear idea of what is meant by «codification convention». I have always been struck by the remark of our Confrère André Gros in *Gulf of Maine*, when he referred to the 1982 Convention on the Law of the Sea as one «which has been presented as a codification». [1984] ICJ *Reports* at 364 (paragraph 7). Later in the same paragraph he drew attention to the practice of UNCLOS III «which gave its proceedings ... a cachet which sets them apart from those of codification conferences». There is a challenge in those observations, and it calls for a response.

Apart from the law of the sea, two other aspects of the brief discussion on the report of the *Commission des travaux* at Helsinki should, I think, be kept in mind, although I am not sure that we can deal with them.

It was confirmed that our terms of reference can equally cover codification conventions of private international law. If this aspect is to be considered, perhaps it ought to be referred to another Commission, as was done a few years ago when the topic of the intertemporal law was divided into two.

Secondly, the President suggested that account should be taken of conflicts between codification conventions and customary law. I am not sure that in this context «conflicts» is necessarily the right approach. I think it should be more in the direction of the relationships between the two. I find this aspect particularly troublesome, especially when you take the usual paragraphs in a final report of the International Law Commission to the effect that it does not determine whether its work is «codification» or «progressive development» within the meaning of its Statute — a paragraph first instituted in the important paragraph 26 of its report on the law of the sea in ILC *Yearbook*, 1956-II at 255 — together with

the now usual expression in «codification conventions» (and perhaps in others, or in some related documents) regarding the relationship of the provisions of the convention and customary law. This usually appears in the preamble, but is not matched by any substantive provision in the operative clauses of the convention. I am sure you remember the important debate on that preambular clause in the closing stages of the 1969 Vienna Conference, and perhaps I might refer you also to p. 464 of volume I of the *Commentary on the 1982 Convention on the law of the Sea* being prepared by the Center for Oceans Law and Policy of the University of Virginia.

You mention, I think in allusion to my remarks at Helsinki about the problem of the relationship of the «codified» law of the sea and the vast network of maritime law conventions, and express doubts (which I share to some extent) about enlarging the scope of our topic to include a study of all [your emphasis] conventions in the broad field of maritime law. I did not intend to go so far, and at Helsinki limited myself to a reference to the Hamburg Convention of 1978 on the carriage of goods by sea. In the back of my mind was the question, which UNCITRAL and the United Nations Conference on the Carriage of Goods by Sea, seem to have ignored entirely, of any possible connection between an international convention on the carriage of goods at sea (even if this is primarily a question of private law) and the international law governing «passage» — whether limited to innocent passage as in the 1958 Conventions, or something broader, innocent passage, transit passage and archipelagic sealanes passage (already taking shape by 1978) as in the 1982 Convention. Yet I seem to remember that at the 1958 Conference, one of the factors leading to the radical change in the rules of innocent passage then adopted by comparison with the texts proposed by the International Law Commission, was precisely the question of the relationship of the cargo to the exercise of the right of innocent passage, as is noted in McDougal and Burke, *The Public Order of the Oceans* 258 (1962). On the other hand, both IMO in its various conventions, especially those dealing with the protection of the marine environment, and UNCTAD in its 1986 Convention on Conditions for the Registration of Ships (doc. TD/RS/CONF/23) refer specifically either to the ongoing work of UNCLOS III or to the 1982 Convention itself. Indeed, perusal of the list of multilateral treaties relevant to the United Nations Convention on the Law of the Sea, issued by the Office of the Special Representative of the Secretary-General for the Law of the Sea in 1985, demonstrates the extremely wide scope of the relevant treaties, at least in the eyes of the responsible officers of the United Nations. I agree with you fully that we must be very careful not to cast our net too wide, but by the same token we must ensure that we cast it wide enough to bring in everything that is relevant.

Now let me try and give you tentative answers to your questions — tentative in the sense of sharing thoughts with you at this stage.

1. Preliminary work in the International Law Commission is certainly not the only criterion for determining whether any treaty, in whole or in part, is or is not a «codification convention». My current thinking is that the test is to be found by individualizing the provisions of the convention, and examining whether a given provision corresponds or not to accepted rules of customary international law. Article 32 of the Vienna Convention on the Law of Treaties notwithstanding, this will inevitably require full consideration of the *travaux préparatoires* of the provision in question, as was undertaken by the International Court in the *North Sea* cases, [1969] ICJ *Reports* 3, paras. 49 ff., with regard to the provisions of the 1958 Convention on the Continental Shelf concerning delimitation. The test is to be based on an intrinsic examination of the provision under discussion, and not on an extrinsic and mechanical factor such as the procedure by which the convention in question was adopted.

2. In principle, yes, but the law here is both widely diffused and in a confused state. We should proceed with caution.

3. No.

4. Not maritime law generally, because not all of it has a direct relationship with the international law of the sea. The basic problem is to identify those maritime law conventions which do have such a relationship.

5. Yes, with special emphasis on (b). Sub-question (a) *may* not be given to overmuch generalization beyond article 30 of the Vienna Convention, as detailed provisions in a given convention may be intimately related to the substantive provisions of the convention in question. Article 311 of the 1982 Convention on the Law of the Sea, which was extremely difficult to negotiate, provides an instructive illustration of this.

6. The topic is vast, and you may find it necessary to proceed by stages.

With warm personal regards,

Yours sincerely,

Shabtai Rosenne

3. *Réponse de M. Santiago Torres Bernardez*

16 May 1987

Mon cher Confrère,

In some haste I am sending you, as requested, a few preliminary observations on the various questions listed in the annex to your communication. They are tentative and may vary in the light of your discussions in Cairo. In any case, congratulations on your very stimulating communication the contents of which, as a whole, I support.

1. The codification conventions to be considered by the First Commission, within the present study, should include any succession of codification conventions on a particular subject, independently of the procedure of adoption of each of the conventions concerned. My answer to the question is, therefore, in the affirmative. It follows that, to begin the study at least, I am in favour of defining the term «codification convention» by reference to substantive rather than procedural criteria. The object and purposes of the convention appears to me as being the basic differentiating criterion to be retained, namely : the formulation and systematization by the conventions concerned of rules intended to become written rules of *general* international law, whether or not such rules, at the moment of adoption of a given convention, were rules *de lege data* (codification) or *de lege ferenda* (progressive development) or of both. Possible problems arising from a succession of regional codification conventions as well as from a succession of conventions adopted for a limited number of States would be from the outset excluded from the scope of the study by such a definition.

2. Yes. If the successive conventions concerned fall within the above mentioned broad definition, the subject-matter of the conventions should not be an obstacle for its study. The title of the topic refers to «codification conventions on a *particular topic*» without any further qualification.

3. No. The conventions or chains of conventions described are not intended to be a formulation and systematization of rules of general international law. The importance of the matters regulated by the said conventions and the number of States participating in the adoption do not bestow upon them the qualification of codification conventions. Treaty law and codified international law are not identical concepts.

4. Only the UN 1982 Convention on the Law of the Sea and prior and subsequent conventions relating to matters covered by the 1982 Convention. The «law of the sea» and «maritime law» are not in my view the «same subject-matter» within the meaning of such an expression in article 30 of the Vienna Convention on the Law of Treaties.

5. The title of the topic referred to the First Commission appears to me as encompassing the study of (a) and (b). It refers to «problems arising from» and not to «*conventional* problems arising from». In principle, therefore, my answer is in the affirmative. I realize, however, the difficulties involved in the study of the relationship between codification conventions and customary law. At the meeting of the Commission to be held in Cairo this very central question should be the object of particular attention.

6. As to the manner in which the study should be conducted the First Commission should follow the normal procedures outlined in the Rules of the Institute. Regarding the scope, I would favour to limit the study to codification conventions dealing with subjects of *public* international law. But I would include in the study those conventions which codify a particular sector or sectors of a given subject-matter of general public international law (for example, any convention which may be adopted in the future on the basis of the current ILC work on couriers and bags).

Best regards,

Yours sincerely,

Santiago Torres Bemardez

4. Réponse de M. Fritz Münch

1er juin 1987

Cher et honoré Confrère,

Nous pouvons tous partir de la thèse, me semble-t-il, que notre problème se rattache aux articles 30, 40, 41 et 59 de la Convention sur le droit des traités de 1969, articles que nous acceptons comme représentant le droit général en la matière. Il se complique du fait que les textes de codification ne semblent pas s'intégrer entièrement dans le système envisagé par la Convention, car on est arrivé à admettre que le droit international coutumier peut se développer indépendamment d'une codification existante. Ce fait, dans une certaine mesure, comporte un paradoxe, car comment constater une nouvelle coutume tant que les parties au texte codificateur restent liées par celui-ci ? La Convention ne prévoit pas l'extinction d'un traité codificateur par désuétude ni par violation persistante. On peut évidemment envisager l'éventualité que le texte codificateur est remplacé,

par la quasi totalité des parties contractantes, et alors les articles précités de la Convention s'appliquent. Mais dans la réalité des choses le cas ne se présente ainsi que rarement ; il y aura au moins tout un temps où la communauté des Etats est divisée et se réclame de règles différentes.

Il est vrai que la concurrence de deux textes successifs pour les règles sur la guerre sur terre, 1899 et 1907, n'a pas causé de difficultés pratiques, mais le droit de la mer risque de devenir problématique. Si nous tranchons la question simplement d'après la Convention, nous méconnaissons certainement un élément essentiel qui caractérise les textes codificateurs.

Mais il est en effet difficile de déterminer les traités codificateurs. Je suis d'accord sur la liste que vous dressez en annexe de votre lettre, et je ne voudrais pas l'élargir. Toutefois, dans nos délibérations et dans votre rapport, il faudrait jeter un coup d'oeil sur les dites *chains of conventions*, simplement pour se rapprocher du noeud du problème. Ces textes, et aussi ceux qui tendent à unifier des parties du droit civil et commercial, ont créé des codes. En quoi se distinguent-ils d'un texte qui opère une codification imprégnée d'une tendance progressiste et réformatrice, et ne fournissent-ils pas des éclaircissements utiles pour notre étude ? Il est vrai, d'autre part, que je n'ai pas trouvé beaucoup de secours chez Majoros et Thirlway qui s'en sont occupés.

Les textes codificateurs du droit de la mer de 1958 avaient prévu une procédure de revision. Y a-t-il lieu de discuter la question de savoir s'il en résulte un problème à l'égard du droit de la mer en 1982 qui passe outre à cette garantie attachée à la codification antérieure ?

Réponses à votre questionnaire :

1. Oui, mais étant entendu que d'autres textes devraient être discutés pour clarifier la matière.

2. Oui, bien que le droit humanitaire des conflits armés se développe récemment dans un milieu plus vaste que celui des Etats et leurs forces régulières.

3. Oui, en tant que matériel de recherche, non comme objet de conclusions ou de recommandations.

4. Oui.

5. Oui.

6. Pas pour le moment.

Veuillez agréer, cher et honoré Confrère, l'expression de toute ma considération.

Fritz Münch

5. *Réponse de M. Vladimir-Djuro Degan*

2 June 1987

My dear Confrère,

I read with great interest your Preliminary communication concerning «Problems arising from a succession of codification conventions on a particular subject». Here are my answers to the Questionnaire you enclosed, with some remarks and suggestions which, I hope, can be of some use for our future work.

1. Yes.

2. Yes.

3. I agree that in your study international postal and telecommunications conventions should not necessarily be encompassed. However, I am not convinced that we can altogether neglect problems arising out of «chain of conventions» in private international law. At least some conventions adopted by the Hague Conference on Private International Law provide provisions which are «declaratory, or may generate, rules of customary international law». Examples : *Convention relative à la procédure civile* of 1905, and the new one of 1954 ; *Convention pour régler la tutelle des mineurs* of 1902, and *Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* of 1958 ; Convention governing Conflict of Laws concerning Marriage of 1902, and Convention on Celebration and Recognition of the Validity of Marriages of 1978 ; etc.

Final conclusions reached by our Commission in its draft resolution must suit all «codification conventions» in the larger sense in their chain, including postal and telecommunications conventions.

4. I agree with you that when considering the 1982 Law of the Sea Convention, a study of all kinds of maritime law conventions is not necessary, except of those to which it refers itself (*i.e.* pollution conventions).

5. I entirely agree on two basic items of our study, as formulated by you. I venture to make some proposals in regard to each of them :

(a) «The general principles of the law of treaties relating to the question of successive conventions on the same subject-matter» : This problem chiefly involves rules of «conflict of treaties», on which most authors entirely disagree. I personally found the most suitable formulation and classification of these rules by Nguyen Quoc Dinh : *Droit international public*, Paris 1975, pp. 259-264. His rules are based on Article 103 of

the UN Charter ; on Articles 30, 41 and 59, and also on Articles 53, 60 and 64, of the 1969 Vienna Convention on the Law of Treaties. Maybe, these proposals would be of some help for our further study of the main problem.

(b) «The general principles of international law concerning the relationship between codification conventions and customary law» : When more specifically provisions from 1958 and 1982 law of the sea conventions are involved, they could, in my view, *grosso modo* be divided into four large groups :

(i) Rules of pure «codification» of the customary law already in force at the time of the adoption of the convention. Examples : Article 6 of the 1958 Convention on the High Seas and Article 92 of the 1982 UN Law of the Sea Convention.

(ii) Rules of «progressive development», where customary process is still in progress at the time of the adoption of the convention, or its adoption means the «crystallization» of an existing practice of States into a new customary rule. Example : Part IV of the 1982 Convention concerning Archipelagic States.

(iii) Impersonal rules of pure «legislation», in respect of which no practice of States, nor *opinio juris* exist at the time of the adoption of the convention which lays them down. These new impersonal rules are the result of negotiation or of package deal at the diplomatic conference, but are aimed at generating rules of customary law. Examples : most provisions from the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas ; or essential provisions concerning transit passage from the 1982 Convention.

(iv) In the last group fall other provisions of a codification convention which are couched in the form of contractual norms, and are not intended to generate customary law. Examples : part XV of the 1982 Convention concerning settlement of disputes between its own parties.

The foregoing division is conditional and must be regarded in the light of customary process. For example, some provisions which initially belonged to groups (ii) or (iii), later become evidence of customary law in force. Or, Article 2 of the Geneva Convention on the Continental Shelf was probably in 1958 a rule of pure «legislation», but the corresponding Article 77 of the 1982 Convention is the rule of «codification».

6. I have no alternative views on the manner in which the study should be conducted, and I wish you the best success.

Sincerely yours,

Vladimir-Djuro Degan

6. *Réponse de M. Sompong Sucharitkul*

June 5, 1987

I thank Sir Ian Sinclair for the preliminary communication and questionnaire, conveying the Rapporteur's initial reflections on the scope of the topic and the manner in which it could best be tackled.

Let me say how closely I share the Rapporteur's reflections regarding the imprecise scope of the topic. I wish merely to add a few general observations in this connection.

There appears to be a reasonable measure of agreement regarding the main core of the topic, in particular, the problems which arise, or might arise, from successive conventions on the law of the sea and their relationship with customary international law. Questions arise as to the identification of other «successive codification conventions» for the purpose of our study.

There is apparently no agreed definition of what constitute «successive codification conventions». The Rapporteur has identified twelve major codification conventions adopted by conferences of plenipotentiaries to consider draft articles on particular topics prepared by the International Law Commission. To this list has been added the 1982 Convention on the Law of the Sea, without including other conventions prepared by the International Law Commission, such as the Convention on the Reduction of Statelessness (1961), or the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents (1973).

The Rapporteur has also referred to a field of the humanitarian law of armed conflicts, where there exists a body of practice concerning the impact and legal effect of successive conventions on the same subject-matter, specifically the relationship between the Additional Protocol I of 1977 and the 1949 Geneva Conventions, and earlier conventions of 1929 and 1907. This reference seems fully justifiable.

The Rapporteur has been unpersuaded by the proposed extension of the scope of the study to encompass the legal problems which arise out of such «chains of conventions» as exist, notably in the fields of international telecommunication or postal law. Graver doubts have been expressed regarding possible enlargement of the scope of the topic to include a study of all successive conventions in a broader field of maritime law. Further investigation may be warranted with the exception of certain specified areas.

All things considered, I do not disagree with the Rapporteur's proposition that a significant feature of codification conventions is that they will, at least in part, be declaratory of, or may generate, rules of customary international law, and it is this feature which tends to distinguish them from «chains of technical conventions». In my considered opinion, however, the distinction is not so much between the «succession» and the «chains» of «codification conventions», rather greater precision must be sought for the expression «codification conventions *on particular subjects*» (emphasis added) and clarification given to the term «technical conventions».

To be more precise, closer attention should be directed to the substance or contents of the conventions which may be said to be partly declaratory or codificatory and therefore reflecting if not generating rules of customary international law. A further distinction is to be drawn between rules of customary international law and rules of international customs dealing with the practice of trade and private law transactions. «Technical conventions» could cover both types of subjects, at least in parts.

Although the Institute is concerned with both public and private international law, as far as the problems arising from the application of treaties or codification conventions are concerned, the topic under consideration is primarily one of the law of treaties and for that reason one of public rather than private international law. It cannot be gainsaid nevertheless that codification techniques have often been used in recent practice to achieve harmony and uniformity in the unification of private laws, such as the law of international sale of goods, carriage of goods by sea, air transportation, maritime and inland transport, liability of terminal operators, telecommunications and the use of satellites and space stations. When an international régime is set up by a general convention followed by a succession of conventions on the same or similar subjects, problems that might arise could not be said to be entirely outside the scope of the present enquiry.

I believe the key to our definitional problem or the problem of delimiting the scope of our topic lies in the phrase «*on a particular subject*». This could be a particular subject of public international law relating to the rights and duties of States or subject of purely private rights and obligations of individuals but falling within international regulation or global control. Thus, the 1982 Convention on the Law of the Sea covers at least both of these aspects. It is not difficult to discern in other codification conventions the regulation of rights and duties under international law as well as rights and liabilities under private law, so long as the means to achieve the end is through a succession of codification conventions.

The difficulty surrounding this distinction is inherent in the absence of differences in real terms between the variety of subjects covered or regulated by codification conventions, technical or non-technical, in the fields of private or public international law.

In my view, the Rapporteur's empirical approach is a practical one. We should start from the basic core, the minimum or the irreducible content or the most narrowly defined scope, and add on to this main core whatever appear more plausible to be included in the essential scope of the topic, leaving aside, at least for the time being, the types of codification conventions that are intended to achieve unification of private laws or to settle conflicts of laws problems. There is nonetheless a host of codification conventions that are neither purely public international law rules nor merely unification of private laws, but simply the establishment or organization of an international régime, such as the Code of Conduct for Liners Conferences, the Hague rules, the Hague-Visby rules, the York-Antwerp rules and the UNCTAD or UNCITRAL rules in respect of liability of carier for maritime transport or the Chicago Convention, the Warsaw Convention, the Tokyo Convention, the Montreal Convention and the Hague Convention relating to liability and safety of civil aviation. The three generations of Human Rights Instruments, international covenants and regional conventions on the same subjects offer another intriguing example.

It is with these different types of general codification conventions in mind that the topic should be examined at closer range, taking carefully into account possible multi-dimensional and interlocking or inter-connecting links between the different series and successions of conventions on diverse particular subjects in all fields of human and State activities. The study cannot be expected to be exhaustive, and whatever line is drawn, it is bound to be more or less arbitrary. Our purpose is to minimize the arbitrary nature of the delimitations to be adopted.

I shall now respond to the queries raised in the Questionnaire

1. I am of the view that the Rapporteur could afford a broader base and perhaps a much more liberal starting point. Initially, the scope of the topic should comprehend, as the barest minimum, all the problems arising out of a succession of major codification conventions adopted through a normal multilateral treaty-making process, including but not limited to those adopted on the basis of draft articles prepared by the International Law Commission. I do not believe that the U.N. Convention on the Law of the Sea 1982 is altogether divorced, at any rate in its main legal provisions, from the earlier conventions on the same subjects. True, it is that certain new legal concepts such as the Exclusive Economic Zones (EEZ), the archipellagic waters and the right of transit passage may

have emerged from progressive developments through political negotiations and adoption of contemporary State practice.

2. Yes, I do. It constitutes an essential part of international law rules as regulated by codification conventions, *par excellence*.

3. I do not quite see the contrast between «the chains of conventions» generally and other «codification conventions on particular subjects». International postal and telecommunication conventions are binding on States as well as corporations. So are intellectual property conventions. They constitute international arrangements creating international régimes, binding primarily on States and ultimately also on enterprises and corporations.

4. I am of the view that our study should at least cover the relationship between the 1982 Conventions and all other conventions having a bearing on the same subjects, such as the question of jurisdiction of the flag State, the status of ships of war, piracy, pollution, marine research, cable, sea-lanes, etc. Nothing should be left out which touches the same subject-matter even only in parts. This does not warrant an analysis of the 1982 Convention with other aspects of maritime conventions not covered by the law of the sea, such as the question of seamen's wages, common average and demurrage, which may be treated in the context of International Maritime Organization. Clearly, however, no study could be exhaustive for all times, since codification conventions have independent lives of their own.

5. I do agree with the Rapporteur as to where primary attention should be directed. The Rapporteur's proposal appears highly plausible.

6. My views are amply reflected in the general observations made as an introduction to my answers to the Questionnaire. They are not alternative but additional or supplementary, if not complementary to the approach as outlined by the Rapporteur. A broader outlook or wider perspective may be adopted than originally proposed. This broader based approach is not to be viewed as alternative but as necessary addition.

Sompong Sucharitkul

7. *Réponse de M. Geraldo E. do Nascimento e Silva*

7 June 1987

Dear Friend and Confrère,

Congratulations on your communication regarding the scope of the topic «Problems arising from a succession of codification conventions on

a particular subject». With it your mandate will become clearer, but personally I still have some doubts as to the scope of the topic of the First Commission.

Even though our *Annuaire* stresses that «*ce sujet sera à illustrer notamment par des idées tirées du droit de la mer*», I feel that it would be a mistake to insist on this idea. Maybe I am mistaken but in spite of all the enthusiasm provoked by the 1982 Convention on the Law of the Sea, I consider it a bad example of legal craftmanship, especially in comparison with those Conventions in which the International Law Commission prepared the draft that ended up by becoming the Vienna Conventions of 1961, 1963, 1969 and 1986, as well as the Geneva Conventions of 1958. In the drafting of the 1982 Convention too many political considerations mared the final text which cannot be compared with those other important legal documents. Anyhow, as you correctly state, the 1982 Convention of the Law of the Sea «constitutes at least in part, an exercise in the progressive development and codification of international law».

With reference to the questions posed, my opinion at this stage is as follows :

1. The main objective of the study should center precisely on problems arising out of a succession of major codification conventions principally on those prepared by the International Law Commission.

2. The report could include problems in the field of humanitarian law of armed conflicts.

3. At this stage, I feel that the Rapporteur should be free to invoke problems arising out of «chain conventions» if such a procedure should, in his opinion, be advisable.

4. No. As pointed out, I feel that the Convention on the Law of the Sea is not a good example. In some articles, it even represents a step backwards in regard to some other important international conventions such as those relating to the protection of the marine environment.

5. The Rapporteur should feel free to decide on the convenience of including or not maritime law conventions generally.

5. Yes.

6. No. Maybe at a later stage, the Commission might reconsider its approach as to the scope of the Report.

I remain, my dear Friend and Confrère,

Sincerely yours.

Geraldo E. do Nascimento e Silva

8. Réponse de M. Manfred Lachs

11 June 1987

I understand the predicament in which the Rapporteur finds himself and therefore consider his request very legitimate. In fact, I believe that such a preliminary delimitation of the scope of enquiry would be useful in regard to any item discussed by the Institute. The analysis he makes is very clear and I share most of his observations. Turning to his Questionnaire, my replies are as follows :

1. Yes.

2. Yes.

3. No.

4. I feel that the studies should also encompass the relationship between the 1982 Convention and maritime conventions generally.

5. Provisionally I would prefer solution «a». Should we include item «b» we extend the study into the sphere of «General Principles of International Law and the Relationship between Codification Conventions and Customary Law». These would lead us into the wide area of the relationship between treaty law, codification conventions and customary law.

Manfred Lachs

Preliminary Exposé

January 1989

A. *Introduction*

1. The Institute, at the Helsinki session in 1985, decided to include the topic of «Problems arising from a succession of codification conventions on a particular subject» in its programme of work. The brief debate at Helsinki[1] confirms that the *Commission des travaux*, in proposing this topic for study, had in mind particularly the problems which arise, or might arise, from successive conventions on the law of the sea[2], and their relationship with customary law. It was however stressed that the topic should not be limited to the law of the sea, but should equally take account of corresponding problems arising from successive codification conventions on other subjects, for example in the field of diplomatic law[3].

B. *Scope of the topic*

2. The discussion at Helsinki gives no more than a very general idea of the scope of the topic. It is necessary to delimit it more closely. The first question is to determine what is meant by the phrase «codification» convention. It clearly covers the major codification conventions adopted by plenipotentiary conferences convened by the United Nations to consider draft articles on particular topics prepared by the International Law Commission, that is to say :

A. The Geneva Convention on the Territorial Sea, 1958 ;
B. The Geneva Convention on the High Seas, 1958 ;
C. The Geneva Convention on the Continental Shelf, 1958 ;
D. The Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 ;

---

1 Institut de Droit international, *Annuaire*, Vol. 61, Part II, 1985, pp. 59-65.
2 *Loc.cit.*, p. 60.
3 *Loc.cit.*, pp. 61, 63.

E. Vienna Convention on Diplomatic Relations, 1961 ;
F. Vienna Convention on Consular Relations, 1963 ;
G. Convention on Special Missions, 1969 ;
H. Vienna Convention on the Law of Treaties, 1969 ;
I. Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975 ;
J. Vienna Convention on Succession of States in respect of Treaties, 1978 ;
K. Vienna Convention on Succession of States in respect of State Property, Archives and Debts, 1983 ; and
L. Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 1986.

3. It will be noted that this list does not include all conventions adopted on the basis of draft articles on particular topics prepared by the International Law Commission. It does not, for example, include the Convention on the Reduction of Statelessness, 1961, nor the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, since it is highly doubtful whether either of these Conventions can truly be classified as a «codification convention».

4. To this basic list of twelve codification conventions there must of course be added the United Nations Convention on the Law of the Sea, 1982. The International Law Commission was not of course involved in the preparatory work leading up to the adoption of that convention. But it is clear that it was designed to constitute, at least in part, an exercise in the progressive development and codification of international law. The preamble to the Convention *inter alia* expresses the belief that «... the codification and progressive development of the law of the sea achieved in this Convention will contribute to the strengthening of peace, security, co-operation and friendly relations among all nations in conformity with the principles of justice and equal rights ...» (seventh preambular paragraph). An authoritative commentary on the preamble by a member of our Commission — Shabtai Rosenne — states :

> «In the seventh preambular paragraph attention must be drawn to the use of the formula «codification and progressive development» of the law of the sea. This expression, adapted from Article 13 of the Charter itself, did not give rise to controversy, and it undoubtedly gives expression to a truth. Its legal implications go further, however. By deliberately mirroring (as do other codification conventions, except the 1958 Conventions on the law of the sea) the double formula of Article 13 of the Charter (amplified and defined in Article 15 of the Statute of the International Law Commission), this paragraph of the preamble

> puts the interpreter on notice that the Convention as a whole was not, on its adoption, in the minds of those who negotiated and drafted it, to be sharply categorised as being wholly one of codification, simply re-stating in written form what the customary law is, nor wholly one of progressive development constitutive of rules to be binding upon States which give their consent to be bound by it, whatever be the future evolution and development of the law and of the Convention»[4].

5. It must therefore be taken that the 1982 Convention is to be regarded as a «codification convention» within the terms of the mandate given to Commission I. This conclusion is reinforced by the consideration that the mandate is to study the topic with particular reference to the law of the sea.

6. There remains one further question about the scope of the topic insofar as it relates to the law of the sea. Clearly, it has to cover the legal problems arising out of the relationship between the 1982 Convention and the earlier 1958 Convention. But should it go wider ? Should it, for example, also embrace the relationship between the 1982 Convention and all earlier multilateral conventions relating to maritime law in general ? There is a plethora of such conventions dealing *inter alia* with :

(a) safety of life at sea[5] ;
(b) collisions[6] ;
(c) load lines[7] ;

---

4 *United Nations Convention on the Law of the Sea 1982 : A Commentary (ed. Nordquist), Vol. I (1985), pp. 462-3.*

5 Convention for the Safety of Life at Sea, 1914 : abrogated and replaced by International Convention for the Safety of Life at Sea, 1929 : in turn abrogated and replaced by International Convention for the Safety of Life at Sea, 1948 : in turn abrogated and replaced by International Convention for the Safety of Life at Sea, 1960 : in turn abrogated and replaced by International Convention for the Safety of Life at Sea, 1974, as subsequently amended (hereinafter referred to as the «SOLAS Conventions»).

6 International Convention for the Unification of certain Rules with respect to Collisions between Vessels, 1910 ; International Convention on certain Rules concerning Civil Jurisdiction in matters of Collision, 1952 ; International Convention relating to the Arrest of Seagoing Ships 1952 ; International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision, 1952 ; Convention on the International Regulations for Preventing Collisions at Sea, 1972 (replacing earlier International Regulations adopted by the SOLAS Conference, 1960).

7 International Load Lines Convention, 1930 : International Convention on Load Lines, 1966, as amended.

(d) nuclear ships and carriage of nuclear material[8] ;
(e) carriage of goods by sea[9] ;
(f) carriage of passengers and baggage by sea[10] ;
(g) limitation of liability[11] ;
(h) pollution and dumping conventions[12].

7. This list by no means exhausts the content of multilateral conventions dealing with one aspect or another of maritime law. In addition to those conventions which have been cited, one has to take into account a series

---

8 Convention on Liability of Operators of Nuclear Ships, 1962 ; Convention relating to Civil Liability in the field of Maritime Carriage of Nuclear Material, 1971 (supplementary to Paris Convention on Third Party Liability in the field of Nuclear Energy, 1960, and to the Vienna Convention on Civil Liability for Nuclear Damage, 1963).

9 International Convention for the Unification of Certain Rules relating to Bills of Lading, 1924, (incorporating the Hague Rules as revised), as amended by the Protocol of 1968 : United Nations Convention on the Carriage of Goods by Sea, 1978 (incorporating the Hamburg Rules).

10 International Convention for the Unification of Certain Rules in the matter of Transport of Passengers by Sea, 1961 ; International Convention for the Unification of Certain Rules in the matter of Transport of Baggage of Passengers by Sea, 1967. Both these Conventions have since been revised and amalgamated in the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, as subsequently modified by a Protocol of 1976.

11 International Convention for the Unification of Certain Rules relating to the Limitation of the Liability of Owners of Sea-going Vessels, 1924 : International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, as amended by a Protocol of 1979 : Convention on Limitation of Liability for Maritime Claims, 1976.

12 International Convention on Civil Liability for Oil Pollution Damage, 1969, as modified by Protocols of 1976 and 1984 : International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as modified by Protocols of 1976 and 1984 : International Convention on Civil Liability for Oil Pollution Damage, 1984 : International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984 : International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1984 : International Convention for the Prevention of the Pollution of the Sea, 1954, as amended in 1962, 1969 and 1971 : International Convention for the Prevention of Pollution from Ships (MARPOL), 1973, as modified by Protocol of 1978 and as subsequently amended : Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft 1972 (the Oslo Dumping Convention) : Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters, 1972 (the London Dumping Convention), as subsequently amended in 1978 and 1980.

of agreements relating to maritime liens and mortgages (International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1926 ; International Convention for the Unification of Certain Rules relating to Maritime Liens and Mortgages, 1967 ; Convention relating to Registration of Rights in respect of Vessels under Construction, 1967), salvage (Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, 1910, as amended by a Protocol of 1967) and the immunity of State-owned ships (International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, 1926, as amended by a Protocol of 1934).

8. Thus, it will be apparent that we are here confronted with a vast range of multilateral conventions of a regulatory nature which touch upon or are direclty or indirectly related to the law of the sea. It will also be apparent that many of these conventions are «successive» conventions in the sense that they may abrogate or replace, in relations between the parties to them, earlier conventions dealing with the same subject-matter. As against this, it would be wrong to characterise such agreements as «codification» conventions, precisely because their object and purpose was not to codify existing or emerging principles or rules of customary international law, but rather to establish regimes for the regulation and control of activities resulting from the operation of shipping on the high seas or in waters subject to national jurisdiction. This is not to say that certain basic principles embodied in particular conventions of this type may not already have become or may not be in the process of becoming principles of customary international law. This could be true in particular of the basic principles embodied in the International Convention for the Prevention of the Pollution of the Sea, 1954, as amended up to 1969[13] ; to give but one example. But, subject to this qualification, it is submitted that maritime law conventions of a regulatory character, such as those to which attention has been directed, should not be considered as «codification» conventions *stricto sensu*. Nonetheless, it would certainly be appropriate to consider, within the framework of the present study, the relationship between such conventions and the United Nations Convention on the Law of the Sea, 1982 ; and it would equally be appropriate to look at the various treaty provisions which have been

13 Abecassis and Jarashow, *Oil Pollution from Ships*, 2nd Ed. (1985), p. 20. Hakapaa also takes the view that the total discharge prohibition for nearly all tankers contained in the 1969 amendments to the 1954 Convention could be considered to have acquired the status of customary law : *Marine Pollution in International Law — Material Obligations and Jurisdiction* (1981), p. 132.

included in such conventions to regulate their relationship with earlier conventions dealing with the same subject-matter.

9. The field of maritime law is by no means the only field in which the phenomenon of successive conventions dealing with the same subject-matter — so-called «chains of conventions» — can be found. Chains of conventions are a regular feature of the international régimes governing *inter alia :*

(a) the regulation of international commercial aviation ;

(b) the protection of industrial and intellectual property ; and

(c) the regulation of postal and telecommunications services.

For the reasons already developed in relation to maritime law conventions of a regulatory character, it seems clear that chains of conventions of this type do not fall within the framework of the present study, since they cannot be considered to be «codification» conventions. The significant feature of «codification» conventions is that they will, at least in part, be declaratory of, or may generate, rules of customary international law, and it is this feature which serves to distinguish them from chains of regulatory or technical conventions.

10. But there is one other category of international convention which remains to be considered. In the field of the humanitarian law of armed conflicts, there exists a considerable body of practice concerning the impact and legal effect of successive conventions on the same subject-matter. Reference can be made to the relationship between Additional Protocol I (of 1977) to the Geneva Conventions of 12 august, 1949, relating to the protection of victims of international armed conflicts and the 1949 Geneva Conventions themselves, and indeed to the relationship between the 1949 Geneva Conventions and earlier conventions, such as the 1929 Geneva Convention on (a) the amelioration of the condition of the sick and wounded and (b) the treatment of prisoners of war, and the 10th Hague Convention of 1907. That the 1949 Geneva Conventions can be regarded as a exercise in the progressive development and codification of international law has been attested to by no less an authority then our late Confrère, Sir Hersch Lauterpacht, who took the view that :

> «... a large part of the law of war — by far its larger part — has been revised, developed and codified on an imposing scale by the four Geneva Conventions of 1949»[14].

14 Lauterpacht «The Problem of the Revision of the Law of War», 29 *BYIL* (1952), p. 379.

11. There is of course (or at any rate has been in the past) a distinction between what has been referred to as «the law of Genev» and «the law of The Hague». The «law of The Hague», deriving largely from the Hague Conventions of 1899 and 1907[15] was considered to comprise those rules regulating the conduct of hostilities between States ; the «law of Geneva» was considered to comprise those rules which are especially concerned with the protection of the wounded and sick, prisoners of war, and other victims of armed conflict[16]. But this was always a very rough and ready distinction, and appears now to have largely disappeared with the adoption of the two Additional Protocols of 1977 to the 1949 Geneva Conventions. One eminent commentator has indeed noted :

> «Indeed, this distinction has never been more than a convenient but imprecise simplification, which has progressively lost in significance. In any case, with the Additional Protocols of 1977 the so-called «law of Geneva» now covers all the *jus in bello*, with the exception of the rules of neutrality and economic warfare and the possible exception of prohibition of arms *per se*, but not according to their uses and effects»[17].

This may be going a little bit too far, but it would certainly appear that, historically, the alleged distinction between «the law of The Hague» and «the law of Geneva» stemmed from the fact that the rules of land warfare contained in Hague Convention IV of 1907 remained largely untouched for seventy years, whereas «the law of Geneva» was continuously being extended and refined[18].

12. One regrettable feature of the Hague Conventions of 1907 was that they contained a «general participation» (or *si omnes*) clause providing

---

15 Together with antecedent instruments such as the Declaration of St. Petersburg, 1868, and subsequent instruments such as the Geneva Gas Protocol, 1925. One must also not discount the impact of other instruments such as the Lieber instructions of 1863, the unratified Declaration concerning the laws of war on land, 1874, the Manual of the laws of war on land adopted by the Institute in 1880, and the unratified Hague Air Warfare Rules, 1923.

16 Deriving essentially from the Geneva Convention of 1864 for the amelioration of the condition of soldiers wounded in the field, as completed by the Geneva Convention of 1906, the two Geneva Conventions of 1929 and the four Geneva Conventions of 1949.

17 Abi-Saab, «The specificities of humanitarian law», *Studies and Essays on international humanitarian law and Red Cross principles in honour of Jean Pictet* (1984) (hereinafter cited as *«Pictet Essays»*), p. 265 Fn. 1 ; see also Aldrich, «Some Reflections on the Origins of the 1977 Geneva Protocols» in Pictet Essays, p. 130, in much the same sense.

18 Nahlik, «Droit dit 'de Genève' et droit dit 'de La Haye' : unicité ou dualité», 24 *AFDI* (1978), pp. 9-27.

that they should be «only binding between Contracting Powers, and only if all the belligerants are parties to the Convention». In strict law, this seemed to mean that some of the Conventions were deprived of their binding force either from the outbreak of a war or in the course of it as soon as a non-party, however insignificant, joined the ranks of the belligerents[19]. However, the judgment of the Nuremberg Tribunal in 1946 decisively disposed of this apparent restriction upon the applicability of the Hague Conventions. Confronted with an argument about the non-applicability of Hague Convention IV during the Second World War (because Czechoslovakia was not a party to it at the time), the Tribunal states :

> «The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt « to revise the general laws and customs of war «, which it there recognises to be then existing ; but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war...»[20].

Similarly the Tribunal held that the fact that the Soviet Union was not a party to the 1929 Geneva Convention on the treatment of prisoners of war was not sufficient to permit the violation of the generally accepted principles of international law on the subject.

13. Also relevant in this context is the so-called «Martens clause». This is the clause originally embodied in the preamble to the 1899 and 1907 Hague Convention with respect to the laws and customs of war on land [Hague Convention N° IV] which stipulates :

> «Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience».

The Martens clause was originally understood in two distinct senses :

> «(1) International customary law in a wide sense remains valid as long as it is not abolished by the codification of

19 Oppenheim, *International Law*, Vol. II (7th Edn.) (1952), p. 234 : Rousseau, *Le Droit des conflits armés* (1983), p. 23.

20 Judgment of the International Military Tribunal, Nuremberg, 1946, reproduced in *Annual Digest* (1946), Case N° 92, p. 202 (at p. 212).

> the *Regulations respecting the Laws of War on Land* [*i.e.* the Hague Regulations] ; hence one must not be led to the negative conclusion that law does not exist if there is no stipulation in respect of a certain situation in the said Regulations,
>
> (2) When new means of warfare develop in the future, even if there are no concrete provisions regulating such means of warfare in the treaties, the assertion of the absence of law is not permitted»[21].

Vestiges of the Martens clauses were also taken over into the so-called «law of Geneva». Thus, each of the four Geneva Conventions of 1949 contains an identical provision on denunciation which stipulates *inter alia* :

> «The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience».

Here, the Martens clause operates in a different context. The original clause in the preamble to Hague Convention N° IV was designed to cater for situations not covered by the Hague Regulations ; but the denunciation clauses in the 1949 Geneva Conventions incorporate this provision as a general reminder that, as is now stated in Article 43 of the Vienna Convention on the Law of Treaties «... the termination or denunciation of a treaty ... shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty».

14. Additional Protocol I of 1977 contains, in its Article 1(2), a broad reaffirmation of the Martens clause in its original sense. It states :

> «In cases not covered by this Protocol or by other international agreements, civilians and combatents remain under the protection and authority of the principles derived from established custom, from the principles of humanity and from the dictates of the public conscience».

The ICRC Commentary explains the genesis of what is now Article 1(2) of Additional Protocol of 1977 :

---

21 Miyazaki, «The Martens Clause and international humanitarian law» in *Pictet Essays*, pp. 436-7.

> «Except for a few details, this paragraph is taken from the famous clause, known as the «Martens clause», after the Russian diplomat who had proposed it ; it was included by unanimous decision in the Preamble of the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land.
>
> The 1949 Conventions did not contain a preamble, and it was therefore considered appropriate to include a similar clause in their article on denunciation, in order to underline in a succinct fashion that even denunciation could not result in a legal void ...
>
> In the initial context of 1899 and 1907, the Martens clause was obviously justified, as the Peace Conferences were aware that the conventions that had been adopted had left a number of questions unanswered. We referred above to the reasons why it was taken up in the 1949 Conventions.
>
> There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment ; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.
>
> In conclusion, the Martens clause, which itself applies independently of participation in the treaties containing it, states that the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law and whether or not the relevant treaty law binds as such the parties to the conflict»[22].

15. The denunciation clause in Additional Protocol I of 1977 (Article 99) contains nothing corresponding to the stipulation based on the original Martens clause which has been cited at paragraph 13 above. It does however contain a paragraph 4 which provides that «any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective». More generally, the ICRC Commentary on Article 99 concluded by affirming :

> «Even after the denunciation has taken effect, the denouncing party remains bound therefore by the obligations referred to in paragraph 4, by other treaties in force with respect to it, by the whole of the relevant customary law, including the clauses of the Conventions and the protocol

22 *Commentary on the Additional Protocols of 8 June 1977* (eds. Sandoz, Swinarski and Zimmermann) (1987), pp. 38-39.

which represent a codification of customary law, and in particular by *jus cogens*[23]».

16. It seems clear therefore that the series of successive conventions on the international law of armed conflicts embody a number of rules of customary law. It is indeed noteworthy that the Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (adopted, together with the two Additional Protocols, in 1977) records, as one of the reasons for inviting selected national liberation movements to the Conference, that «... the progressive development and codification of international humanitarian law applicable in armed conflicts is a universal task in which the national liberation movements can contribute positively». The participants in that Diplomatic Conference were accordingly of the view that they were engaged, at least in part, in an exercise of progressive development and codification. It is not necessary to take a position on whether Additional Protocol I constitutes, in its entirety, a «codification convention» within the terms of the mandate entrusted to Commission I to conclude that the study should also embrace the legal problems arising from successive conventions in the field of international humanitarian law.

17. The essential characteristic of a «codification convention» is that it should be designed to codify or progressively to develop rules of *general* international law. It should also be open to universal, or at least very widespread, participation. This would *prima facie* exclude *regional* conventions even if designed, in whole or in part, to codify rules of international law.

18. The question also arises whether the study should be confined to codification conventions dealing with topics of public international law or should also include conventions on the unification of private law. On the basis of a questionnaire circulated by the Rapporteur prior to the Cairo session of the Institute, majority opinion among the members of the Commission favours confining the study, at least for the time being, to codification conventions on topics of public international law. Nevertheless, Degan believes that we cannot altogether neglect problems arising out of «chains of conventions» in the field of private international law, some of which, in his view (and he cites certain conventions adopted by the Hague Conference on Private International Law) may be declaratory of, or may have generated, rules of customary international law. Sucharitkul also has some doubts about confining the study to conventions codifying aspects of public international law. While acknowledging that the topic under

23 *Op. cit.*, p. 1111.

consideration is «primarily one of the law of treaties and for that reason one of public rather than private international law», he points out that «codification techniques have often been used in recent practice to achieve harmony and uniformity in the unification of private laws, such as the law of international sale of goods, carriage of goods by sea, air transportation, maritime and inland transport, liability of terminal operators, telecommunications and the use of satellite and space stations». Nevertheless, Sucharitkul agrees that «we should start from the basic core ... leaving aside, at least for the time being, the types of codification conventions that are intended to achieve unification of private laws or to settle conflicts of laws problems. Rosenne suggests that if codification conventions of private international law are to be considered, «perhaps [this aspect] ought to be referred to another Commission, as was done a few years ago when the topic of the intertemporal law was divided into two».

19. The other members of the Commission are content that, at least initially, the study should concentrate on conventions dealing with topics of *public* international law and designed to codify or progressively to develop rules of general international law. Substantive, rather than procedural, criteria should be used to determine what is a codification convention for this purpose. Accordingly, there is unanimity within the Commission that the study should extend, as a minimum, to encompass the codification conventions listed in paragraph 1 above, the UN Convention on the Law of the Sea, 1982, and the series of conventions on the humanitarian law of armed conflicts referred to in paragraph 10 above. In considering the relationship between the UN Convention on the Law of the Sea, 1982, and earlier conventions, account should also be taken, not only of the 1958 Geneva Conventions on the law of the Sea but also of any earlier maritime law conventions to which the 1982 Convention refers (see in particular Article 237 of the 1982 Convention). The study will also have to consider the relevance of provisions in existing maritime law conventions which, as it were, anticipate or look forward to the conclusion of the 1982 Convention. In looking at the treaty law aspects of the topic, reference may in addition be made to the solutions adopted in other of the maritime law conventions referred to in paragraphs 6 to 8 above. All this is without prejudice to a possible reconsideration of the scope of the topic at a later stage, as Nascimento e Silva has suggested.

C. Content of the study

I. Introduction

20. The mandate given to Commission I requires that, as a first step, the study should concentrate upon :

(a) the general principles of the law of treaties relating to the application of successive conventions on the same subject-matter ; and

(b) the general principles of international law concerning the relationship between codification conventions and customary law.

Under head (a), the study will, in the view of the Rapporteur, have to consider the inter-action between Articles 30, 41 and 59 of the Vienna Convention on the Law of Treaties, considered in the light of the legislative history of those and related provisions and illustrated by reference to particular treaty provisions bearing on the relationship between earlier and later codification conventions. In the context of the law of the sea, particular attention should be focused on those provisions of the 1982 Convention which refer to earlier or later conventions, notably Articles 311 and 237 and (in a narrower context) Article 35(c). More generally, the study could also, as Crawford has suggested, embrace the meaning of the obligation in Article 18 of the Vienna Convention on the Law of Treaties not to defeat the object and purpose of a codifying treaty after signature in the case where the treaty is a subsequent codifying convention varying in material respects the provisions of an earlier one. Under head (b), the study should in the view of the Rapporteur, be directed towards distilling the general principles concerning the relationship between codification conventions and customary law, illustrated, so far as the law of the sea is concerned, by judicial pronouncements directed towards establishing that a particular provision of the 1982 Convention may be declaratory of a rule of customary law in the sense of the Convention provision, or may have generated such a rule. In this context, attention should also be directed, as Crawford has suggested, to the interesting question of whether a judicial pronouncement that particular provisions of a codification convention are declaratory of customary law may be subject to the tacit condition *rebus sic stantibus* in circumstances where those provisions have been radically modified by a subsequent codification convention.

II. General principles of the law of treaties

(a) Application of successive treaties relating to the same subject-matter

21. Article 30 of the Vienna Convention on the Law of Treaties embodies the following rules on this matter :

> «1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
> 2. When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one :
>
> a) as between States parties to both treaties the same rule applies as in paragraph 3 ;
>
> b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty».

22. Note that Article 30 is concerned essentially with the *order of priority* in the application of successive treaties on the same subject-matter. It does not directly touch upon the related issue of the validity of a later treaty concluded by one party in violation of an express provision in an earlier treaty prohibiting the conclusion of the later treaty. An example would be a treaty of alliance between two belligerent powers prohibiting the conclusion of a separate peace with a common enemy. One of the two belligerent powers subsequently concludes a separate peace[24]. Obviously, this later treaty destroys the *raison d'être* of the earlier treaty and creates a new political situation[25]. But, in addition the responsibility of the State which has become a party to the later treaty in violation of its obligations under an earlier treaty towards another State would be engaged ; and of course Article 30 is specifically stated to be without prejudice to this question of responsibility.

23. Note also that the rules set out in Article 30 are essentially residual rules. The ILC commentary to what is now Article 30 makes this clear :

> «Treaties not infrequently contain a clause intended to regulate the relations between the provisions of the treaty and those of another treaty or of any other treaty relating to the matters with which the treaty deals. Sometimes the clause concerns the relation of the treaty to a prior treaty, sometimes its relation to a future treaty and sometimes to any treaty past or future. Whatever the nature of the provision, the

---

24 A number of instances of this are given in Bastid, *Les traités dans la vie internationale* (1985), p. 162.

25 Rosenne, *Breach of Treaty* (1985), p. 85.

> clause has necessarily to be taken into account in appreciating the priority of successive treaties relating to the same subject-matter[26].»

Also, in response to a comment made at the Vienna Conference on the Law of Treaties, the Expert Consultant (Sir Humphrey Waldock) confirmed that «the rules in paragraphs 3, 4 and 5 [of Article 30] were thus designed essentially as residuary rules»[27].

24. Paragraph 2 deals in general terms with clauses inserted in a treaty for the purpose of determining the relationship between the treaty and other treaties (whether earlier or later) entered into by the contracting States. As the ILC commentary to what is now Article 30 points out, «some of these clauses do no more than confirm the general rules of priority contained in paragraphs 3 and 4 of this article[28]». But others are clearly designed to do more than this. At one end of the spectrum is a clause which may be thought to limit the freedom of action of States to conclude future bilateral or regional agreements on the same subject-matter. An example is Article 73(2) of the Vienna Convention on Consular Relations which provides :

> «Nothing in the present Convention shall preclude States from concluding international agreements *confirming or supplementing or extending or amplifying* the provisions thereof.»

It is by no means clear whether the words underlined are intended to be limitative, although they could be so interpreted. The ILC commentary confines itself to stating that this provision merely confirms «the legitimacy of bilateral agreements which do not derogate from the obligations of the Geneva Convention»[29]. What is left open is whether two States parties to the Geneva Convention on Consular Relations could, as between themselves, enter into a subsequent bilateral consular agreement, some of whose provisions involve a derogation from particular rules contained in the Geneva Convention. Article 41 of the Vienna Convention on the Law of Treaties establishes that two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if, *inter alia* :

> «the modification is not prohibited by the treaty and :

---

26 *Yearbook of the ILC* (1966), Vol. II, p. 214 (paragraph 2 of commentary to Article 26).

27 *Official Records, Second Session,* 91st Meeting.

28 *Yearbook of the ILC* (1966), Vol. II, p. 214 (paragraph 4 of commentary to Article 26).

29 *Ibid.*

> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations ;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole».

The question would then be : does Article 73(2) of the Vienna Convention on Consular Relations prohibit any subsequent *inter se* modification of the Convention ? It does not do so in terms, and it is therefore suggested that a subsequent bilateral consular agreement derogating from some of the provisions of the Geneva Convention may be permissible, provided that the other conditions specified in Article 41 (1) (b) of the Vienna Convention and the Law of Treaties are met[30]. Of course, there are treaty provisions which specifically prohibit the conclusion of subsequent bilateral agreements incompatible with a basic principle stated in the parent treaty. A good recent example is to be found in Article 311(6) of the UN Convention on the Law of the Sea, 1982, which reads as follows :

> «States parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof».

25. But it is clear that paragraph 2 of Article 30 of the Vienna Convention on the Law of Treaties is primarily concerned with clauses which may influence the operation of the general rules in paragraphs 3 and 4. The ILC commentary to what is now Article 30 cites several examples of treaty clauses which disavow any intention of overriding existing treaties[31]. The commentary continues :

> «Such clauses, insofar as they relate to existing treaties concluded by the contracting States with third States, merely confirm the general rule *pacta tertiis non nocent*. But they may go beyond that rule because in some cases not only do they affect the priority of the respective treaties as between States parties to both treaties, but they may also concern

---

30 In the same sense, see Lee, *Vienna Convention on Consular Relations* (1966), p. 196. But the contrary view is asserted by Mme Bastid who, referring to Article 73(2) of the Vienna Convention on Consular Relations, states that *«il ne paraît pas possible d'admettre, qu'entre parties à la convention, des accords contraires puissent être reconnus valables» ; op.cit.* at footnote 24 above, p. 164.

31 The examples given include Article XVII of the Universal Copyright Convention of 1952, Article 30 of the Geneva Convention on the High Seas, 1958, and Article 73(1) of the Vienna Convention on Consular Relations, 1963 ; *loc.cit.* at footnote 28 above.

> future treaties concluded by a contracting State with a third State. They appear in any case of incompatibility to give priority to the other treaty»[32].

But of course one may have a treaty clause which does not so much give priority to a later treaty but which confines itself to declaring that the treaty being adopted is without prejudice to another, more general, treaty known to be under negotiation. Examples can be found in a number of maritime law conventions adopted in the 1970s at a time when the Third Law of the Sea Conference was in session. Article 9(2) of the International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL) provides that :

> «Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C(XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag, State, jurisdiction».

This is a typical «without prejudice» clause and does not appear, as such, to give priority to the future Law of the Sea Convention. On the other hand, Article 9 (3) of the same Convention stipulates that :

> «The term «jurisdiction» in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the Convention».

This has considerably greater significance since it clearly refers forward to the «jurisdiction» exercisable by coastal and flag States respectively under the future Law of the Sea Convention or under customary law as it may have been influenced or affected by the future Law of the Sea Convention[33].

26. Article 9(2) of MARPOL had already been foreshadowed by a corresponding provision in the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters, 1972 (the London Dumping Convention). Article XIII of the London Dumping Convention contains a first sentence which is identical with the text of Article 9(2) of MARPOL. But it also contains a second sentence, as follows :

> «The Contracting parties agree to consult at a meeting to be convened by the Organization of the Law of the Sea Conference, and in any case not later than 1976, with a view to defining the nature and extent

---

32 *Ibid.*

33 Abecassis and Jarashow, *op.cit.* at footnote 13 above, pp. 55-6.

> of the right and responsibility of a coastal State to apply the Convention in a zone adjacent to its coasts».

A commentator, in referring to the first sentence of Article XIII of the London Dumping Convention (the «without prejudice» clause), suggests the conclusion that «the provisions of the Convention on Dumping, so far as jurisdiction is concerned at least, should be interpreted subject to the provisions of the Convention on the Law of the Sea or, in any event, subject to the rules of the law of the sea - whatever it is or however evidenced - at the time of the interpretation and/or application of the Convention»[34]. This conclusion may be sensible, but it is difficult to see how it emerges from the actual wording, particularly when the London Dumping Convention contains nothing corresponding to the ambulatory definition of «jurisdiction» in Article 9(3) of MARPOL.

27. Paragraph 3 of Article 30 of the Vienna Convention on the Law of Treaties deals with the (now) rather rare case where all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation under Article 59[35]. In such a case, paragraph 3 stipulates that «the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty». There is obviously a close link between Articles 30 and 59. But, as the Commission point out in their commentary to what is now Article 59[36], Article 30 deals only with the *priority* of inconsistent obligations both of which are to be considered as in force and in operation. The commentary continues :

> «That article does not apply to cases where it is clear that the parties intended the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty ; for then there are not two sets of incompatible treaty provisions in force and in operation, but only those of the later treaty. In other words, Article [30] comes into play only after it has been determined under the present article

---

34 Timagenis, *International Control of Marine Pollution* (1980), Vol. I, p. 243.

35 Article 59 of the Vienna Convention on the Law of Treaties stipulates that a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and :

> «(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty ; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time».

36 *Loc.cit.* at footnote 26 above, p. 253.

> that the parties did not intend to abrogate or wholly to suspend the operation of, the earlier treaty»[37].

This is an important clarification of the relationship between Articles 30 and 59.

28. One can also deduce another distinction from the wording of Articles 30 and 59. It has been suggested that paragaraph 3 of Article 30 deals with a situation where, as regards certain provisions, there are elements of compatibility between the two successive treaties, but, as regards other provisions, there are elements of incompatibility ; in such a case, the earlier treaty is only modified, that is to say, partially terminated. The same commentator regards Article 59 as envisaging such a degree of incompatibility between the two successive treaties that it becomes impossible to apply to two treaties at the same time ; in such a case, the termination of the earlier treaty in its entirety is required[38].

29. The key element in all this is what is meant by *compatibility* or *incompatibility*. These are the tests to be applied under paragraph 3 of Article 30 and under paragraph 1(b) of Article 59. It is not every difference between an earlier and a later treaty which constitutes an incompatibility. Indeed, the Chairman of the Drafting Committee at the Vienna Conference on the Law of Treaties, in introducing the revised text of what was to become Article 30 at the 91st meeting of the Committee of the Whale, clarified the meaning to be attached to the concept of compatibility as used in paragraph 3 of the Article :

> «In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the meaning of the last phrase of paragraph 3. In point of fact, maintenance in force of the provisions of the earlier treaty might be justified by circumstances or by the intention of the parties»[39].

Accordingly, although paragraph 3 of Article 30 indirectly accords priority to the later treaty, a limited role is still envisaged for the earlier treaty.

30. The case envisaged in paragraph 3 of Article 30 is becoming rarer and rarer, at least where general multilateral conventions are concerned. This is a natural consequence of the exponential growth of the international

---

37 *Ibid.*

38 Capotorti, «L'extinction et la suspension des traités», 134 *Recueil des Cours* (1971), pp. 498-9.

39 *Official Records, Second Session,* 91st meeting.

community of individual nation States over the past forty years. It is becoming more and more difficult to ensure that all States parties to a multilateral treaty become parties to a later successive multilateral treaty relating to the same subject-matter. Certain treaty-making techniques have been evolved in order to avoid incompatibilities between an earlier treaty and a later treaty. They may involve, in the case of two linked, but separate treaty instruments[40], complex arrangements to «phase in» a new régime while retaining the old régime for a limited period, combined with an obligation for the States parties to denounce the earlier treaties on a set date in the future.

31. Paragraph 4 of Article 30 deals with the more frequent case where the parties to the later treaty do not include all the parties to the earlier one. This may well occur where some of the States parties to the earlier treaty are unhappy with certain of the new or revised provisions contained in the later treaty. It may also occur because of lengthy delays in the ratification processes of certain States, attributable to differing constitutional requirements. Where paragraph 4 applies, then, as between State parties to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty ; and, as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties (whether earlier or later) governs their mutual rights and obligations. This is simply a reflection (or rather a particular application) of the more general principle *pacta tertiis nec nocent nec prosunt.*

32. All these rules are of course without prejudice to any question of responsibility which might arise for a State from the conclusion or application of a treaty the provisions of which violate its obligations towards another State under another treaty. There was much discussion within the ILC about whether a special rule should be incorporated into Article 30 to deal with the case where the earlier treaty embodied «interdependent» rights and obligations (where a fundamental breach of one of the obligations of the treaty by one party would justify a corresponding non-performance generally by the other parties and not merely a non-performance in their relations with the defaulting party) or

---

40 Such as the International Convention on Civil Liability for Oil Pollution, 1984 (the 1984 Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution, 1984 (the 1984 Fund Convention). The 1984 Liability Convention is in fact constituted by the text of the 1969 Liability Convention as amended by a Protocol of 1984 and the 1984 Fund Convention is constituted by the text of the 1971 Fund Convention as amended by a Protocol of 1984.

«integral» rights and obligations (where the force of the obligation was self-existent, absolute and inherent for each party, and not depending on a corresponding performance by the others). The distinction between multilateral treaties of the «reciprocating» type (providing for a mutual interchange of benefits between the parties) and multilateral treaties of the «interdependent» or «integral» types had been suggested by Sir Gerald Fitzmauzrice in his Third Report on the Law of Treaties[41] ; indeed Sir Gerald had posited the rule that, in the case of multilateral treaties of the «interdependent» or «integral» types, any subsequent treaty concluded by two or more of the parties, either alone or in conjunction with third parties, which conflicted directly is a material particular with the earlier treaty would, to the extent of the conflict, be null and void. Sir Gerald identified disarmament treaties as being of the «interdependent» type and humanitarian law or human rights treaties so being of the «integral» type. But when, under the direction of Sir Humphrey Waldock, the members of the ILC drew up their final set of draft articles on the law of treaties in 1966, they deliberately decided *not* to incorporate a special rule on multilateral treaties of the «interdependent» or «integral» type in Article 30[42]. The ICL commentary to what is now Article 30 explains why the Commission were reluctant to envisage any special rule applicable to such treaties :

> «Certain members of the Commission were inclined to favour the idea of a special rule in the case of an earlier treaty containing obligations of an «interdependent» or «integral» character, at any rate if the parties to the later treaty were all aware of its incompatibility with the earlier one. The Commission, however, noted that under the existing law the question appeared to be left as a matter of international responsibility if a party to a treaty of such a type afterwards concluded another treaty derogating from it. The Commission also notes that obligations of an «interdependent» or «integral» character may vary widely in importance. Some, although important in their own spheres, may deal with essentially technical matters ; others may deal with vital matters, such as the maintenance of peace, nuclear tests or human rights. It

41 *Yearbook of the ILC* (1958), Vol. II, pp. 27-8 and 41-4 (Articles 18 and 19).

42 But the Vienna Conference added a new paragraph 5 to Article 60 (dealing with breach) making it clear that the normal consequences of material breach do not apply to «provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties», thereby implicitly acknowledging the special category of «integral» type treaties. And note that Article 60(2)(c) makes special provision for breach of a multilateral treaty of the «interdependent» type.

> pointed out that in some cases the obligations, by reason of their subject-matter, might be of a *jus cogens* character and the case fall within the provisions of Articles 50 and 61[43]. But the Commission felt that it should in other cases leave the question as one of international responsibility»[44].

33. The problem is that paragraph 4 of Article 30 is based on the hypothesis that one can distinguish between and deal separately with two distinct types of legal relationships, that between States parties to both treaties, and that between a State party to both treaties and a State party to only one of them. But, as Reuter points out, certain multilateral treaties (notably those of the «interdependent» or «integral» type) cannot be broken up into a series of bilateral commitments, and in such a case the later treaty will appear as a violation of the earlier treaty (or, at any rate, its implementation will interfere with the implementation for the earlier treaty)[45]. It is clear therefore that paragraph 4 of Article 30 has to be read in conjunction with Article 60 (setting out the consequences of material breach of a treaty) and subject to the reservation that it is without prejudice to any question of international responsibility which may arise for a State from the conclusion of a later treaty incompatible with its obligations towards another State under another treaty.

34. Closely linked with Article 30 of the Vienna Convention on the Law of Treaties are Articles 40 and 41 dealing with the amendment and modification of treaties, since it is self-evident that a later successive treaty on the same subject-matter can take the form of an independent treaty or of a protocol amending or modifying the earlier treaty. Indeed, paragraph 5 of Article 30 specifically states that paragraph 4 is without prejudice to Article 41.

(b) Amendment and modification of treaties

35. The Vienna Convention on the Law of Treaties distinguishes between the «amendment» of a multilateral treaty, where the intention is to draw up a formal agreement between the parties generally for modifying the treaty between them all, and the «*inter se* modification» of such a treaty, where the agreement is entered into by some only of the parties to the treaty and intended to modify it between themselves alone. Article 40 of the Convention deals with «amendment» *stricto sensu* and Article 41 with «*inter se* modification».

---

43 Now Articles 53 and 64 of the Convention as adopted.

44 *Loc.cit.* at footnote 26 above, p. 217.

45 Reuter, *Introduction au droit des traités* (1985), pp. 112-13.

36. Of course, the distinction between «amendment» and «*inter se* modification» is not as clear-cut as the Convention régime might suggest. As the present writer has stated elsewhere :

> « For one thing, the parties to a treaty may set out with the intention of formally amending the treaty. But one or more parties may fail to ratify the amending instrument, in which case the eventual result may be an *inter se* modification ; even if all the parties do ratify the amending instrument there will inevitably be a certain lapse of time before they do so, during which period the amending instrument, if it has entered into force, will presumably operate as an *inter se* modification. Then there is the converse case where two or more of the parties to a treaty deliberately set out with the intention of negotiating an *inter se* modification ; but the *inter se* modification may be open to acceptance by other parties to the treaty and, if accepted, may eventually operate as a formal amendment»[46].

37. But even admitting the truth of these observations, it seems clear that the ILC, in thus distinguishing between «amendment» and «*inter se* modification», wished to focus attention on the object and purpose of the proposal to effect a change in the original treaty. A proposal to amend the treaty as between *all* the parties differed in kind from a situation in which a small group of States parties were prepared to modify the treaty as between themselves alone :

> «For an *inter se* agreement is more likely to have an aim and effect incompatible with the object and purpose of the treaty»[47].

Accordingly, the distinction between the two processes lies in the *intention* of the parties seeking to bring about a change in the original treaty. If the intention is genuinely to achieve an amendment of the original treaty as between all the parties to it, then this will be treated as an amendment, even if, subsequently, not all the parties to the original treaty become parties to the amending treaty. By the same token, a proposal for an *inter se* modification will be treated as such, even if, subsequently, it operates as a formal amendment.

38. The process of formal amendment does of course have its inconveniences. It is not surprising therefore that the large majority of recent multilateral treaties contain specific amendment clauses. Where a multilateral treaty is of a regulatory or technical character, it will require frequent amendment to take account of technological or other changes. As has been rightly pointed out, the rule whereby a treaty could be

---

46 Sinclair, *Vienna Convention on the Law of Treaties*, 2nd edn (1984), p. 107.

47 *Loc.cit.* at footnote 26 above, p. 235.

revised only with the unanimous agreement of the parties to it had become impracticable if one wished to ensure a rapid adaptation to changing needs. Hence the growing practice of inserting amendment or revision clauses into multilateral treaties. These nearly always provide that revision can be effected by qualified majorities ; in some cases, even a simple majority will suffice, in others there may be an additional requirement that the amendment be accepted by certain States specially interested in the treaty. But, as the same author concludes :

> «... le résultat le plus certain de cette pratique conventionnelle est qu'il y aura, après l'entrée en vigueur de l'amendement, deux séries d'Etats faisant partie du même système conventionnel ; ceux qui sont liés par la Convention originaire seulement et ceux qui sont liés par la Convention originaire et la Convention amendée. C'est là une conséquence du maintien de la souveraineté étatique conjuguée avec la nécessaire souplesse des nouveaux accords»[48].

Reuter goes on to compare this system with the one resulting from the operation of the rules on reservations as embodied in the Vienna Convention on the Law of Treaties ; in both cases, there is a conventional system composed of differing commitments, both as to their substance and as to the circle of States bound by them[49].

39. In formulating their proposed rules on the amendment and modification of treaties, the ILC were conscious of the widely varying types of amendment clause to be found in multilateral treaties[50] :

> «In general, the variety of the clauses makes it difficult to deduce from the treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties ; and the Commission did not therefore think it would be appropriate for it to try to frame a comprehensive code of rules regarding the amendment of treaties»[51].

Accordingly, Article 40 confines itself to laying down some basic residual rules of a procedural character, which can be summarised as follows :

a) A proposal to amend a multilateral treaty must be notified to all the contracting States, each of which becomes entitled to participate in the negotiation and conclusion of any amending agreement.

---

48 Reuter, *op.cit.* at footnote 45 above, p. 114.

49 *Ibid.*

50 Examples are given in *The Treaty-Maker's Handbook* (eds. Blix and Emerson) (1973), pp. 225-39.

51 *Loc.cit.* at footnote 26 above, p. 232.

b) A State entitled to become a party to a treaty also has the right to become a party to the treaty as amended.

c) An amending agreement does not bind any State party to the original treaty which does not become a party to the amending agreement.

d) A State which becomes a party to a treaty after it has been amended is, failing the expression of a contrary intention, considered to be a party to the treaty as amended, and a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

40. By way of contrast, Article 41 imposes certain limitations on the ability of two or more states to enter into agreements modifying, in their mutual relations, the provisions of a multilateral treaty. Obviously, where the treaty itself specifically provides for the possibility of *inter se* modification, there is no problem ; here it is quite clear that the parties intended to admit the possibility of *inter se* modification. But where this is not the case, Article 41 sets out the following substantive and procedural conditions on the conclusion of *inter se* agreements :

1) the modification in question must not be prohibited by the treaty ;

2) it must not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations ;

3) it must not relate to a provision derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole ;

4) the parties to the *inter se* agreement must notify the other parties of their intention to conclude the agreement and of the proposed modification.

There is of course a certain overlap between conditions (1) and (3), since an *inter se* agreement incompatible with the object and purpose of the treaty could be said to be impliedly prohibited by the treaty.

41. Precisely because of the difficulty in securing a sufficient number of instruments of ratification or acceptance to bring an amendment into force, the States parties to a multilateral treaty may prefer to conclude an entirely new treaty designed to abrogate and replace the earlier treaty. The successive Conventions on the Safety of Life at Sea provide an interesting example of this phenomenon :

> «The earliest international agreement on safety of life at sea was the International Convention for the Safety of Life at Sea, 1948, with Collision Regulations attached, which was superseded by the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60), and the

International Regulation for Preventing Collisions at Sea, 1960. SOLAS 60 was amended regularly since its entry into force, but by 1974 (and, indeed, even today) none of these amendments had gained sufficient acceptance to enter into force. Partly with the hope of bringing these amendments into force, they were readopted with other changes in the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74) which entered into force on May 25, 1980. The 1960 Collision Regulations were also revised by the Convention on the International Regulations for Preventing Collisions at Sea, 1972, which entered into force on July 15, 1977»[52].

It should be noted that Article VI of SOLAS 74 mirrors the corresponding provision in SOLAS 60 (Article VII) by providing :

a) As between the Contracting Governments, the present Convention replaces and abrogates the International Convention for the Safety of Life at Sea, which was signed in London on 17 June 1960.

b) All other treaties, conventions and arrangements relating to safety of life at sea, or matters appertaining thereto, at present in force between Governments parties to the present Convention shall continue to have full and complete effect during the terms thereof as regards :

(i) ships to which the present Convention does not apply ;

(ii) ships to which the present Convention applies, in respect of matters for which it has not expressly provided.

c) To the extent, however, that such treaties, conventions or arrangements conflict with the provisions of the present Convention, the provisions of the present Convention shall prevail.

d) All matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments».

It should also be noted that the amendment clauses in SOLAS 74 incorporate a much more flexible regime for the adoption and acceptance of amendments than was embodies in SOLAS 60[53].

(c) Particular treaty clauses governing relations with other conventions

42. The basic principles of the law of treaties reflected in Articles 30, 40, 41 and 59 of the Vienna Convention on the Law of Treaties apply as much to successive codification conventions as they do to successive multilateral treaties in general. However, as we have noted, most of the Convention rules on the application of successive treaties relating to the

52 Abecassis and Jarashow, *op.cit.* at footnote 13 above, p. 68.

53 Compare Article VIII of SOLAS 74 with Article IX of SOLAS 60.

same subject matter, on the amendment and modification of treaties, and on the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty are residual rules in the sense that they will yield to a particular treaty provision. It is therefore necessary to look carefully at the clauses contained in particular codification conventions and dealing with such matters as the relationship with prior or subsequent treaties, amendments and *inter se* modifications, and denunciations. Only thus will it be possible to assess the significance and utility of the differing provisions on these matters.

1) Relationship between the 1982 UN Convention on the Law of the Sea (UNLOSC) and prior or subsequent treaties.

43. Article 311 of UNLOSC contains a detailed set of provisions governing the relationship between the new Convention and other conventions and international agreements. It is proposed to analyse Article 311 paragraph by paragraph.

44. Paragraph 1 deals with the relationship between UNLOSC and the four Geneva Conventions of 1958 and provides :

> «1. This Convention shall prevail, as between State Parties, over the Geneva Conventions on the Law of the Sea, 1958».

Note that paragraph 1 does not purport to abrogate the 1958 Conventions. It is confirmed to the more limited proposition that the new convention should prevail over the 1958 Geneva Conventions. Note also that it is only «as between States parties» to the new Convention that the new Convention prevails. There is here an obvious reliance upon the rules stated in Article 30(4) of the Vienna Convention on the Law of Treaties. Some of the considerations underlying the rule stated in paragraph 1 are set out in the President's note of 9 August, 1979, summarizing the debates of an informal plenary meeting held on 7 August, 1979. Paragraph 6 of that note states :

> «The discussion tended to focus primarily upon the question of the relation of the new Convention to the 1958 Geneva Conventions on the law of the sea. On this basis, the following views were expressed :
>
> a) One view was that, since the basic feature of the new Convention as contemplated from the outset is its comprehensive character, though some considered it still not comprehensive enough, and that since the number of States participating in its negotiation is larger compared to those which negotiated the 1958 Conventions, it is imperative to include a provision in the new Convention to the effect that it supersedes the 1958 Geneva Conventions on the law of the sea. Such a provision, it was argued, is necessary to bring into sharp focus the fact that a new Convention was needed because the 1958 Conventions were outmoded and inadequate and did not take, nor could they have taken, into consideration the interests of a large number of States participants in

this Conference which had not attained Statehood at the time of the 1958 Conventions.
The question was then raised as to when the complete abrogation of the 1958 Geneva Convention which was suggested would occur : at the time of adoption of the new Convention or on the date of its entry into force ?
b) There was also the view that, since it is not clear that the Parties to the 1958 Conventions would also be Parties to the new Convention, it is necessary to allow for the coexistence of the new Convention and the 1958 Conventions as between the Parties to both Conventions without prejudice to the rights and interests of other States which are Parties to the new Convention only. Article 30, paragraph 4, of the Vienna Convention on the Law of Treaties was cited in this regard.
c) These views led to a suggestion that there should be a provision stating specifically which provisions of the 1958 Conventions may be abrogated, specially given the fact that it may not be readily clear as to how far the new Convention replaces or duplicates the old. On the other hand, the point was made that the application of Article 30, paragraph 3 of the Vienna Convention on the Law of Treaties and of the rules of customary international law on treaty interprepations, would permit automatic abrogation of the old provisions which were incompatible with the new. It was also observed that consideration be given to the question of possible changes in the manner of application of the 1958 Conventions as between the Parties to them so as to avoid incompatibility and the need for abrogation»[54].

This statement was of course made *during* the Conference. The final text of paragraph 1 obviously draws its inspiration from the rules set out in Article 30 of the Vienna Convention on the Law of Treaties. For States parties to the 1982 Convention, and equally parties to one or more of the 1958 Geneva Conventions, the 1982 Convention will prevail. But the 1958 Conventions are not superseded and continue to coexist alongside the 1982 Convention. As between States parties to any or all of the 1958 Geneva Conventions but not to the 1982 Convention, their relations will continue to be governed by the relevant 1958 Conventions. The same will apply as between a State which is party to one or more of the 1958 Conventions and a State which, being party to the same 1958 Convention, has also become party to the 1982 Convention[55].

46. Paragraph 2 of Article 311 deals more generally with the relationship between the 1982 Convention and other international agreements. It stipulates :

---

54 Platzoder, *Third UN Conference on the Law of the Sea : Documents,* Vol. XIII (1987), p. 361.

55 See Dupuy et Vignes, *Traité du nouveau droit de la mer* (1985), pp. 91-92 ; and cf. Oxman, «The Third UN Conference on the Law of the Sea : Ninth Session (1980), 75 *AJIL* (1981), pp. 249-50.

> «2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention».

It will be recalled that Article 30 of the 1958 Geneva Convention on the High Seas, and Article 25 of the 1958 Geneva Convention on the Territorial Sea, had simply provided :

> «The provision of this Convention shall not affect conventions or other international agreements already in force, as between State Parties to them».

Paragraph 2 of Article 311 is deliberately drafted in narrower terms than the corresponding provisions in the 1958 Geneva Conventions just cited. Paragraphs 5 and 7 of the President's note of 9 August, 1979, reveal some of the considerations in the minds of the drafters of this provision :

> «5. Another issue was whether, in the event of a provision concerning the effect of a new Convention on other Conventions being included, it would be desirable or even possible to draw up a list of the other Conventions affected. One school of thought considered that the preparation of an exhaustive list of that kind would be difficult. The point was, however, made that such a list, if prepared, could only include, at the most, multilateral conventions concluded under the auspices of the United Nations. It was emphasised, however, that difficulties would arise if an attempt were to be made to prepare an exhaustive list of all conventions, multilateral or bilateral ...
>
> 7. As regards the relation between the new Convention and other multilateral or bilateral agreements, it was suggested, for example, that the possibility of their continued existence should be envisaged only to the extent that they are not incompatible with the objects and purposes of the new Convention as a whole. In this regard, it was emphasised that the standard for determining incompatibility should be whether or not such bilateral or multilateral agreements either on specific subjects or of a regional nature, adversely affect the rights and duties of third party States under the new Convention ...»

It seems clear that what was of concern to the delegates at the Conference was that the restructuring of the general law of the sea embodied in the Convention would call for a parallel restructuring of the detailed and often highly technical conventions regulating maritime and air transport and other related matters. The nexus of regulatory conventions governing such matters was based upon a differentiation of the seas into internal waters, territorial waters and the high seas and took no account, for example, of the new concept of the exclusive economic zone (EEZ). Yet it was clearly impossible for the Conference to undertake such a mammoth task ; in any event, many of the regulatory conventions concerned had been prepared under the auspices of other international organizations

such as the IMO and ICAO. What was therefore sought to be achieved by paragraph 2 of Article 311 was to give a measure of priority for the 1982 Convention by requiring that the other agreements preserved should be «compatible» with the Convention. No further guidance is given as to the meaning of the word «compatible», but it would appear to signify (at least indirectly) to the other international organizations concerned that they should endeavour, where necessary, to modify the agreements with which they are concerned in such a way as to bring them into line with the new Convention.

47. Closely linked with paragraph 2 of Article 311 is paragraph 5 of the same Article which provides :

> «5. This article does not affect international agreements expressly permitted or preserved by other articles of the Convention».

This appears to be designed to ensure that the *lex specialis* of other relevant provisions, insofar as it preserves and protects existing international agreements, remains unaffected by Article 311. The Presidential statement of 9 August, 1979, refers in this context to Article 35(c) (preserving the effect of long-standing international conventions on passage through straits), 51 (requiring archipalegic States to respect existing agreements with other States), 83(4) (preserving bilateral agreements on delimitation of the continental shelf) and 282 (giving priority to general, regional or bilateral agreements on settlement of disputes involving a procedure that entails a binding decision). But many other provisions of UNLOSC also make reference to existing or future international agreements. These include, apart from those already cited ; Articles 15, 23, 39, 41, 43, 47, 53, 63, 66, 67, 69, 70, 72, 73, 74, 92, 94, 108, 109, 116, 124, 125, 126, 128, 132, 134, 146, 151, 162, 169, 197, 207, 208, 209, 210, 211, 212, 217, 221, 222, 237, 262, 280, 281, 284, 288, 297, 299 and 303, as well as Annex IV, Article 13 ; Annex V, Articles 1, 3, 4, 7 and 10 ; Annex VI, Articles 20, 21, 22, 24, 32 and 36 ; Annex VII, Articles 3, 5 and 11 ; Annex VIII, Articles 3 and 5 ; and Annex IX, Article 4. The terms of these provisions vary enormously according to the subject-matter with which they are concerned, and, where appropriate, Article 311 grants priority to the other agreement.

48. It is perhaps worth mentioning in this context the award in the arbitration between Canada and France concerning *Filletting in the Gulf of St Lawrence*[56]. This award was rendered on 17 July, 1986. The dispute

---

56 The French text of the award has been published in 90 *RGDIP* (1986), p. 713. For comment, see Dipla, «L'affaire concernant le filetage à l'intérieur du Golfe du Saint-Laurent entre le Canada et la France», 32 *AFDI* (1986), pp. 239-258.

essentially concerned the right of French trawlers registered in St Pierre and Miquelon to carry out filletting operations on board while exercising their right to fish in the Gulf of St Lawrence. A fisheries agreement of 1972 between Canada and France had made provision for twelve French trawlers registered in St Pierre and Miquelon, with a maximum size of 50 metres, to continue to fish in the Gulf of St Lawrence. But Canada had objected to filletting operations being carried out on board of one of these trawlers, the «Bretagne». The arbitration tribunal regarded the issue as being essentially one of interpretation of the 1972 Agreement, and eventually found in favour of the French thesis. Some consideration was however given to the impact of the 1982 Convention of the 1972 Agreement, Canada arguing that the provisions of Articles 61 and 62 of the 1982 Convention granted more extensive rights to coastal States to ensure through proper conservation and management measures that the maintenance of the living resources of the EEZ is not endangered by over-exploitation. The Tribunal, while acknowledging that there had been an evolution in the law of the sea since 1972 which had had a certain impact on Canadian rights under the 1972 Agreement, was unpersuaded that this evolution and the adoption of the 1982 Convention had fundamentally modified the balance of the rights and obligations of the parties under the 1972 Agreement. In other words, the Tribunal gave priority to the 1972 Agreement, applying by analogy the terms of paragraph 2 of Article 311 :

> «Even if the United Nations Convention on the Law of the Sea at present regulated relations between the two parties the Tribunal notes that it would not impair the validity of the relations established by the 1972 Agreement because of the clause in Article 311, paragraph 2 of the Convention ...»[57].

49. One commentator[58] has pointed to the existence of a possible problem arising in connection with the interaction between the provisions of the 1952 Brussels Convention on the unification of certain rules relating to the arrest of sea-going ships (the Arrest Convention) and the provisions of the 1982 Convention. Article 2 of the Arrest Convention provides that :

---

57 Paragraph 51 of the Award.

58 Letalik, «Arrest of Vessels and the Law of the Sea», *The Developing Order of the Oceans* (eds. Krueger and Riesenfeld) (1985), pp. 687-97. The same problem is hinted at in McDougal and Burke, *The Public Order of the Oceans* (1962), pp. 277-82.

> «A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other claim».

Unfortunately, the term «jurisdiction» was not defined, but it is clearly capable of comprehending the territorial sea, notwithstanding that Article 20 of the 1958 Convention on the Territorial Sea provides that «the coastal State may not ... arrest a ship [passing through the territorial sea] for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal State». This discrepancy was raised at the 1958 Conference on the Law of the Sea, but it was felt that the effect of Article 25 of that Convention, stipulating that its provisions «shall not affect conventions or other international agreements already in force, as between States parties to them» sufficiently preserved the position of those States parties to the Arrest Convention. The issue does not appear to have been raised at the Third UN Conference on the Law of the Sea, and Article 28 of the 1982 Convention simply reproduces Article 20 of the 1958 Convention on the Territorial Sea. But paragraph 2 of Article 311 of the 1982 Convention does *not* simply reproduce the terms of Article 25 of the 1958 Convention on the Territorial Sea, but requires in addition that the «other agreements» concerned should be «compatible» with the 1982 Convention. This suggests that, for those States parties to the Arrest Convention who ratify the 1982 Convention, the latter might have to be viewed as superseding those provisions of the Arrest Convention which are incompatible with it.

50. Paragraphs 3 and 4 of Article 311 deal with *inter se* modification of the 1982 Convention by the States parties to that Convention. They provide :

> «3. Two or more States parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performances of their obligations under this Convention.
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides».

51. Paragraphs 3 and 4 of Article 311 are clearly modelled on the rules relating to the *inter se* modification of treaties laid down in Article 41 of the Vienna Convention on the Law of Treaties. Paragraph 3 incorporates an extra condition that such agreements «shall not affect the

application of the basic principles embodied herein», the other two conditions mentioned in that paragraph being drawn from Article 41(1)(b) of the Vienna Convention on the Law of Treaties. Whether this extra condition adds anything significant to the requirement that an *inter se* modification must not relate to a provision «derogation from which is incompatible with the effective execution of the object and purpose of this Convention» is unclear. What is clear, however, is that an *inter se* modification of the basic principle relating to the common heritage of mankind set forth in Article 136 would be impermissible. There is an obvious linkage here between paragraph 3 of Article 311 and paragraph 6 of the same article which provides :

> «6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof».

So, for States Parties to the 1982 Convention, *inter se* modification of Article 136 is specifically prohibited under paragraph 6 of Article 311, irrespective of whether it might not also fall foul of one or more of the conditions embodies in paragraph 3 of Article 311. It is unusual to see a provision such as paragraph 6 of Article 311 included in a major multilateral convention. It clearly draws its inspiration from the notion of *jus cogens* reflected in Article 53 of the Vienna Convention on the Law of Treaties ; but it is significant that it refrains from characterising the basic principle relating to the common heritage of mankind as a norm of *jus cogens,* and it accordingly remains doubtful whether the validity of any amendment duly adopted in accordance with Article 314 (which envisages the possibility of amendments to provisions of the Convention relating to activities in the Area) could be impugned on the grounds that it violated paragraph 6 of paragraph 311. The issue is, however, by no means beyond doubt ; and it has been pointed out that the vagueness of some of the expressions used in paragraphs 2 («compatible with this Convention»), 3 («effective execution of the object and purpose of this Convention») and 6 («basic principle relating to the common heritage of mankind») of Article 311 could lead to an «accidental» breach of those provisions brought to light only by a process of interpretation[59].

52. It will thus be seen that the 1982 Convention incorporates a carefully crafted set of rules on the relationship between it and other conventions. But Article 311 of the 1982 Convention does not stand in isolation. As has already been noted, many of the other articles in the 1982 Convention make reference to existing agreements. The text of the Convention is replete with reference to «generally accepted international regulations»

---

59 Rosenne, *op.cit.* at footnote 25 above, p. 86.

(Articles 41, 53 and 94), «respect existing agreements with other States» (Article 51), «contrary to international conventions» (Article 108), «contrary to international regulations» (Article 109) and «international rules, standard and recommended practices and procedures» or closely similar wording (Articles 197, 207, 208, 209, 210, 211, 212, 217 and 222), to give but a few examples. Of particular interest is Article 237 which provides :

> «1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment, and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.
>
> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention».

This clearly has the effect of giving priority to the obligations of States under existing global and regional agreements relating to pollution from land-based sources, pollution from seabed activities subject to national jurisdiction, pollution from vessels, pollution by dumping and pollution from and through the atmosphere, and encouraging the establishment of new or revised global and regional rules, standards and recommended practices and procedures in these fields. But the generalised wording used in some of the other articles to which attention has been directed could give rise to problems :

> «As far as the prescription of pollution standards is concerned, the Law of the Sea Convention makes no change in the traditional competence of *flag States* to prescribe their legislation for their vessels wherever they may be : it does, however, go further by placing an obligation on flag States to adopt pollution regulations for their vessels which «at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference» (LOSC Article 211(2)). There is no definition of «generally accepted international rules ...», although Article 211(7) provides that they include *inter alia* those relating to notification of accidents likely to cause marine pollution ... Presumably «generally accepted international rules» include the 1954 Convention [for the prevention of the Pollution of the Sea by Oil]. But do they include the MARPOL Convention which is not widely ratified ? And, if so, do they include the provisions of all five annexes ; or only those of the compulsory first two ? The «competent international organisation» is usually taken as meaning the IMO. Do the «standards» established by the IMO include only those found in conventions or do they include those contained in non-binding IMO Assembly resolutions ? Whatever the precise scope of «generally accepted international rules...» — and it is regrettable that no guidance as to what they comprise is given — the effect of Article 211 (2) may be in some cases to oblige

> flag States to prescribe for their vessels the provisions of conventions to which they are not parties»[60].

This is not the place in which to respond to these questions, although a reading of Article 211 in the light of Article 237 might suggest an answer to some of them. For present purposes, it is sufficient to note that the 1982 Convention does *not* purport to override existing conventions relating to the protection and preservation of the marine environment, but, on the contrary, carefully preserves them and indeed enables States parties to fulfil their obligations under them.

2) Relationship between successive conventions codifying the humanitairan law of armed conflict

53. Within the framework of the «law of The Hague» and indeed of the «law of Geneva», a consistent practice has developed whereby a new successive convention on the same subject-matter replaces the previous convention, leaving the latter in force as between the States which are parties to it but do not ratify the new convention. This practice dates back to the early years of the twentieth century, Article 4 of Hague Convention IV on the Laws and customs of War of 1907 providing that :

> «The present Convention, when duly ratified, shall replace, as between the Contracting Powers, the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land.
> The Convention of 1899 remains in force as between the Powers which signed it, but which do not ratify also the present Convention»[61].

Indeed, very similar language had been used in Article 31 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906 (the 1906 Wounded and Sick Convention), which provided :

> «The present Convention, duly ratified, shall replace the Convention of the 22nd August, 1864, in relations between the Contracting States, The Convention of 1864 remains in force between such of the parties who signed it who may not likewise ratify the present Convention».

The 1906 Wounded and Sick Convention was in turn overtaken by the 1929 Wounded and Sick Convention, Article 34 of which simply states :

---

60 Churchill and Lowe, *The Law of the Sea* (1983), pp. 225-6.

61 A similar clause will be found in Hague Convention X for the Adaptation of the Principles of the Geneva Convention to Maritime War, 1907 (Article 25), this Convention replacing the 1899 Hague Convention on the same subject-matter.

> «The present Convention shall replace the Conventions of the 22nd August, 1864, and the 6th July, 1906, in relations between the High Contracting Parties»[62].

54. A similar pattern will be found in other conventions forming part of the «law of Geneva». The Convention relative to the Treatment of Prisoners of War, 1929, (the 1929 Prisoners of War Convention) was the first in a series of successive conventions to be devoted specifically to the treatment of prisoners of war. It does not therefore contain any «replacement» clause. But the preamble to the 1929 Prisoners of War Convention indicates the desire of the drafters to develop «the principles which have inspired the international conventions of The Hague, in particular the Convention concerning the Laws and Customs of War and the Regulations thereunto annexed» ; and Article 89 of the 1929 Prisoners of War Convention accordingly spells out the relationship between the new Convention and the earlier Hague Conventions, as follows :

> «In the relations between the Powers who are bound either by the Hague Convention concerning the Laws and Customs of War on Land of the 29th July, 1899, or that of the 18th October, 1907, and are parties to the present Convention, the latter shall be complementary to Chapter 2 of the Regulations annexed to the above-mentioned Conventions of The Hague».

The 1949 Geneva Convention relative to the Treatment of Prisoners of War (the 1949 Prisoners of War Convention) was designed to revise the 1929 Prisoners of War Convention. Accordingly, it incorporates a standard «replacement» clause as Article 134 :

> «The present Convention replaces the Convention of 27th July, 1929, in relations between the High Contracting Parties».

In the detailed commentary on this Convention drawn up by the Red Cross under the general editorship of Pictet, it is stated, with reference to Article 134 :

> «The new Convention has mandatory force only as between the States party to it. The 1929 Convention therefore continues to bind, in their mutual relations, States which are party to it without being party to the 1949 Convention. In the same way, it will apply to relations between States when one is a party to the 1929 Convention only, the others being party to both the 1949 and the 1929 Conventions.
> Two successive Conventions are thus in existence at the same time. Article 134 does not have the effect of abrogating the 1929 Convention.

---

62 An identical clause will be found in the 1949 Wounded and Sick Convention (Article 59), but taking in also the Convention of 27th July, 1929.

> Even supposing a time came when the latter no longer bound any State at all, it would still preserve a latent existence. For, in the improbable event of a State denouncing the 1949 Convention, the 1929 Convention would become operative once more and again bind the denouncing Power in its relations with other States»[63].

The commentary goes on to consider briefly what the position would be as between two States, one of which was party to the 1949 Convention only and one to the 1929 Convention only and suggests that «they should consider themselves bound by the provisions common to both Conventions» since the 1949 Convention is «merely a revised and corrected version» of the 1929 Convention[64].

55. Article 135 of the 1949 Prisoners of War Convention repeats Article 89 of the 1929 Prisoners of War Convention. The *Pictet Commentary* notes :

> «This provision reproduces the text of Article 89 of the 1929 Convention, the authors of which had intended to *complement* Chapter II of the Hague Regulations, not to *replace* it. The Hague Rules, which were a codification of principles recognised by all civilised nations, remained sacrosanct and the 1929 Convention should be considered as developing the principles set forth in the Regulations. The latter remark is no longer so relevant as it was in 1929 ; Article 4, which defines the persons entitled to the status of prisoner of war, makes the new Convention much more independent of the Hague Regulations than the 1929 Convention»[65].

56. The 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea was designed to revise Hague Convention X of 1907. It accordingly incorporates a standard «replacement» clause, Article 58 stating :

> «The present Convention replaces the Xth Hague Convention of 18th October, 1907 for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, in relations between the High Contracting Parties».

The *Pictet Commentary* to Article 58 of this Convention is *mutatis mutandis* similar to the *Pictet Commentary* on Article 134 of the 1949 Prisoners of War Convention. But it makes two additional points :

1) The fact that Article 58 mentions only the Hague Convention of 1907 and not the 1899 Convention in no way implies that the

---

63 *The Geneva Conventions of 12 August, 1949 : Commentary* (ed. Pictet) (hereinafter cited as «*Pictet Commentary*»), Vol. III (1960), p. 636.

64 *Ibid.*

65 *Ibid.*

authors intended to abrogate the latter ; three successive conventions accordingly co-exist in international law.

2) As regards two States, one of which is party to the 1949 Convention only and one to the 1907 Hague Convention only, the following general principle is advanced :

> «The States should consider themselves bound, at any rate morally, by everything which is common to the two Conventions, beginning with the great humanitarian principles which they contain. An effort should be made to settle by special agreement matters dealt with differently in the two Conventions ; in the absence of such an agreement, the Parties would apply the provisions which entailed the least extensive obligations»[66].

57. The last of the four Geneva Conventions of 1949 is the Convention relating to the Protection of Civilian Persons in Time of War (the 1949 Civilians Convention). It has been rightly pointed out that this is not a revision of any existing Convention, already tried in the fire of experience, but an entirely new venture :

> «To some extent, it is declaratory of existing principles of international law, but in a large measure it lays down new principles which are to become part of the law. It is expressed ... to be supplementary to Sections II and III of the Hague Regulations, but it was drawn up against the background of two World Wars and is therefore far removed from the conceptions of the circumstances of war which dominated those who first framed the Hague Regulations in 1899 and which still prevailed in 1907 when they were revised»[67].

As the citation indicates, Article 154 of the 1949 Civilians Convention provides :

> «In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of 29th July, 1899, or that of 18th October, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague».

As will be apparent, this text parallels that of Article 135 of the 1949 Prisoners of War Convention, which in turn repeated the language of Article 89 of the 1929 Prisoners of War Convention (see paragraphs 54 and 55 above). The Pictet Commentary adds the following clarification :

---

66 *Pictet Commentary*, Vol. II (1960), p. 278.

67 Gutteridge, «The Geneva Conventions of 1949», 26 *BYIL* (1949), pp. 318-9.

> «Generally speaking, however, it may rightly be claimed that the [1949 Civilians] Convention as a whole determines the treatment of civilians in time of war so that in that connection, with the few exceptions discussed later, the new provisions have entirely replaced the 1907 Regulations. For that reason, when a State is party to the Fourth Geneva Convention of 1949, it is almost superfluous to enquire whether it is also bound by the Fourth Hague Convention of 1907 or the Second of 1899. Furthermore, the Hague Regulations are considered to have given written expression to international custom and no State would be justified today in claiming that the Regulations are not binding on it because it is not party to them»[68].

58. It is clear from the foregoing that, up to the date of the adoption of the four Geneva Conventions of 1949, the consistent practice of those responsible for the drafting of conventions on the humanitarian law of armed conflict was to incorporate a standard «replacement» clause when the intention was that the new convention would supersede the old (at least in the relations between States parties to both), and, when the new Convention touched upon matters covered, at least in part, by the Hague Conventions of 1899 and 1907 concerning the Laws and Customs of War on Land, to include another clause providing that the new Convention should be supplementary to the relevant Hague Regulations. Of course, those responsible for drafting those conventions would no doubt have been constrained by the terms of the mandate given to the diplomatic conference at which they were negotiated. As one commentator observes :

> «Since the Geneva Conference of 1949 had no mandate to revise any of the Hague Conventions other than the Tenth[69], it was not posssible to weld into one composite Convention four separate draft Conventions, each of which had a different ancestry»[70].

59. With the additional Protocols of 1977, we have a new legal situation. As the very title of Additional Protocol I indicates, it is a «Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflict». The Commentary on the Additional Protocols published by the ICRC states :

> «The expressions «additional protocol» or «protocol» are widely used to refer to a treaty supplementing an already existing treaty, and it is in this sense that the word «additional» is used in the title here ...

---

68 *Pictet Commentary*, Vol. IV (1958), p. 614.

69 Which, it will be recalled, was replaced by the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea : see paragraph 56 above.

70 Gutteridge, *loc.cit.* at footnote 67 above, p. 297.

> The additional character of the protocol means that it is not an independent instrument. Apart from what is said below about its relation to the 1949 Conventions, this is clearly demonstrated by the fact that it is impossible to become a party to the Protocol without already being a Party to the Conventions — or without becoming a Party to the Conventions simultaneously»[71].

Why did the drafters of the Additional Protocols depart so radically from previous practice ? Some explanation has been given in the General Introduction to the *Additional Protocols Commentary* :

> «However, although humanitarian law had been developed and adapted to the needs of the time in 1949, the Geneva Conventions did not cover all aspects of human suffering in armed conflict. Moreover, by the 1970s even these were already a quarter of a century old and on some points had exposed gaps and imperfections.
> In addition, the law of The Hague, which is concerned with developing rules on hostilities and the use of weapons, had not undergone any significant revision since 1907»[72].

Accordingly, the ICRC, strongly encouraged in this by the UN General Assembly, undertook the enormous and difficult task of preparing studies and proposals for the development of international humanitarian law :

> «There was no intention of trying to rewrite the Geneva Conventions, nor even of completely revising them, which would have entailed the risk of weakening them. When they are fully applied, these Conventions provide effective guarantees for the victims of conflicts. Thus it would be sufficient to extend them so as to cover certain supplementary matters and to clarify some important points. Consequently, since then, one has referred to «reaffirming and developing» humanitarian law. Similarly, the idea of adopting the form of protocols additional to the Geneva Conventions was soon conceived, and later approved by governments»[73].

60. Additional Protocol I contains other provisions which confirm its supplementary character. Of these, the most significant is Article 96 which specifies *inter alia :*

> «1. When the parties to the Conventions are also Parties to the Protocol, the Conventions shall apply as supplemented by this Protocol.
> 2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their

---

71 *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (eds. Sandoz, Swinarski and Zimmermann) (1987) (hereinafter referred to as «*Additional Protocols Commentary*»), p. 20.

72 *Additional Protocols Commentary*, p. xxix.

73 *Op.cit.*, p. xxx.

> mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof»[74].

The significance of paragraph 1 of Article 96 has been explained as follows :

> «The addition of a supplement to the Conventions entails the appearance of two separate, though basically overlapping treaty communities once the Protocol enters into force. On the one hand, the virtually universal already existing community of Parties to the Conventions ; on the other hand, that which came into existence on 7 December 1978[75] of Parties bound by the Conventions and by the Protocol.
> Only this new treaty community is covered by the paragraph under consideration here. It lays down a rule that applies at all times, and not only in time of armed conflict within the meaning of Article 1, paragraphs 3 and 4.
> Basically, the Protocol supplements the Conventions by extending the scope of their application, the categories of protected persons and objects and the protection conferred. Thus the Conventions remain and the Protocol adds to them without in principle removing anything. When the recognised rules of interpretation reveal an incompatibility on a particular point between the provisions of the Conventions and those of the Protocol, the latter take precedence. In this respect, this paragraph merely repeats, succinctly, the relevant rule of the law of treaties.
> The Protocol explains its relation to the Geneva Conventions of 1949 ; the latter do the same with regard to the conventions preceding them, which they replace and the Hague Regulations respecting the laws and customs of war on land (of 1899 or 1907), which they supplement.
> In the area which the Protocol and the law of The Hague have in common, but which is absent from the Conventions, the situation is as follows according to the above-mentioned rule : pre-existing law continues to apply as treaty law or customary law insofar as it is not modified or replaced by the Protocol»[76].

61. Paragraph 2 of Article 96 is taken *mutatis mutandis* from paragraph 3 of Article 2 common to the four Geneva Conventions of 1949 and deals with two aspects of the same assumption, namely, that the parties to a given conflict are not all bound by the same rules. The first sentence of paragraph 2 has been a basic rule of the Geneva Conventions since 1929. What it means is that «a Party to a conflict bound by the Protocol remains bound to apply it vis-à-vis the adverse Parties bound by the same

---

74 Article 96 also contains a paragraph 3 dealing with the manner in which an authority representing a people engaged against a High Contracting party in certain types of armed conflict may undertake to apply the Conventions and this Protocol in relation to that conflict.

75 The date of entry into force of Additional Protocol I.

76 *Additional Protocols Commentary,* pp. 1085-6.

instrument, even if one or several adverse or allied Parties are not bound by the Protocol»[77]. The second sentence of paragraph 2, which corresponds to a provision already contained in the four Geneva Conventions of 1949, establishes a means whereby a State not yet bound by the Protocol can, if it so desires, ensure that the Protocol is made legally applicable between itself and the other Parties to the conflict already bound by that instrument :

> «The way that is open to achieve this is limited in its effects. In fact it does not definitively bind the Party concerned to all the obligations as does ratification or accession ; acceptance is limited to the current conflict and the Party making the declaration of acceptance retains total freedom as regards its formal participation in the Protocol»[78].

62. Because of the close relationship between the Geneva Conventions of 1949 and Additional Protocol I, it need hardly occasion surprise that the protocol was opened for signature only to Parties to the Conventions (Article 92) and is open for accession only by Parties to the Convention which have not signed it (Article 94). In other words, it is not possible to become bound by the Protocol without being bound by the Conventions.

63. The relationship between Additional Protocol I and the four Geneva Conventions of 1949 accordingly differs widely from that between the Geneva Conventions of 1949 and the earlier Geneva Conventions of 1929. Additional Protocol I is supplementary to the Geneva Conventions of 1949 and to the Hague Regulations of 1899 and 1907 concerning the laws and customs of war on land, and is in no way designed to replace these instruments. We have already seen (paragraphs 13 to 16 supra) how the Martens clause, both in its original sense and in the revised sense in which it is used in the denunciation clauses contained in each of the four Geneva Conventions of 1949, continues to exercise its influence on the functioning of the «law of Geneva» and the «law of The Hague» as now codified and developed in Additional Protocol I. We will have occasion to consider this aspect of the matter more closely in the context of the analysis of the general principles of international law concerning the relationship between codification conventions and customary law.

(3) Relationship between the draft articles of the International Law Commission on the status of the diplomatic courier and the unaccompanied diplomatic bag and existing codification conventions.

64. For some years, the ILC has been working on a set of draft articles on the status of the diplomatic courier and the unaccompanied diplomatic

---

77 *Ibid.*

78 *Ibid,* at p. 1087.

bag. Each of the four conventions on what may generically be referred to as «diplomatic law» (the Vienna Convention on Diplomatic Relations, the Vienna Convention on Consular Relations, the Convention on Special Missions, and the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character) contains provisions on the courier and bag. The object and purpose of the work being done by the ILC is to harmonise and develop the rules governing all types of courier and bag (that is to say, diplomatic courier and bag, consular courier and bag, courier and bag of a special mission, and courier and bag of a permanent mission to an international organization or of a delegation), and to try to establish a uniform legal régime on the status of the courier and bag. In this context, account had clearly to be taken of the four «diplomatic law» conventions already adopted, and an appropriate provision had to be included in the set of draft articles to indicate the relationship between the new draft and the existing conventional law. In 1986, the Commission adopted a set of draft articles on first reading, Article 32 of which provides :

> «The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them».

As will be seen, this says nothing about the impact of the new draft on the four «diplomatic law» conventions already adopted. However, the commentary to Article 32 (as adopted on first reading) states :

> «As to the relationship of the present draft articles to the above mentioned four multilateral conventions, it should be noted that the main purpose of the present draft articles has been the establishment of a coherent and uniform régime governing the status of the courier and the bag. Therefore, the present draft articles shall complement the provisions on the courier and the bag contained in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character. The desired harmonisation and uniformity of the rules governing the legal régime of official communications through diplomatic courier and diplomatic bag is sought by means of the codification and progressive development of additional specific provisions further regulating the matter. The present draft articles do not purport to codify or amend the avove-mentioned multilateral conventions. But at least in the view of some members of the Commission the application of some of the provisions of those conventions may be affected by virtue of the complementary character of the present draft articles, which harmonise and develop the rules dealing with the legal régime of couriers and bags»[79].

79 ILC *Report* (1986), pp. 80-1.

65. This comment does not exactly clarify the intention of the Commission, particularly when, as is the case here, uniformity can be achieved only at the expense of reconciling some of the differences between the four «diplomatic law» conventions[80]. The Commission reverted to this problem in 1988 when it began its second reading of the set of draft articles on the status of the diplomatic courier and unaccompanied diplomatic bag. The Special Rapporteur (Ambassador Yankov) introduced a revised version of Article 32 designed, in his view, to clarify the relationship with the four «diplomatic law» conventions :

> «The provisions of the present articles shall not affect other intemational agreements in force as between parties to them and shall complement the conventions listed in Article 3 paragraphs 1 and 2»[81].

In the subsequent debate, varying views were expressed on this revised version :

> «In the view of some members, the word «complement» did not adequately reflect the relationship between the draft articles and the four codification conventions, as in some cases the draft articles really intended to modify some provisions of those conventions and should, as *lex specialis*, take precedence over them. It was observed in this connection that the proposed formulation did not seem to be fully in accordance with Article 30 of the Vienna Convention on the Law of Treaties»[82].

Although some members suggested that the draft article should be drafted along the lines of Article 311 of the 1982 Convention on the Law of the Sea, the Special Rapporteur did not think that this afforded a parallel :

> «There were many differences between Article 311 of the Convention on the Law of the Sea and Article 32 of the draft. In fact these were completely different situations. The Law of the Sea Convention was conceived from its inception as an «umbrella» convention, constituting the legal basis for special conventions in the field of the law of the sea ... Furthermore, Article 311, paragraph 1 explicitly stated that the Convention» shall prevail, as between States parties, over the Geneva Conventions on the Law of the Sea of 29 April, 1958». This rule and the other provisions were inspired by Article 103 of the United Nations

---

80 The most significant difference is between Article 27(3) of the Vienna Convention on Diplomatic Relations, which provides that «the diplomatic bag shall not be opened or detained» and Article 35(3) of the Vienna Convention on Consular Relations which envisages that requests may be made to open the consular bag in certain circumstances and that, if such a request is refused, the bag will be returned to its place of origin.

81 That is to say, the conventions listed in paragraph 64 *supra*.

82 ILC *Report* (1988), p. 251.

> Charter and, taken together, had an effect similar to that article in respect of the prevailing function of the Charter in the event of conflict between the obligations of Member States under the Charter and their obligations under any other international agreement. The draft articles, on the contrary, had a modest role, they were aimed as a special convention, based on the four codification conventions, with certain provisions which intended to harmonise and unify existing rules and supplement them with some specific rules»[83].

The outcome of the debate on this point at the 1988 session of the Commission was inconclusive. Nevertheless, the notion that the set of draft articles on the status of the diplomatic courier and the unaccompanied diplomatic bag might constitute a *lex specialis* by way of comparison with the four «diplomatic law» conventions seems to have taken root. Clearly, this is a case where further work will have to be done before a satisfactory formulation can be found.

66. These differing types of treaty clause bearing upon the relationship between a codification convention and earlier or later codification conventions dealing with the same subject-matter are illustrative of the diversity of provisions that can be found. Where the intention of the drafters is to accord as much priority or primacy to the new convention as is compatible with the circumstances, they may seek a solution along the lines of Article 311 of the 1982 Convention on the Law of the Sea. But their overriding concern may be to secure that as many States as possible become, or remain, bound by evolving conventional obligations. This appears to be one of the reasons why the successive conventions on international humanitarian law have regularly incorporated provisions designed to ensure the continued applicability of an earlier instrument between States parties to it which do not become party to the new instrument :

> «Here again we witness an endeavour to ensure a threshold of humanitarian protection in the form of pre-existing norms (whether customary or conventional), so that every new instrument can only have a purely cumulative or supplementary (but no destructive) effect in relation to what preceded it. In other words, this pattern ensures that the evolution of substantive norms, regardless of their formal source (which can change in the course of this evolution) can proceed only in the direction of a higher level of protection»[84].

Again, it may be that the new instrument covers only a small part of the ground covered by earlier codification conventions, so that what we

---

83 *Loc.cit.*, p. 252.

84 Abi-Saab, «The specificities of humanitarian law», *Pictet Essays* (1984), p. 276.

have are a series of general conventions codifying an international law topic, followed by a more specialised convention developing one particular aspect of that topic. This is the case with the ILC project on the status of the diplomatic courier and unaccompanied diplomatic bag ; and the right solution here may be to build on the distinction between the *lex generalis* and the *lex specialis*. Accordingly, the *context* of the particular convention may suggest what should be the *content* of a treaty clause dealing with relations with earlier or later conventions ; what is in any event of critical importance is that the problem should be faced, and a suitable provision on «relations with other conventions» incorporated into the new instrument.

(d) The obligation not to defeat the object and purpose of a treaty.

67. Article 18 of the Vienna Convention on the Law of Treaties provides that :

> «A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when :
>
> a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty ; or
>
> b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed».

In the context of the present study, the question arises as to the meaning of this obligation in the case where the treaty in question is a subsequent codification convention varying in material respects the provisions of an earlier codification convention on the same subject-matter. It is in fact doubtful whether Article 18 of the Vienna Convention on the law of Treaties is declaratory of pre-existing international law[85]. Whatever may be the position in this respect, the scope of the obligation is in any event uncertain. This can best be appreciated if one considers the position of States which have signed the 1982 Convention on the Law of the Sea during the period pending its entry into force. Does that Convention have one single object and purpose ? As one commentator rightly points out :

---

85 Cahier, «L'obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur», *Mélanges Dehousse* (1979), p. 31. See also Sinclair, op.cit. at footnote 46 above, p. 19 ; O'Connel, *International Law*, Vol. I (2nd Edn.) (1970), pp. 223-4 ; and Morvay, «The obligation of a State not to frustrate the object of a treaty prior to its entry into force», 27 *ZaöRV* (1967), pp. 451-62.

> «Clearly not every one of its provisions can be said to be one of its objects and purposes ; yet how are we to determine which provisions are sufficiently important to constitute an object or purpose ? Probably also we would have to conclude, in this particular case, that the Convention has more than one main object and purpose. But even if one could readily concede that, say, undertaking an act which is inconsistent with the «common heritage of mankind» would be inconsistent with the object and purpose of the treaty, this certainly cannot be said of all its provisions»[86].

This is in no way to denigrate or downplay the element of good faith in the conclusion of treaties. Indeed, Article 18 of the Vienna Convention on the Law of Treaties is based upon the notion of good faith implicit in the proposition that a State which has signed a treaty should refrain from acts which would undermine the treaty pending its entry into force. The difficulty lies in how this proposition can be applied in circumstances where the treaty concerned has no single overriding object and purpose but a series of unrelated objects and purposes. It may be indeed, as Professor Mendelson suggests, that it is possible to pick out one or more provisions of the 1982 Convention which can be said to articulate a major «object and purpose». The internal evidence, for example, suggests that Article 136 is of the nature, the more particularly since, as we have already noted, paragraph 6 of Article 311 prohibits States parties from becoming a party to any agreement which would derogate from the principle of the common heritage of mankind as applicable to the deep seabed area and its resources. It remains only to add that a State which signs a subsequent codification convention is unlikely to fall four of the rule in Article 18 of the Vienna Convention on the Law of Treaties (assuming it to be a party to the latter) if it applies those provisions of the subsequent codification convention which are expressive of or have generated customary law, even if the «new» customary law constitutes a development of, or is otherwise at variance with, the earlier codification convention.

III. General principles of international law concerning the relationship between codification conventions and customary law

a) Treaty and custom

68. Much has been written in recent years about the relationship between

86 Mendelson, «Fragmentation of the Law of the Sea», 12 *Marine Policy* (1988), pp. 193-4.

treaty and custom[87]. Article 38(1)(b) of the Statute of the International Court of Justice refers to «international custom, as evidence of a general practice accepted as law» : and this is as good a starting point as any for an analysis of the constituent elements of customary international law. International custom, in this sense, is of course to be distinguished from «international conventions» which, in the terms of Article 38(1)(a) of the Statute, establish rules «expressly recognised by the contesting States». Now, it is hardly surprising that, in the list of sources of international law to be found in Article 38 of the Statute, the reference to «international conventions» precedes the reference to «international custom». This suggests that, at least in the practical application of the varying sources listed in Article 38 , priority will be given to treaty law over customary law. As has been said :

> «As respects the determination of the rights and duties of States inter se, the stipulations of a treaty to which they have agreed are paramount over everything else ... This explains why treaties stand at the head of Article 38 of the Statute»[88].

The *order* of sources as set out in Article 38 of the Statute is, however, equally explicable on the ground that one is proceeding from the *particular* law that might be applicable (*i.e.* a treaty binding both parties to a dispute) to the more *general* law that might otherwise be applicable (*i.e.* customary law and general principles of law). On this view of the matter, Article 38 of the Statute does not establish any hierarchy of sources, but, at most, a sequence of the factual importance of the sources and of the relative ease of the ascertainment of the respective rules :

> «The silence in Art. 38 as to a hierarchy of sources reflects accurately the structure of the international legal order to which an *a priori*

---

87 See, for example, Baxter, «Multilateral treaties as evidence of customary international law», 41 *BYIL* (1965-6), pp. 275-300 ; id., «Treaties and Custom», 129 *Recueil des Cours* (1970), pp. 31-104 ; Shihata, «The treaty as a law-declaring and custom-making instrument», 22 *Revue égyptienne de droit international* (1966), pp. 51-90 ; D'Amato, «Manifest intent and the generation by treaty of customary rules of international law», 64 *AJIL* (1970), pp. 892-904 ; *id. The Concept of Custom in International Law* (1971), pp. 103-66 ; Thirlway, *International Customary Law and Codification* (1972), *passim* ; Akehurst, «Custom as a source of international law», 47 *BYIL* (1974-5), pp. 1-53 ; Villiger, *Customary International Law and Treaties* (1985), *passim* ; Cheng, «Custom : the future of general State practice in a divided world», in *The Structure and process of International Law* (eds. Macdonald and Johnston) (1983), pp. 513-54 ; Cassese, *International Law in a Divided World* (1986), pp. 179-85 ; and Schachter, 178 *Recueil des Cours* (1982), p. 91-132.

88 Parry, *The Sources and Evidence of International Law* (1965), p. 34.

> hierarchy of sources is an alien concept. The reason for this is that customary law and treaties are autonomous sources : the conditions for their formation, existence and termination are such that the rules of one source do not depend for their formation on the rules of the other source. This autonomy of sources necessitates customary law and treaties being equivalents, and any relationship between the two depending on other criteria *in casu*»[89].

69. The relationship between treaty and custom figured prominently in the judgment of the ICJ in the merits phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua*[90]. It will be recalled that the Court in the earlier phase of the same case dealing with questions of jurisdiction and admissibility had determined that it had jurisdiction to hear the case and that the Nicaraguan application was admissible : but the Court had equally determined that the objection based on the «multilateral treaties» reservation in the United States acceptance of the compulsory jurisdiction did not possess an exclusively preliminary character, being «a question concerning matters of substance relating to the merits of the case»[91]. Accordingly, in the merits phase of the proceedings, the Court had to consider again the applicability of the «multilateral treaties» reservation ; and, in so doing, the Court held, by 11 votes to 4, that in adjudicating the dispute, it was required to apply the «multilateral treaties» reservation, so that it was precluded from entertaining the Nicaraguan claims that the United States had violated Article 2(4) of the United Nations Charter and Articles 18, 20 and 21 of the Charter of the Organization of American States. However, the Court still had jurisdiction to determine the Nicaraguan claims based on allegations of violation by the United States of a bilateral Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, and of the relevant rules of customary international law. It is in the context of this latter conclusion that the observations of the Court on the relationship between treaty law and customary law must be assessed.

70. In its earlier judgment on jurisdiction and admissibility, the Court had already indicated its preliminary view :

> «The Court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognised as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary

89 Villiger, *op.cit.* at footnote 87 above, p. 35.
90 ICJ *Reports* (1986), p. 14.
91 ICJ *Reports* (1984), pp. 425-6.

> law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law despite the operation of provisions of conventional law in which they have been incorporated»[92].

71. The Court developed and refined those initial remarks in its judgment on the merits. It first of all doubted whether, in the areas of law relevant to the present dispute, all the customary rules which might be invoked had a content exactly identical to that of the rules contained in the treaties which could not be applied by virtue of the United States reservation. The Court continued :

> «But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective»[93].

The Court then found that Article 51 of the UN Charter itself referred to pre-existing customary international law by mentioning the «inherent» right of individual or collective self-defence ; moreover, the Charter, while recognising this right, did not go on to regulate all aspects of it.

72. The Court proceeds to advance other arguments to sustain the thesis that, even if two norms belonging to two sources of international law are identical in content, and even if the two States are bound by those rules both of the level of treaty-law and on that of customary international law, these norms still retain a separate existence. The Court states *inter alia :*

> «Rules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application. A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also

---

92 *Loc. cit.*, p. 424.

93 ICJ *Reports* (1986), p. 94 ; later in the judgment, the Court states that «there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter «supervenes» the former, so that the customary international law has no further existence of its own» (*loc.cit.*, p. 96).

> because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule. Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules»[94].

73. The Court then proceeds to reject another argument advanced by the United States during the jurisdiction and admissibility phase of the proceedings. This United States argument was that the multilateral treaties covered by the Vandenberg «reservation» articulated legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties would continue to be governed by those treaties, irrespective of what the Court might decide on the customary law issue. Therefore, the Court could not properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations was barred ; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties had agreed to conduct themselves in their actual international relations. To this, the Court responded :

> «The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral treaties binding on the parties, would be a wholly academic exercise ... The Court does not consider that this is the case ... [On] the question of the use of force, the United States itself argues for a complete identity of the relevant rules of customary international law with the provisions of the Charter. The Court has not accepted this extreme contention, having found that on a number of points the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content ... The essential consideration is that both the Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations. The differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate ...»[95].

74. This approach by the majority of the Court is not beyond criticism. Few would quarrel with the general proposition that a norm which has been incorporated in a multilateral convention may, if it was previously

---

94 *Loc.cit.*, p. 95.

95 *Loc.cit.*, pp 96-7.

a norm of customary international law, retain its separate existence as such. But, it is that convention, if binding on the parties to a dispute, which will henceforth, and for so long as the convention remains in force as between the parties, govern their mutual rights and obligations. To this extent, there may be said to exist a hierarchy of sources of international law, as indeed the late Sir Hersch Lauterpacht suggested :

> «When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty. Like a contract between individuals, a treaty between States constitutes the law between them ... It is only when there are no provisions of a treaty applicable to the situation that international customary law is, next in hierarchial order, resorted to»[96].

Much the same view is taken by Brownlie, who observes, with reference to Article 38 of the ICJ Statute :

> «The first question is whether paragraph 1 creates a hierarchy of sources. They are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word «successively» appeared. In practice the Court may be expected to observe the order in which they appear : (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. Source (a) is thus not primarily a source of rules of general application, although treaties may provide evidence of the formation of custom»[97].

75. Another consideration is that the Court may not have sufficiently distinguished between *jurisdiction* and *applicable law*. The so-called Vandenberg «reservation», whatever one may think of the terms in which it is couched[98], was clearly designed to exclude from the Court's jurisdiction disputes falling within its terms. In analysing that reservation, which has, as the Court itself admits, «some obscure aspects», the Court seems to have assumed that because the Nicaraguan claims were based on asserted

---

96 *Hersch Lauterpacht : International Law : Collected Papers* (ed. E. Lauterpacht), Vol. I, 1970, p. 87.

97 Brownlie, *Principles of Public International Law*, 3rd Edition (1979), pp. 3-4 ; *cf.* Akehurst, «The hierarchy of the sources of international law», 47 *BYIL* (1974-5), pp. 273-85.

98 A prominent American international lawyer, otherwise generally sympathetic towards the judgment of the Court on the merits of the dispute, draws attention to the fact that the Court failed to give any consideration to the alternative thesis that the reservation «would be so destructive of international judicial processes as to be incompatible with the Court's Statute» : Briggs, «The International Court of Justice lives up to its name», 81 *AJIL* (1987), p. 81.

violations of customary law as well as of the UN and OAS Charters, the dispute did not necessarily «arise under» those two multilateral treaties, so that the Court still had jurisdiction to adjudicate on the alternative allegations of breaches of customary law. But it can be argued, as Judge Oda has maintained in his dissenting opinion, that this is to confuse the issue of applicable law with that of jurisdiction :

> «I believe that the issue — which relates to applicable law — of whether, once the Court assumes jurisdiction over a case, it can apply the rules of customary and general international law apart from any applicable treaty rules, is quite different from the other issue — which relates to the Court's jurisdiction — of whether a State's declaration excludes «disputes arising under multilateral treaties» (United States reservation) from the jurisdiction of the Court ...»[99].

76. Another way of looking at the matter is to follow the line of reasoning of Judge Jennings. He advances two principal arguments against this aspect of the Court's judgment on the merits. The first is the following :

> «Although the multilateral treaty reservation qualifies the jurisdiction of this Court, it does not qualify the substantive law governing the behaviour of the Parties. Article 38 of the Court's own Statute requires it first to apply «international conventions», «general» as well as «particular» ones, «establishing rules expressly recognised by the contesting States» ; and the relevant provisions of the Charter — and indeed also of the Charter of the organisation of American States, and of the Rio Treaty — have at all material times been principal elements of the applicable law governing the conduct, rights and obligations of the Parties. It seems therefore eccentric, if not perverse, to attempt to determine the central issues of the present case, after having first abstracted these principal elements of the law applicable to the case, and which still obligate both the Parties»[100].

The second of Judge Jennings' arguments is to recall that the Vandenberg «reservation» relates to «disputes arising under a multilateral treaty». Judge Jennings continues :

> «Clearly the legal nature of a dispute is determined by the attitude of the parties between which the dispute is joined. Nicaragua eventually, though not originally, pleaded its case in the duplex form of a dispute under multilateral treaties or, in the alternative, a dispute under customary law. But there are at least two sides to a dispute. The United States did not countenance a dispute arising only under custom. Its response to the charge of unlawful use of force was based firmly on Article

99 *Loc.cit.*, p. 533.
100 *Loc.cit.*, p. 533.

> 51 of the Charter. One party cannot in effect redefine the response of the other party. If the Respondent relies on Article 51, there is a dispute arising under a multilateral treaty»[101].

77. Whatever view may be taken of this particular issue, the fact remains that the conclusion drawn by the Court about the legal effect of the multilateral treaties reservation required it to determine the content of the customary law on non-use of force and non-intervention. In doing so, the Court quoted with approval the following passage from its earlier judgment in the *Libya/Malta Continental Shelf* case :

> «It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them»[102].

Having done so, and notwithstanding its earlier conclusion about the legal effect of the multilateral treaties reservation, the Court nevertheless proceeded to look to the terms of the UN and OAS Charters for evidence of the customary law relating to the non-use of force and non-intervention :

> «Although the Court has no jurisdiction to determine whether the conduct of the United States constitutes a breach of those conventions, it can and must take them into account in ascertaining the content of the customary international law which the United States is also alleged to have infringed»[103].

This poses a logical conundrum. If the Court is precluded from *applying* the UN and OAS Charters because of the multilateral treaties reservation, how can it properly look to them and take them into account in determining the content of the relevant customary rules ? As Judge Jennings states in his dissenting opinion :

> «The use of treaty provisions as «evidence» of custom takes the form of an interpretation of the treaty text. Yet the Court itself acknowledges that treaty-law and customary law can be distinguished precisely because the canons of interpretation are different ...[104]. To indulge the treaty interpretation process, in order to determine the content of a posited customary rule, must raise a suspicion that it is in reality the treaty itself that is being applied under another name. Of course this way of going about things may be justified where the treaty text was, from the beginning, designed to be a codification of custom ; or where the

---

101 *Ibid.*

102 ICJ *Reports* (1985), pp. 20-30.

103 ICJ *Reports* (1986), p. 97.

104 See passage cited at paragraph 72 above.

> treaty is itself the origin of a customary law rule. But, as we have already seen, this could certainly not be said of Article 2, paragraph 4, or even Article 51, of the United Nation's Charter ; nor indeed of most of the other relevant multilateral treaty provisions»[105].

78. It would go beyond the confines of this study to analyse more closely the manner in which the Court developed its conclusions on the content of the rules of customary law relating to the non-use of force and non-intervention. But, in assessing the practice of States (one of the constituent elements of custom), the Court made the folllowing important pronouncement :

> «It is not to be expected that in the practice of States the applicationn of the rules in question[106] should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significcance of that attitude is to confirm rather than weaken the rule»[107].

Despite the criticisms to which this passage has been subjected[108], it is expressive of what one might call a «common-sensical» attitude to State conduct. More questionalbe is the Court's analysis of the other constituent element of custom, *opinio juris*. To find the requisite *opinio juris* in the attitude of States towards such General Assembly Resolutions as the Declaration of Principles of Friendly Relations and Co-operation among States in accordance with the Charter (the «Friendly Relations Declaration») is highly suspect, and is open to the criticism voiced by D'Amato :

---

105 ICJ *Reports* (1986), p. 532.

106 That is to say, the rules on the non-use of force and non-intervention.

107 ICJ *Reports* (1986), p. 98.

108 See, for example, D'Amato, «Trashing customary international law», 81 *AJIL* (1987), pp. 102-3, and Franck, «Some observations on the ICJ's procedural and substantive innovations», *id.*, pp. 118-9.

> «If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content ; one may simply apply the UN resolution as it is and mislabel it «customary law»[109].

In any event, the Friendly Relations Declaration was formulated as an *elaboration* of Charter principles, not as an expression of principles of customary international law. It has nothing to say about the right of individual or collective self-defence, subsuming this concept is the general safeguard clause :

> «Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful».

It does not require much imagination to conclude that this generalised formula was included in the Declaration precisely because there were differences of view on the interpretation of the relevant provisions of the Charter.

79. For the purposes of the present study, however, what is important to note is that the Court was considering a case where the two multilateral treaties in question were, at least so far as the non-use of force is concerned, generally expressing a *pre-existing* rule of customary law, although there are innovative features in the UN Charter provisions, such as the prohibition of the «threat», as opposed to the «use» of «force», and indeed in the use of the term «force» rather than «war», and again in the recognition of a right of «collective» self-defence. For present purposes, however, and accepting that the UN Charter did not purport to codify existing custom about the use of force and self-defence, it is sufficient to note that the UN Charter could hardly have *generated* new rules of customary law on the use of force and self-defence, given the fact that subsequent State conduct is wholly explicable on the basis that the States concerned (leaving aside those very few non-members of the UN whose practice could hardly count in an evaluation of this kind) were bound by the Charter itself.

b) Treaties declaratory of or generating customary international law

80. Attention has already been drawn (paragraphs 13 to 16 *supra*) to certain considerations which seem to establish that some provisions of international humanitarian conventions are declaratory of or reflect rules of customary international law. It forms no part of this study to identify *which* particular provisions of the four Geneva Conventions of 1949 or indeed of Additional Protocol I are declaratory of custom. In the case of

---

109 D'Amato, *loc.cit.* at footnote 108 above, p. 102.

Additional Protocol I, an attempt has been made to analyse its provisions and to specify those which supposedly reflect customary international law ;[110] but the author of this contribution would no doubt admit that this is a hazardous undertaking, and it may not always be decisive of the issue whether a particular article reflects customary law that it was adopted by consensus.

81. In the case of the four Geneva Conventions of 1949, some guidance is afforded by the judgment on the merits in the *Military and Paramilitary Activities in and against Nicaragua* case. Nicaragua had not expressly invoked the provisions of international humanitarian law in the proceedings, though it did complain of acts committed on its territory which would appear to have been in breach of such provisions. The Court did not find it necessary to take a position on the applicability to the Geneva Conventions of 1949 of the (United States) multilateral treaty reservation because in the Court's view :

> «... the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles»[111].

All this is unexceptionable ; as indeed is also the Court's invocation of the common denunciation clause to support the proposition that some of the conventional provisions may be declaratory of custom. What may be more open to question is the subsequent analysis of common Articles 1 and 3 of the Geneva Conventions of 1949. As regards Article 1, the Court states :

> «[T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to «respect» the Conventions and even «to ensure respect» from them «in all circumstances», since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression»[112].

Now, it can readily be accepted that the obligation of the United States to «respect» the Geneva Convention of 1949 can be said to derive from a source other than the Conventions themselves ; *pacta sunt servanda* is clearly a recognised rule of general international law. But what of the

---

110 Penna, «Customary international law and Protocol I : an analysis of some provisions», *Pictet Essays* (1984), pp. 201-25.

111 ICJ *Reports* (1986), p. 113.

112 *Loc.cit.*, p. 114.

obligation «to ensure respect» ? In commenting on this point, one distinguished jurist observes :

> «There is no evidence, however, that at that time the negotiating States believed that they were codifying an existing principle of law. They appear to have chosen the words «and to ensure respect» deliberately «to emphasise and strengthen *the responsibility of the Contracting Parties*»[113]. Also the language «and to ensure respect» was not used in earlier Geneva Conventions. The repetition of such prior usage would have strengthened the claim that the phrase is declaratory of international law»[114].

If the obligation «to ensure respect» for the Geneva Conventions of 1949 was not declaratory of customary international law at the outset, could subsequent developments have *generated* a customary rule in this sense ? This seems very doubtful, given that the Geneva Conventions have received virtually universal acceptation so that there can be little or no practice of States *not* party to these Conventions[115]. In the *North Sea Continental Shelf* cases, the Court had already, in considering whether a conventional provision could generate a rule of general international law binding even on non-parties, discounted the subsequent practice of States «acting actually or potentially in the application of the Convention»[116].

82. The Court's treatment of common Article 3 of the Geneva Convention of 1949 in the *Nicaragua* case is also somewhat surprising. The Court states :

> «Article 3 ... defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts ... The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question»[117].

There is little positive evidence to support the conclusion that the rules set out in common Article 3 apply, as a «minimum yardstick», to international armed conflicts as well as to non-international armed conflicts. Indeed the ICRC Commentary to the 1949 Geneva Conventions goes out

---

113 *Pictet Commentary,* Vol. I (1952), p. 26 : emphasis supplied.

114 Meron, «The Geneva Conventions as customary law», 81 *AJIL* (1987), p. 353.

115 *Loc.cit.*, p. 354.

116 ICJ *Reports* (1969), p. 43

117 ICJ *Reports* (1986), p. 114.

of its way to show that Article 3 «applies to non-international conflicts only»[118]. The same commentary does however go on to say, with reference to the obligation to accord humane treatment as set out in subparagraph (1) :

> «The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper when all the provisions of the Convention are applicable»[119].

It may be that this is the passage on which the Court are relying to sustain the «minimum yartstick» thesis. Whatever may be the position on this aspect of the matter, it is clear that common Article 3 of the four Geneva Conventions of 1949 was a new provision which had «no antecedents in earlier Geneva Conventions»[120]. The ICRC Commentary characterises it as «a new step forward» in the development of international humanitarian law, and as envisaging «explicitly and for the first time, the application by the parties to a civil war, if not of all of the provisions of the Geneva Conventions, at any rate of their essential principles»[121]. Contemporary writers certainly regarded Article 3 as constituting an innovation[122]. Indeed, one of them goes so far as to state :

> «This Article represents both a substantial innovation in the law of war and a considerable extention of the international obligation of States»[123].

This being the case, it is remarkable that the Court does not even seek to enquire whether *opinio juris* and State practice support the crystallisation of Article 3 into customary law[124].

83. It is not therefore surprising that two of the judges should, in their separate and dissenting opinions, have expressed considerable doubt about the Court's analysis of the relationship between treaty and custom, particularly so far as the Geneva Conventions of 1949 are concerned. Thus, Judge Ago, in his separate opinion, states :

---

118 *Pictet Commentary*, Vol. I (1952), p. 48.
119 *Ibid.*, p. 52
120 Meron, *loc.cit.* at footnote 114 above, p. 356.
121 *Pictet Commentary*, Vol. I (1952), pp. 38, 41.
122 Gutteridge, *loc.cit.* at footnote 67 above, p. 301 ; Lauterpacht, *loc.cit.* at footnote 14 above, p. 361.
123 Draper, *The Red Cross Conventions* (1958), p. 14.
124 Meron, *loc.cit* at footnote 114 above, p. 357.

> «I am moreover most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain «fundamental general principles of humanitarian law», which, according to the Court, were pre-existent in customary law, to which the Conventions «merely gave expression» ... or of which they are at most «in some respects a development». ... Fortunately, after pointing out that the Applicant has not relied on the four Geneva Conventions of 1949, the Court has shown caution in regard to the consequences of applying this idea, which in itself is debatable»[125].

Likewise, Judge Jennings, in his dissenting opinion, puts up a marker as regards the Court's analysis of the relationship between the Geneva Conventions of 1949 and customary law :

> «On the other hand, it might be objected that the question of possible breaches of humanitarian law must be a dispute arising under the 1949 Geneva multilateral conventions ; and there must be at least very serious doubts whether those conventions could be regarded as embodying customary law. Even the Court's view that the common Article 3, laying down a «minimum yardstick» ... for armed conflicts of a non-international character, are applicable as «elementary considerations of humanity», is not a matter free from difficulty»[126].

84. The *Nicaragua* case was a particularly difficult one. If there has been some criticism of the Court's treatment of the relationship between treaty-law and customary law in this case, that criticism in reality derives from the extremely awkward position in which the Court put itself by its handling of the Vandenberg «reservation». The Court found itself in a strait-jacket in attempting to formulate the content of customary international law on self-defence and non-intervention. It correctly identified the twin elements of State practice and the *opinio juris* as being constitutive of custom, but the paucity of evidence which it could adduce of State practice and *opinio juris* outside the framework of application of the UN and OAS Charters showed up the inherent unreality of trying to construct a customary law on the non-use of force, self-defence and non-intervention without reference to the multilateral treaties within whose framework these concepts have for the past fourty years been developed and applied.

---

125 ICJ *Reports* (1986), p. 184. Judge Ago expressed similar reservations about the asserted close correspondence or identity between treaty-law and customary law on certain key matters, being unconvinced that «certain restrictive requirements on which the Charter makes resort to self-defence conditional are also to be found in customary international law» and that customary international law, whether universal or regional, «has already endorsed all the achievements of treaty law where the prohibition of intervention is concerned» : *ibid.*

126 *Loc.cit.*, p. 537.

85. In other recent cases, however, the Court has not encountered the same kind of problem, precisely because it has not been inhibited from making reference to relevant multilateral treaties. For example, in the *Libya/Malta Continental Shelf* case, the parties were broadly in agreement as to the sources of the law applicable in the case :

> «Malta is a party to the 1958 Geneva Convention on the Continental Shelf, while Libya is not ; the Parties agree that the Convention, and in particular the provisions for delimitation in Article 6, is thus not as such applicable in the relations between them. Both Parties have signed the 1982 United Nations Convention on the Law of the Sea, but that Convention has not yet entered into force, and is therefore not operative as treaty-law ; the Special Agreement contains no provisions as to the substantive law applicable. Nor are there any other bilateral or multilateral treaties claimed to be binding on the Parties. The Parties thus agree that the dispute is to be governed by customary international law. This is not at all to say, however, that the 1982 Convention was regarded by the parties as irrelevant : the Parties are again in accord in considering that some of its provisions constitute, to a certain extent, the expression of customary international law in the matter. The Parties do not however agree in identifying the provisions which have this status, or the extent to which they are so treated»[127].

86. The two Parties were in disagreement as to the legal basis of title to continental shelf rights. For Libya, it was natural prolongation which formed the basis of title to areas of continental shelf ; for Malta, the ruling principle was the «distance» criterion, continental shelf rights being controlled by the concept of distance from the coasts. Malta in fact submitted that account must be taken of the rules of customary law relfected in Article 76 of the 1982 Convention on the Law of the Sea in the light of the provisions of that Convention concerning the exclusive economic zone. In this context, Malta relied upon certain passages in the Court's earlier judgment in the *Tunisia/Libya Continental Shelf* case declaring that the exclusive economic zone «may be regarded as part of modern international law»[128] and that «the definition given in paragraph 1 [of Article 76] cannot be ignored»[129]. Accordingly, for Malta, the «distance» principle was included among the principles and rules of customary international law and should be taken into account. By way of contrast, Libya contended that the «distance» principle was not a rule of positive international law with regard to the continental shelf and that, while it might be applicable to the definition of the outer limit of the shelf in certain circumstances, it was inappropriate for application in the

127 ICJ *Reports* (1985), p. 29.
128 ICJ *Reports* (1982), p. 74.
129 *Loc.cit.*, p. 48.

Mediterranean. The Court deals with this issue in a highly significant passage :

> «It is in the Court's view incontestable that, apart from those provisions [that is to say, Article 76], the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law ... Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf. It follows that, for juridical and practical reasons, the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone ; and this quite apart from the provision as to distance in paragraph 1 of Article 76. This is not to suggest that the idea of natural prolongation is now superseded by that of distance. What it does mean is that where the continental margin does not extend as far as 200 miles from the shore, natural prolongation, which in spite of its physical origins has throughout its history become more and more a complex and juridical concept, is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary ; and both remain essential elements in the juridical concept of the continental shelf»[130].

This was a radical innovation in the law. But the Court drew the necessary logical consequences from it. Having determined that the «distance» principle gave entitlement to continental shelf rights up to 200 miles from the shore, the Court had no difficulty in holding that «there is no reason to ascribe any role to geological or geophysical factors within that distance either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims»[131]. This was sufficient to dispose of the Libyan «rift-zone» argument.

87. The Court went on to make another significant observation. It recalled that its own jurisprudence in previous cases had recognised the relevance of geophysical characteristics of the area of delimitation if they assisted in identifying a line of separation between the continental shelves

130 ICJ *Reports* (1985), p. 33.

131 *Loc.cit.*, p. 34.

of the parties[132]. For example, in the *Tunisia/Libya Continental Shelf* case, the Court had remarked *inter alia* that «a marked disruption or discontinuance of the sea-bed» may constitute «an indisputable indication of the limits of two separate continental shelves as two separate natural prolongations»[133]. In the *Libya/Malta* case, the Court confidently swept aside these earlier pronouncements :

> «However, to rely on this jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, insofar as sea-bed areas less than 200 miles from the coast are concerned»[134].

88. What this latest *dictum* seems to suggest is that when the Court finds that a recent convention has generated a new rule of customary law, any earlier statements of the Court incompatible with the new rule, even if they themselves claimed at the time to represent rules of customary law, whould be regarded as having been overtaken. In other words, any pronouncement by the Court as to the content of rules of customary law which may have been generated by treaty must be treated as subject to a tacit condition *rebus sic stantibus*.

89. Numerous other examples can be given of particular provisions of codification conventions having been held to be declaratory of customary international law. Let us take first the Vienna Convention on the Law of Treaties. The rules on interpretation of treaties embodied in Articles 31 to 33 of that Convention have been said by the European Court of Human Rights to «enunciate in essence generally accepted principles of international law ...»[135]. The Court of Arbitration in the *Beagle Channel* case (Argentina/Chile) referred to «the traditional canons of treaty interpretation now enshrined in the Vienna Convention on the Law of Treaties»[136]. So also, in the *Young Loan* case, the majority judgment of the Arbitral Tribunal for the Agreement on German External Debts expressed the view

---

132 As in the *North Sea Continental Shelf* cases, where the Court had stressed the usefulness of considering the geology of the shelf «in order to find out whether the direction taken by certain configurational features should influence delimitation because, in certain localities, they point up the whole notion of the appurtenance of the continental shelf to the State whose territory it does in fact prolong» ; ICJ *Reports* (1969), p. 51.

133 ICJ *Reports* (1982), p. 57.

134 ICJ *Reports* (1986), p. 36.

135 57 *ILR*, p. 214.

136 52 *ILR*, p. 93.

that «... the Convention properly reflects both the present and the past state of international treaty law since, as regards interpretation at least, it is restricted to the codification of customary law in force»[137]. Finally, in its award of 14 February, 1985, in the *Guinea/Guinea-Bissau Maritime Boundary* case, the Arbitration Tribunal (consisting of Judges Lachs, Mbaye and Bedjaoui) made the following pronouncement :

> «The two States concerned do not dispute, though neither is a party to the Vienna Convention of 29 May, 1969, on the Law of Treaties, in force since 27 January, 1980, that Articles 31 and 32 of this Convention constitute the relevant rules of international law governing the interpretation of the 1886 Convention. Due to the Parties' agreement on this point and the practice of international tribunals concerning the applicability of the provisions of the Convention on the Law of Treaties by virtue of an international custom recognised by States ... the Tribunal can only base itself on the aforementioned Articles 31 and 32»[138].

So there is substantial judicial authority for the proposition that the provisions of the Vienna Convention on the Law of Treaties relating to treaty interpretation are an expression of generally accepted principles of customary international law. There is also judicial authority for the view that the rule relating to the termination of a treaty on account of a fundamental change of circumstances (*rebus sic stantibus*), as formulated in Article 62 of the Convention, is declaratory of customary international law. In the *Fisheries Jurisdiction* case (jurisdictional phase), the International Court of Justice had occasion to refer to an Icelandic argument invoking changed circumstances and stated :

> «This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention of the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of a termination of a treaty relationship on account of change of circumstances»[139].

The Court made a similar statement in the *Namibia* advisory opinion with reference to the rules in Article 60 of the Convention governing termination of a treaty on account of material breach :

> «The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach

---

137 59 *ILR*, p. 529.

138 25 *ILM* (1986), pp. 271-2. For a more detailed survey of State practice, jurisprudence and doctrine on this point, see Villiger, *op.cit.* at footnote 87 above, pp 334-46.

139 ICJ *Reports* (1973), p. 18.

> (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject»[140].

So also, in the Fisheries Jurisdiction case (jurisdictional phase), the Court was required to consider the legal effect of Article 52 of the Vienna Convention on the Law of Treaties in the context of a veiled charge by Iceland that the 1961 Exchange of Notes between Iceland and the United Kingdom had been entered into under duress. In rejecting this contention, the Court stated :

> «There can be little doubt, as is implied in the Charter of the United Nations and recognised in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. It is equally clear that a court cannot consider an accusation of this nature on the basis of a vague general charge unfortified by evidence in its support»[141].

It would not be right to leave the Vienna Convention on the Law of Treaties without drawing attention to Article 38 which states :

> «Nothing in Articles 34 to 37 [the articles dealing with treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such».

This clearly refers to the process of generation of new customary rules through conventional provisions. It is also evident that Article 38 is no more than a saving clause :

> «The text of the article ... discloses no intention of stating how customary law can be generated, and apart from a reference to the original written rule, Art. 38 mentions no prerequisites for the process. Yet a provision without substance hardly qualifies as a rule. Consequently, Art. 38 merely *serves as a reminder* that the process is feasible, without entering into the matter in any detail. The *travaux préparatoires* confirm this view that Art. 38 is a «general reservation» regarding customary law»[142].

---

140 ICJ *Reports* (1971), p. 47 : on the significance of the phrase «adopted without a dissenting vote» in this passage, see Sinclair, *op.cit.* at footnote 46 above, p. 21, who points out that the converse proposition certainly does not hold good, since States represented at a codification conference may vote against a provision which is clearly declaratory of existing customary law for wholly unrelated reasons.

141 ICJ *Reports* (1973), p. 14 : see comment by Briggs, «Unilateral Denunciation of Treaties : the Vienna Convention and the International Court of Justice», 68 *AJIL* (1974), pp. 62-3.

142 Villiger, *op.cit.* at footnote 87 above, p. 186 (emphasis in original) : in the same sense, Sinclair, *op.cit.* at footnote 46 above, p. 9.

90. But it is not only particular provisions of the Vienna Convention on the Law of Treaties that have been found to be declaratory of customary law. The International Court of Justice has also determined that selected provisions of the Vienna Convention on Diplomatic Relations of 1961 and of the Vienna Convention on Consular Relations of 1963 reflect general international law. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court recalled that Article 22 of the 1961 Convention solemnly proclaimed the inviolability of the premises of a diplomatic mission and placed a special duty on the receiving State to take all appropriate steps to protect the premises of the mission against any intrusion or damage ; that Article 29 of the 1961 Convention proclaimed that the person of a diplomatic agent should be inviolable and that he should not be liable to any form of arrest or detention, and that the receiving State should take all appropriate steps to prevent any attack on his person, freedom or dignity ; that Article 24 of the 1961 Convention obliged the receiving State to protect the inviolability of the archives and documents of a diplomatic mission ; that Article 25 of the 1961 Convention required the receiving State «to accord full facilities for the performance of the functions of the mission» ; that Article 26 of the 1961 Convention obliged the receiving State to «ensure to all members of the mission freedom of movement and travel in its territory» ; that Article 27 of the 1961 Convention obliged the receiving State to «permit and protect free communication on the part of the mission for all official purposes» ; and that analogous provisions were to be found in the 1963 Convention regarding the privileges and immunities of consular missions and their staffs. Having recited all these specific provisions of the 1961 and 1963 Conventions, the Court continued :

> «In the view of the Court, the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law»[143].

At a later stage in its judgment, the Court re-emphasises the fundamental nature of the rules of international law governing diplomatic and consular relations :

> «But what has above all to be emphasised is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm»[144].

---

143 ICJ *Reports* (1980), pp. 30-1.

144 *Loc.cit.*, p. 42.

91. The foregoing survey demonstrates, first, that the Court has no hesitation in applying, in practice, the concept that a codification convention may be declaratory of, or may indeed generate, rules of customary international law : and, secondly, that it has moved a considerable way beyond its first invocation of this concept in the *North Sea Continental Shelf* cases. It will be recalled that, in the *North Sea Continental Shelf* case, the Court had indicated, in general terms, the conditions which must be satisfied before the generating process can be acknowledged :

> «In the first place the conventional provision whose transformation into a rule of customary law is in question must «be of a fundamentally norm — creating character such as could be regarded as forming the basis of general rule of law». In the second place, there must be a very widespread and representative participation in the Convention, particularly of those States whose interests are specifically affected. In the third place, there must be the *opinio juris* reflected in an extensive State practice virtually uniform in the sense of the provision invoked»[145].

The Court of course denied that Article 6 of the 1958 Convention on the Continental Shelf had this «fundamentally norm-creating» character. Its reasons for doing so have been criticised, and it has indeed been suggested that what the Court meant by this obscure passage was that «they did not like the idea of Article 6 becoming a general rule, so were minded to persuade themselves that it actually could not do so» ; or, alternatively, that it was a way of wrapping up «that the Court takes some discretion to decide whether it is minded to elevate a treaty norm into a general norm»[146].

92. Although the Court has never in terms disavowed the conditions which it set in the *North Sea Continental Shelf* cases for the generation of customary rules by treaty, some of its more recent applications of the process could suggest that the second explanation offered by Professor Jennings (as he then was) may be correct. Whether this be so or not, the recent ferment in the law has caused even so acute and experienced an observer as Professor Jennings to question the very foundations of the formation of custom :

> «Perhaps it is time to face squarely the fact that the orthodox tests of custom — practice and *opinio juris* — are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek : much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory,

145 Sinclair, *op.cit.* at footnote 46 above, p. 22.

146 Jennings, «What is international law and how do we tell it when we see it», 37 *Schweizerisches Jahrbuch für internationales Recht* (1981), p. 64.

> it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term it would be difficult to imagine»[147].

Of course, this assumes (or may be thought to assume) that what is being referred to as «new law» is in fact law rather than a claim to represent law or even merely a proposal to modify existing law. Whatever view one may take on this, there can be no doubt (and the more recent pronouncements by the Court confirm this) that the classical tests of custom are being applied in a much more flexible manner than was the case even twenty years ago. As Sir Robert Jennings has stated in a very recent contribution :

> «The fabric of law on which the treaties are imprinted is still the common customary international law, inseparable from its history, though, largely as the result of the impact of the new States on the international society, more plastic and quicker to reflect changes and new developments than at any previous period of the development of international law»[148].

A prime example of the «plasticity» is the rapid reception into customary international law of the concept of the exclusive economic zone, brought about as a result of the deliberations of the Third UN Conference on the Law of the Sea and contemporaneous State practice. It should not be forgotten that recognition of the exclusive economic zone as a new concept in customary international law has been achieved by, in effect, overriding the basic codified law of the high seas (in the 1958 Geneva Convention on the High Seas) prescribing the freedom to fish as an element of the freedom of the high seas :

> «In other words, a codification convention, authoritative as it may seem because of its universal (or nearly universal) acceptance, cannot freeze the development of law. Changing conditions and new perceptions of interests and aims continue to operate. The existence of written codified law may impede the pace of change but it cannot prevent it»[149].

A comparable insight is afforded by the asserted distinction between «*coutume sage*» and «*coutume sauvage*», the former denoting custom emerging from the traditional process of extensive State conduct reinforced by the necessary *opinio juris*, and the latter denoting custom emerging

147 *Loc.cit.*, p. 67.

148 Jennings, «Universal international law in a multicultural world», *Liber Amicorum for Lord Wilberforce* (1987), p. 46.

149 Schachter, «The Nature and Process of Legal Development in International Society» in *The Structure and Process of International Law* (eds. Macdonald and Johnston) (1983), p. 779.

primarily from an asserted *opinio juris* deriving from the attitudes of States and preceding any consistent or constant State practice. This distinction has been criticised by a number of commentators, partly because of the inversion of the time element in the consideration of the two constitutive elements of custom and partly because it downgrades the significance of the material, as opposed to the psychological, element[150].

93. The foregoing survey demonstrates how fluid and subjective have become the conditions for the formation of custom. Lip-service is still paid to the significance of the classic tests — State practice and the *opinio juris* — but there has been increasing flexibility (some might even say slackness) in their application by international tribunals. This may have certain advantages, in the sense that less stringent conditions for the transformation of a conventional provision into a rule of customary law will ease the process of development and even modification of the law ; but it also has some disadvantages, since any greater flexibility thereby achieved will have been bought at the expense of certainty and stability.

94. It is of course primarily the Third UN Conference on the Law of the Sea and developments in its wake which have excited this renewed interest in the relationship between treaty and custom and in the process of the generation of customary law by treaty. Many have commented on the significance of the «package deal» concept developed at the Conference[151], suggesting that this is a factor which will continue to have some influence in the short-term. But it is unlikely that this factor, by itself, will operate indefinitely to prevent the transformation of a conventional provision into a norm of customary law. As one commentator puts it :

> «In time, of course, what started out as a «package deal» in negotiations pointing towards a widely accepted multilateral treaty may develop into custom itself»[152].

95. One final observation bearing on the relationship between treaty and custom. In analysing the metamorphosis of treaty provisions into rules

---

150 Nguyen Quoc Dinh, Daillier and Pellet, *Droit International Public*, 3rd Edn. (1987), pp. 301-2 ; cf. R.-J. Dupuy, «Coutume sage et coutume sauvage», *Mélanges Rousseau* (1974), pp. 75-89.

151 See, for example, Caminos and Molitor, «Progressive Development of International Law and the Package Deal», 79 *AJIL* (1985), pp. 871-90 : Lee, «The Law of the Sea Convention and Third States», 77 *AJIL* (1983), pp. 541-68 ; and Jennings, «Law-making and Package Deal» in *Mélanges offerts à Paul Reuter* (1981), pp. 347-55.

152 Lee, *loc.cit.* at footnote 151 above, p. 562.

of general international law, Cheng reminds us of a simple point which is often forgotten :

> «What must be realised is that parties to a treaty do not normally regard the provisions of that treaty as rules of general international law. In other words, they do not entertain an *opinio juris generalis* vis-à-vis the provisions of their treaty. This is not to say, however, that they do not regard the treaty as binding. Their typical intention is to regard their treaty as binding within the framework of the general law of treaties, including the principle *pacta tertiis*. This psychological element may be characterised as *opinio obligationis conventionalis* (that is to say, acceptance of the rule or rules in question as a matter of treaty rights and obligations vis-à-vis the other contracting party or parties), as opposed to an *opinio juris generalis* (that is to say, acceptance of the rule or rules in question as a matter of general international law *erga omnes*). But this does not prevent either or both of the contracting parties or any of the non-parties from developing in due course (or even from the very beginning) toward these treaty provisions individual *opiniones juris generalis*, treating them as rules of general international law. If so, when sufficient individual *opiniones juris generalis* exist to form an *opinio generalis juris generalis*, than these treaty provisions automatically become rules of general international law from an objective point of view»[153].

Cheng's point may not be so pertinent in relation to codification conventions as it is in relation to other bilateral or multilateral treaties ; but it is nonetheless a salutary reminder of the continuing differences between treaty and custom.

D. Tentative conclusions and future work programme

96. What tentative conclusions can one draw from the preceding analysis in terms of the problems that arise or may arise in connection with a succession of codification conventions on the same subject ? It is appropriate to address the question, first, in terms of treaty-law, and secondly, in terms of the relationship between custom and treaty.

1) Treaty-law

97. It is important to note in the context of this study the all-pervading influence of the general principle *pacta tertiis nec nocent nec prosunt* as expressed in the rule that «a treaty does not create either obligations or rights for a third State without its consent». (Article 34 of the Vienna Convention on the Law of Treaties). It is this general principle, expressive of the notion that «as regards States which are not parties ... a treaty is *res inter alios acta*»[154], which inevitably places limits on the extent to

153 Cheng, *loc.cit.* at footnote 87 above, pp. 532-3.

154 McNair, *Law of Treaties* (1961), p. 309.

which a later convention can supersede an earlier convention on the same subject. It can of course do so *in the relations between parties to both conventions,* but it cannot do so generally and, in particular, it cannot purport to deprive States party to the earlier convention (but not party to the later convention) of their rights under the earlier convention. It is the *pacta tertiis* principle which underlies and provides at least a practical explanation for the rules laid down in Article 30 of the Vienna Convention on the Law of Treaties on the application of successive treaties relating to the same subject-matter. If a State has not expressed its consent to be bound by a later convention replacing an earlier convention, it continues to be bound by that earlier convention, as a matter of treaty-law, in its relations with other States so bound, including those which have become parties to the later convention. It is only as between States, both of whom have expressed their consent to be bound by the later convention, that the later convention will prevail in the case of any incompatibility between it and the earlier convention.

98. Against this background, it is evident that treaties are in no way comparable with legislation. A new legislative measure can repeal an earlier one with *erga omnes* effects precisely because the legislature is, as a matter of constitutional law, invested with the power to enact measures having these effects. Within national legal systems, the subjects of the law do not, in general, have capacity to lay down general rules : that is the exclusive responsibility of the legislator. However, the position is quite otherwise in the international legal system :

> «As the subjects of international law are, generally speaking, States, there is no independent legislator, so that there is in reality no distinction, as there is in municipal law, between the parties to a contract, who can create only individual rights between themselves, and the legislator who can lay down general rules»[155].

Thus, treaty provisions, no matter what their content may be, strictly apply only *inter partes.*

99. It is these general considerations which explain, at least in part, the varied techniques utilised by treaty draftsmen to deal with the problem of successive conventions on the same subject. As we have seen, a decision has to be taken, at the outset whether to proceed by way of a new convention (which will in many cases supersede and replace the earlier convention in relations between the States parties) or by way of an *amending* or *additional* protocol. A new convention will probably be the more appropriate solution where, as in the case of the 1982 Convention

155 Sinclair, *op.cit.* at footnote 46 above, p. 206.

on the Law of the Sea, an attempt is being made to produce conventional provisions regulating matters covered by a series of previous conventions and introducing radically new concepts ; or where, as in the case of the successive Geneva Conventions on international humanitarian law, it is the intention of the negotiating States to ensure a basic minimum of humanitarian protection in the form of pre-existing norms, the new convention or conventions simply supplementing or developing or building upon all earlier conventions. But these *indicia* are by no means conclusive. One has seen instances where, as in the case of the development of international humanitarian law, a regular pattern of proceeding by way of new conventions «replacing» earlier conventions has been interrupted by the conclusion of additional protocols supplementing already existing conventions (see paragraphs 53 to 63 *supra*). One has equally seen instances where, particularly in relation to regulatory conventions in the fields of maritime and air transport and of pollution control requiring frequent amendment to take account of technological developments, there has been a regular pattern of proceeding by way of amending instruments but where, exceptionally, a new convention may be concluded in an endeavour to attract wider acceptance by States of existing or proposed amendments (see paragraph 41 *supra*). The choice of method (as between new convention or amending or additional protocol) will therefore reflect differing concerns, and one cannot generalise. Moreover, so far as the amendment of treaties is concerned, it is wise to bear in mind the warning by the ILC that the very wide variety of amendment clauses included in treaties makes it difficult to deduce from treaty practice the development of detailed customary rules regarding the amendment of multilateral treaties (paragraph 39 *supra*). In this, as in so many other areas of treaty law, a great deal of discretion is left to the negotiating States.

100. If there is a broad range of amendment clauses which can be included in multilateral treaties, and if the choice of proceeding between a new convention or by way of an amending protocol may depend upon extra-legal considerations, what about the content of treaty clauses regulating the relationship between a later and an earlier convention ? Here again, treaty practice shows very considerable diversity. We have already analysed some of these treaty clauses, concentrating in particular on Article 311 of the 1982 UN Convention on the Law of the Sea and on the «relationship with earlier conventions» clauses in the successive Geneva Conventions on international humanitarian law. A broader survey would doubtless confirm that there are very wide variations in the wording and legal effect of such clauses. One can of course immediately discount bilateral treaties. It is common form for a later bilateral agreement to contain a clause «abrogating» or «superseding» or «terminating» any earlier

bilateral agreement on the same subject-matter[156]. This presents no problem, since the rights and obligations which arise under the earlier bilateral agreements will have accrued to the two parties alone (leaving aside the very rare case where the earlier agreement may have conferred or purported to confer rights on a third State). The difficulties begin to surface when it is a question of successive *multilateral* treaties. Here, the operation or potential operation of the *pacta tertiis* rule makes it necessary to provide that the new treaty shall «abrogate» or «supersede» or «replace» any earlier treaty on the same subject-matter *only as between the parties to the new treaty*. But of course a treaty clause on relations with other conventions can go much wider than that, depending on the intentions of the negotiating States. They may wish to stress the hierarchically superior value and legal force of the new treaty vis-à-vis *any* other international agreement, existing or future. Such is the case with Article 103 of the UN Charter which provides that in the event of conflict between the obligations of the Members of the United Nations and their obligations under any other international agreement, their obligations under the Charter shall prevail. Note that this is expressed in terms of a *conflict of obligations* ; Article 103 does not purport to abrogate the *treaty* which may be in conflict with the Charter, nor to render it invalid[157]. Here then we have an example of a clause which deliberately sets out to express a principle of *hierarchical superiority*, but applicable only to the case of a conflict of obligations.

101. Slightly lower down the scale is the treaty clause which is designed to give as much *primacy or priority* to the new convention as the circumstances will permit. The degree of *primacy or priority* achieved will depend on the content of the clause. The basic content of such a clause will normally be that *as between the States parties to the new treaty*, it shall «abrogate», «supersede», «replace», «terminate and replace» or «prevail over» the earlier treaty on the same subject-matter (the language used is variable). Occasionally, such a clause will contain a proviso preserving the continuance in force of the earlier treaty as between those parties to it which do not become party to the new treaty (see examples at paragraph 53 above). A particular treaty may, at one and the same

156 An example, taken at random, is the UK/Swedish Double Taxation Convention of 30 August, 1983, Article 29(4) of which provides that identified earlier agreements between the parties on taxation matters «shall terminate and cease to be effective» from a specified date in respect of the taxes or income or capital gains to which the new Convention applies. See also *The Treaty-Maker's Handbook* (eds. Blix and Emerson) (1973), p. 210 (United Nations-Uganda Agreement on Operational Assistance, 1967).

157 Cot et Pellet, *La Charte des Nations Unies* (1985), p. 1374.

time, replace an earlier treaty on the same subject-matter in relations between the parties to the new treaty, and supplement another earlier treaty dealing with related matters ; this has been a feature of successive Geneva Conventions on international humanitarian law (see paragraphs 54 to 57 above).

102. The *degree* of *primacy or priority* to be given to the new treaty will emerge from a study of the relevant treaty clauses in their entirety. That the drafters of the 1982 UN Convention on the Law of the Sea wished to give a high degree of primacy to the new convention is evident from an analysis of Article 311 of that Convention (see paragraphs 43 to 51 *supra*). The inclusion of the «compatibility» test in paragraph 2 of that Article, the insertion in paragraph 3 of an extra condition (not to be found in Article 41 of the Vienna Convention on the law of Treaties) requiring that an *inter se* modification should not affect the basic principles embodied in the 1982 Convention, and the prohibition of amendments to Article 136 — all testify to the strong urge to establish a new régime for the law of the sea, restrained only by the need to respect fundamental principles of treaty-law. The impact of Article 311 of the 1982 Convention is, however, attenuated by the fact that Article 237 preserves and gives priority to the specific obligations assumed by States under prior conventions which relate to the protection and preservation of the marine environment (see paragraph 52 above).

103. A particular multilateral treaty may of course contain a specific undertaking by the parties that they will not enter into any international engagement in conflict with the treaty. Such is the case with the North Atlantic Treaty, 1949 (Article 8)[158]. The wording of any such undertaking has to be studied closely in order to assess its legal effect. It may be so framed as to prohibit the parties from concluding with any State whatever a treaty conflicting with the earlier treaty ; or it may refer only to agreements with third States, as in the case of Article 18 of the Statute on the Régime of Navigable Waterways of International Concern, 1921, which provides :

> «Each of the Contracting States undertakes not to grant, either by agreement or in any other way, to a non-contracting State treatment with regard to navigation over a navigable waterway of international concern which, as between contracting States, would be contrary to the provisions of this Statute».

Again, the aim of the clause may be to prohibit Contracting States from entering into *inter se* agreements derogating from their general obligations

158 Other examples will be found in *The Treaty-Maker's Handbook, op.cit.* at footnote 156 above, p. 214.

under a convention ; or it may, as does Article 311 of the 1982 Convention on the Law of the Sea, subject *inter se* modifications to particularly stringent conditions. Examples of treaty-clauses totally prohibiting *inter se* modifications are not all that easy to find. The ILC have suggested, however, that treaty clauses totally prohibiting *inter se* modifications may be more appropriate in the case of treaties incorporating «interdependent» or «integral» rights and obligations (see paragraph 32 *supra*) :

> «The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it appears to be in making explicit the intentions of the parties to create a single «integral» or «interdependent» treaty régime not open to any contract out ; in short, by expressly forbidding contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty»[159].

It goes without saying that a particular treaty may also prohibit the amendment on *inter se* modification of a norm which may be considered to be expressive of *jus cogens* ; whether the particular norm *is* a norm of *jus cogens* will of course depend upon other tests — the fact that the parties may have agreed that it should not be capable of amendment or *inter se* modification, while persuasive, is not decisive of itself.

104. Towards the other end of the scale, a treaty-clause on «relations with other conventions» may be designed to accord *priority to another existing or future convention.* As regards existing conventions, we have already noted the content of Article 30 of the Geneva Convention on the High Seas, 1958, which must be compared with the narrower formulation in paragaraph 2 of Article 311 of the 1982 Convention on the Law of the Sea ; but again, this narrower formulation cannot be considered in isolation, since paragraph 5 of Article 311 of the 1982 Convention may also be relevant in any particular case (see paragraphs 46 and 47 *supra*). There are many examples of treaty clauses which provide that the new treaty does not affect the rights and obligations of the parties under existing international agreements, whether identified or not[160].

105. The content of treaty clauses dealing with «relations with other conventions» is therefore extremely varied. It is impossible to detect any standard pattern. Much will depend on the nature of the multilateral convention under negotiation and on the will of the negotiating States.

---

159 ILC *Yearbook* (1966), Vol. II, p. 216.

160 See *The Treaty-Maker's Handbook, op.cit.* at footnote 156 above, pp. 217-20.

When a new multilateral convention is being negotiated against the background of one or more earlier conventions covering, in whole or in part, the same subject-matter, the negotiating States will certainly have to address themselves to the problem. But a solution which may be considered suitable in one set of circumstances may not be appropriate in another set of circumstances, as witness the continuing discussion in the ILC of the utility, as a precedent, of Article 311 of the 1982 Convention on the Law of the Sea in the different context of the relationship between a new draft convention on the diplomatic courier and unaccompanied diplomatic bag and existing diplomatic law conventions of a more general character (see paragraphs 64 and 65 *supra*).

106. Accordingly, while it is certainly desirable that a subsequent codification convention should contain a specific treaty clause dealing with the relationship between it and other related conventions (particularly the earlier codification convention or conventions covering, in whole or in part, the same subject-matter), it would be unwise to recommend what the *content* of that clause should be, at any rate beyond drawing attention to the relevant provisions of the Vienna Convention on the Law of Treaties discussed earlier in this preliminary report.

2) Relationship between custom and treaty

107. Attention has already been drawn to recent developments bearing on the relationship between treaty and custom, both generally (see paragraphs 68 to 79 *supra*) and in the context of whether particular provisions of existing codification conventions are declaratory of, or may have generated rules of customary international law (see paragraphs 80 to 90 *supra*). This brief survey amply justifies the following conclusion expressed very recently by one of our confrères :

> «Several decisions of the Court have attributed important effects with respect to the formation of customary law to conventions adopted at general codification conferences held under the auspices of the UN. The Court has recognised that this kind of customary law which finds expression in general conventions may operate in three different ways : the conventional text may merely re-state a pre-existing rule of custom : it may crystallize an emergent rule *in statu nascendi* : or finally, a treaty provision, or even a proposal at a conference, may become the focal point of a subsequent practice of States and, in due course, harden into a customary rule. These three modalities may be described as the declaratory effect ; the crystallising effect ; and the generating effect»[161].

161 Jimenez de Arechaga, «The Work and the Jurisprudence of the International Court of Justice 1947-1986», 58 *BYIL* (1987), pp. 32-3.

108. Of course, it is not *all* provisions of *all* codification conventions which may have one or other of these effects. For the generating effect, the Court, in the *North Sea Continental Shelf* cases, indicated the conditions which had to be met before this generating effect could be acknowledged as having taken place (see paragraph 91 *supra*). There is some evidence that, in more recent cases, the Court has applied these tests in a more flexible manner than it did in the *North Sea Continental Shelf* cases. Certainly, recent publicists have repeatedly drawn attention to the fluidity of the relationship between treaty and custom (see paragraphs 92 to 95 above)[162].

109. The fact that particular provisions of codification conventions may be declaratory of pre-existing customary law, may crystallise emergent rules of customary law, or may generate new norms of customary law, assists greatly in tempering the rigidities and constraints of the *pacta tertiis* rule in the law of treaties. States are fully entitled to refuse their consent to be bound by a codification convention ; but they cannot opt out of the operation and application of customary law and, to the extent that rules embodied in a codification convention may have one or other of the three effects just described, those rules will be binding on States which do not become parties to the convention, *not* as treaty rights and obligations, but as rights and obligations arising under customary law.

110. It is also necessary to bear in mind that judicial pronouncements bearing on the question whether a particular provision of a codification convention is to be regarded as having a declaratory, crystallising or generating effect must always be regarded as ambulatory or mutable (see paragraphs 87 and 88 *supra*). It would be a very bold and indeed reckless jurist who would now seek to rely on the Court's *dictum* in the *North Sea Continental Shelf* case to the effect that Articles 1 to 3 of the Geneva Convention on the Continental Shelf of 1958 :

> «... were then regarded as reflecting, or as crystallising, received or at least emergent rules of customary international law relative to the continental shelf, amongst them the question of the seaward extent of the shelf ; the juridical character of the coastal State's entitlement ; the nature of the rights exercisable ; the kind of natural resources to which these relate ; and the preservation intact of the legal status as

162 *Cf.* also recent studies on General Assembly resolutions as evidence of customary law, that is to say, Skubiszewski, IDI, *Annuaire*, vol. 61, Part I, 1985, pp. 92-105, 110-25 and 327-30 ; and Sloan, «General Assembly Resolutions Revisited», 58 *BYIL* (1987), pp. 68-76 and 101-2.

> high seas of the waters over the shelf, and the legal status of the superjacent air-space»[163].

This *dictum*, justified as it was in 1969, has been largely, if not entirely, overtaken by the much more recent pronouncement by the Court in the *Libya/Malta Continental Shelf* case which has been cited at paragraph 86 above ; it is clear that the «distance» criterion of 200 miles for the exclusive economic zone now applies equally to the continental shelf, so that the definition of the continental shelf in Article 1 of the 1958 Convention can no longer be regarded as expressing a rule of customary international law, at the very least as regards the seaward extent of the shelf and the status of waters over that part of the shelf now capable of being included in an exclusive economic zone.

3) Future work programme

111. The Rapporteur apologises for the length of this Preliminary Exposé, but he wished to review much of the relevant material at a very early stage in order to assist the Commission in its further work. This review suggests that the Commission may have to be somewhat cautious in any conclusions it may wish to present. The study already undertaken demonstrates considerable diversity in the content of clauses embodied in successive multilateral treaties (particularly codification conventions) dealing with relations with earlier or indeed later multilateral treaties on the same subject-matter. It also demonstrates that there are varying views on how the traditional tests for the formation of custom (State practice and the *opinio juris*) should be applied in particular circumstances. It forms no part of this study to identify which rules or norms embodied in successive codification conventions on the same subject should now be regarded as forming part of the corpus of customary international law ; that would be to go far beyond the mandate conferred upon Commission I. The task given to Commission I is rather to concentrate on the problems arising from successive codification conventions on the same subject.

112. These considerations, and indeed the terms of the mandate itself, tend to suggest that the end-product of our study need not necessarily be a substantive draft resolution. The study entrusted to us has some affinities with the study carried out by our Confrère Skubiszewski on «Resolutions of the General Assembly on the United Nations», in the sense that it touches (if only tangentially) on the problem of sources of international law, at least so far as the relationship between treaty and custom is concerned. This is obviously a highly controversial and delicate area, and it might not be appropriate to ask the Institute as a whole to

163 ICJ *Reports* (1969), p. 39.

take a position on it. On this aspect of the study, the Commission could possibly prepare «conclusions».

113. So far as treaty law is concerned, account has obviously to be taken of the relevant provisions of the Vienna Convention on the Law of Treaties. Treaty practice, however, demonstrates that differing techniques may be utilised to clarify the relationship between a new codification convention and earlier (or later) codification conventions on the same subject. Much will depend *inter alia* on the degree of priority or primacy which the authors of the new convention wish to give to it, or the extent to which they may wish specifically to preserve existing conventions on the same subject. Much will also depend on whether the new convention deals with only part of the subject-matter of an earlier convention, so that it can be viewed as a *lex specialis* by way of comparison with the *lex generalis* of the earlier convention. It is of course highly desirable that a new codification convention should incorporate a specific treaty clause or clauses dealing with the relationship between it and earlier (or later) conventions on the same subject, and any resolution of the Institute could recommend that this be done.

January 1989

Questionnaire

January 1989

1. Do you think that, for the purposes of our study, the expression «codification convention» should be taken to mean any convention designed to codify or progressively to develop rules of *general* international law and open to universal, or at least very widespread, participation by States ? If so, can we exclude problems arising from the relationship between a *regional* convention designed, in whole or in part, to codify or progressively to develop a particular branch of international law and a subsequent codification convention on the same subject ?

2. Do you think that our study should be confined to «codification conventions» operating in the field of public, as opposed to private, international law ?

3. Is one of the distinctive characteristics of a «codification convention» for the purpose of our study that it should contain provisions which are declaratory of customary law, or may crystallize emergent rules of customary law, or may generate new rules of customary law, binding even upon non-parties ? If so, can we largely ignore «chains» of regulatory conventions governing, for example, the regulation of international

commercial aviation, the protection of industrial and intellectual property and the regulation of postal and telecommunications services ?

4. In the particular case of the law of the sea, should our study nonetheless encompass the relationship between the 1982 UN Convention on the Law of the Sea and earlier maritime law conventions of a regulatory character, such as those dealing with the safety of life at sea, collisions, lead lines, nuclear ships and carriage of nuclear materials, carriage of goods by sea, carriage of passengers and luggage by sea, limitation of liability and pollution and dumping conventions ?

5. As regards the treaty law aspects of our mandate, do you agree that the relevant provisions of the Vienna Convention on the Law of Treaties are Articles 30, 40, 41 and 59 ?

6. Do you accept that Article 30 of the Convention expresses a fundamental principle of the law of treaties, so that the States parties to a later convention cannot purport, as a matter of treaty law, to deprive States which do not become parties to the later convention of their rights under an earlier convention ?

7. Is it right to concentrate, as does Article 30 of the Vienna Convention on the Law of Treaties, on the order of priority in the application of successive treaties relating to the same subject-matter ? Should the conclusion by two or more States of a later treaty in violation of a prohibition to conclude the treaty contained in an earlier treaty by which one or more of these States are bound be treated simply as a question of responsibility, or are there any circumstances in which the later treaty can be considered as invalid (*e.g.* a later treaty in violation of a norm of *jus cogens* contained in the earlier treaty) ?

8. Can any particular pattern be discerned in the variety of clauses inserted in new codification conventions designed to clarify the relationship between the new convention and earlier or later conventions on the same subject ?

9. Do you think that the content of such a claused may reflect the will of the negotiating States to give as much priority of primacy as possible to the new convention, or indeed to an earlier or later convention on the same subject ?

10. Can a distinction be drawn between a successive codification convention which covers all the ground covered by an earlier codification convention or conventions and a successive codification convention which regulates in greater detail only a small part of the ground covered by an earlier codification convention or conventions ? In the latter case, is there room for the application of the distinction between *lex generalis* and *lex specialis,* so that the *lex specialis* may prevail in any case of incompatibility ?

11. Can any particular pattern be discerned in the variety of amendment clauses to be found in multilateral treaties ?

12. Has the judgment of the International Court on the merits of the case relating to *Military and Paramilitary Activities in and against Nicaragua* shed any new light on the relationship between treaty and custom ?

13. In your view, do recent judicial pronouncements, notably in the *Nicaragua* case and the *Libya/Malta Continental Shelf* case, indicate a greater flexibility in the *application* of the criteria laid down in the *North Sea Continental Shelf* cases for the generation of customary law by treaty ? Are these criteria nevertheless still valid ?

14. In assessing the element of State practice in the process whereby a rule of customary law may be generated by treaty, should one look only to the practice of States *not* party to the treaty, or may one also take into account the practice of States acting actually or potentially in the application of the treaty ?

15. Should any judicial pronouncement to the effect that a particular provision of a codification convention is declaratory of customary law, or has crystallized an emergent rule of customary law, or has generated a new rule of customary law, be regarded as subject to a tacit condition *rebus sic stantibus* ? If so, does this apply only in the case where a successive codification convention may be held to have generated new rules and new concepts incompatible with those provisions of the earlier codification conventions said to have had the declaratory crystallizing or generating effect ?

16. What should constitute the content of a resolution of the *Institut de Droit international* summing up the results of our study of the topic submitted to us ?

17. Should we seek to formulate certain «conclusions» resulting from our study ? Should we ask the *Institut* to endorse these «conclusions» ? Or should we simply request that the *Institut* take note of them ?

18. Without prejudice to your response to Question 17, should we in any event present a general recommendation to the effect that negotiating States, when formulating a successive codification convention on the same subject as that of an earlier codification convention, should include in that convention a clause concerning the relationship between it and the earlier convention, and indeed between it and other relevant conventions ?

19. What other questions relating to problems arising from a succession of codification conventions on the same subject should be studied by the Commission ?

Réponses et observations des membres de la Commission

1. Réponse de M. Shabtai Rosenne

April 3, 1989

Dear Friend and Colleague,

Before offering my comments on your magnificent Preliminary Exposé on *Problems arising from a Succession of Codification Conventions on a Particular Subject*, allow me to express my most sincere congratulations on a superb piece of research on a topic which is daily acquiring new and grater significance. A year ago you shared some thoughts with us, and I gave you my initial reaction in my letter of 14 May 1987. By and large I would hold to the views I expressed there. Consequently, save on one point, I propose to proceed directly to the questions you have now put.

2. The one point on which I feel further elucidation could be useful relates to the law of the sea. In paragraphs 25 and 26 you deal with the relations between the MARPOL Convention of 1973 and the United Nations Convention on the Law of the Sea of 1982 ; and in paragraphs 43 and following you discuss at some length article 311 of the 1982 Convention. My further researches into the legislative history of the 1982 Convention have brought out the following :

In a series of Conventions dealing with different topics, but all concluded under the auspices of the International Maritime Organization (IMO), a clause appears along the lines of article 9, paragraph 2, of the MARPOL Convention, which you quote in paragraph 24. The Conventions in question, apart from MARPOL, include :

- Article XII of the London Convention of 1972 on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (3 Singh, *International Maritime Law Conventions* 2522) (cited by you in paragraph 26) ;

- Article 8 of the Torremolinos Convention for Safety of Fishing Vessels of 1987 (2 Singh, *ibid.*, 1472, 1481) ;

- Article V of the London International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 1978 (3 Singh, *ibid.*, 1884) ;

- Article 11 of the Hamburg Convention on Maritime Search and Rescue of 1979 (2 Singh, *ibid.*, 1675) ;

- The Final Act of the International Conference on Marine Pollution of 1973, at which MARPOL was concluded, also adopted resolution 25 reading :

Transmission of the International Convention for the Prevention of Pollution from Ships, 1973, to the United Nations Conference on the Law of the Sea.

The Conference,

Bearing in mind that a United Nations Conference on the Law of the Sea will be convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations,

Noting that, in accordance with the foregoing Resolution, international law concerning marine pollution forms a part of the Law of the Sea,

Requests the Secretary-General ... to forward the ... Convention ... to the United Nations Conference on the Law of the Sea, so that this Convention can be taken into account in the broader context of that Conference.

That resolution (and others) was itself transmitted to UNCLOS III by the Inter-Governmental Maritime Consultative Organization (as it was then called) in document A/CONF.62/27, III Third United Nations Conference on the Law of the Sea, *Official Records*, at 43. As far as I have been able to establish, this is the only resolution of that character in this series of Conventions.

3. You classify the MARPOL clause as a «typical 'without prejudice' clause which does not appear, as such, to give priority to the future Law of the Sea Convention». At the same time you point out that these clauses were inserted at a time when another more general treaty was known to be under negotiation (paragraph 25).

I venture to suggest another interpretation of this clause in its context. Originally it was included in a Convention adopted before UNCLOS III was convened and it is last found in a Convention of 1979, by which time the main lines of most of the 1982 Convention had been established. As I see it (although I have not been able to check the legislative history), the provision was designed to open the way to the integration of the detailed regulatory provisions laid down in the respective Conventions within the future law of the sea, and it is only «without

prejudice» (assuming this to be the correct expression) because, looking to the future, the integration in the law of the sea was a matter for UNCLOS III. As far as the Conventions dealing with the marine environment are concerned, this was achieved by a very carefully negotiated set of articles correlating the standard-setting provisions of Part XII, section 5 (articles 207-212) with the enforcement provisions of section 6 (articles 213-222) : and both correlated with the new conceptions of the geographical extent of coastal State jurisdiction. It is not a question of giving priority to one or other Convention, but of formulating accurately the agreed balance of the interrelationship between them, and it is in this respect that article 237, with its emphasis on obligations, assumes importance. UNCLOS III decided that in this respect, the obligations of the regulatory IMO Conventions would have precedence within the general framework of the Convention as a whole. It could have decided otherwise. Resolution 25 of the London Conference of 1973 just quoted seems to indicate a similar approach by that Conference.

With regard to the other three Conventions, which are related to articles 94 and 98 respectively, article 311 will be governing, and paragraph 2 would accord priority to those IMO Conventions, again within the general framework established by the 1982 Convention as a whole. Here, too, UNCLOS III could have decided otherwise.

4. Incidentally, you have a different and perhaps opposite situation in the United Nations Convention on Conditions for Registration of Ships, 1986 (26 *ILM* 1336). The third paragraph of the preamble recalled the «genuine link» provision regarding the nationality of ships found in both the 1958 Convention on the High Seas (article 5) and the 1982 Convention on the Law of the Sea (article 91). Here there is no doubt that the purpose of the 1986 Convention is to complete the provisions of the 1958 and 1982 Conventions, the relations of those between themselves being governed by article 311 of the 1982 Convention (but not by article 30 of the 1958 Convention thanks to the word «already», see your paragraph 48). Article 311 also governs the relations between the 1986 and the 1982 Conventions, although the general principle of the relativity of treaties, and the different sets of parties to the Conventions of 1982 and 1986, is a potential source of difficulty.

5. With the increase in what are commonly called — but still not fully defined — codification conventions, I think that this phenomenon of intermeshing Conventions, especially when you have detailed regulatory instruments, is going to increase. In paragraph 3 you query whether the 1973 Convention of the Prevention and Punishment of Crimes against Internationally Protected Persons «can truly be classified as a 'codification convention'». I am not sure that your query is fully justified, at all events in that particular form. It is true that the basic codification conventions

relating to the matter, the Conventions of 1961 and 1963 on Diplomatic and on Consular Relations (and the parallel 1969 Convention on Special Missions), which you mention in paragraph 2, are not cited in either General Assembly resolution 3166 (XXVIII) of 14 December 1973 or in the 1973 Convention itself. At the same time the 1972 report of the International Law Commission cites all three in paragraph 66, and in paragraph 67 the Commission stressed that it was basing itself on existing Conventions. Surely the definition of «internationally protected person» merely summarizes relevant provisions of those earlier Conventions, as the jumping off point for the elaboration of the main substantive and regulatory provisions of the 1973 Convention, which experience had found to be needed. What is more, to the extent that the 1973 Convention clearly deals with procedural matters, much of its contents would have been out of place in a general codification Convention. I assume that a somewhat similar problem is going to arise in connection with the work of the International Law Commission on the diplomatic courier. It also arose, although not as regards regulatory details, in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations, and many regard the solution then reached (and principally embodied in article 73) as unsatisfactory. The solutions have been different in each case.

6. What has struck me in connection with the law of the sea is that there are cases in which no mention is made of the relationship of a given Convention with the codified law, when one would really have expected to find something, at least in the preamble. The Conventions you mentioned in paragraph 6 certainly have relevance for the codified law of the sea, while even those mentioned in paragraph 7 ought not to be ignored entirely, if only because of article 28 of the Law of the Sea Convention in relation to ships in the territorial sea. ILO Conventions dealing with mariners and conditions of work at sea (which I do not find mentioned in your exposé) are certainly another prominent example, especially having in mind article 94, paragraph 3 (b), of the 1982 Convention. At one time there was a suggestion for some elaboration of that provision — negotiations in which representatives of the International Labor Organization participated — but in the crisis-ridden eleventh session of the Conference (1982), that suggestion never got off the drawing board and was never presented to the Conference.

7. The point which I am trying to make is, that in dealing with the problems arising from a succession of codification conventions on a particular subject, the law of the sea (and other topics, the law of treaties, the law of diplomatic and consular relations — can the two really be separated, and what would have happened if the Special Rapporteur, the late Professor Zourek, had not been occupied in 1959 as judge *ad hoc*

in the International Court, making it impossible for the International Law Commission to complete its work on consular relations in sufficient time for serious consideration to be given to the suggestion that a single conference should deal with the two drafts of the International Law Commission ?), and referring to what I wrote to you in 1987 on the temporal aspect of succession in this context, it seems to me that major codification conventions, in which there is always in the nature of things an element of «progressive development», are bound to spawn further developments both in the general principles of the law and in regulatory aspects. Conversely, insulated regulatory treatment of a given topic, such as pollution of the marine environment, or the protection of foreign diplomatic staff (using the word «diplomatic» in the widest possible sense), cannot be adequately approached if the responsible bodies ignore the existence or likelihood of a codification convention dealing with the broader context coming into existence in the foreseeable future. (Incidentally, article 304 of the Law of the Sea Convention recognizes that State responsibility is being examined by the ILC). It is for that reason that I was surprised not to find in the UNCITRAL treaty on the carriage of goods by sea any reference to UNCLOS III. Is the private law aspect always so completely dissociated from the public international law aspect ? Is not freedom of navigation, of which the carriage of goods by sea is a most important aspect, not one of the primary objects of the law of the sea, codified or not ?

8. It therefore seems to me, that one of the real purposes and functions of our Commission is to investigate whether guidance on these matters is possible and even desirable (I am inclined at present to think that it is), in order to facilitate the future development of the law, reduce the difficulties of diplomatic negotiations around the technicalities of the relevant «final clause», and in general bring about some clarity in a branch of the law not fully comprehended within existing categories (such as the intertemporal law).

After these prefatory remarks, I will try and answer your specific questions.

1. In principle I agree that we should concentrate on general international law, but I doubt if we should or could be too rigid insofar as concerns the exclusion of so-called regional law. As an illustration, various provisions in the 1982 Law of the Sea Convention do envisage a role for regional law, especially in the field of the protection and preservation of the marine environment.

2. My view remains as stated in paragraph 18 of your preliminary exposé.

3. First sentence yes. Second sentence yes.

4. For reasons stated, any exclusions must be carefully examined, in view of the «umbrella» quality of the 1982 Convention, at least in parts.

5. This question is causing me some difficulties.

I have no problem over article 30.

With regard to article 40, I detect in the question the notion that «States which do not become parties to the later convention» may continue to have rights, what rights is another matter, under the earlier convention.

I think that this question, thus interpreted, must be looked at from two perspectives : (a) the «right» to become a party to the unamended convention ; and (b) any substantive third party rights under the earlier unamended convention.

With regard to the «right» to become a party to any convention, in the first place this depends on the appropriate participation clause. In the *Reservations to the Convention on Genocide* advisory opinion, the International Court of Justice pointed out that «the right to become a party» does not express any very clear notion. [1951] ICJ *Reports* 15 at 28. I do not think that anything in the general law of treaties, whether customary, *cf.* paragraph 8 of the preamble to the 1969 Convention, or as codified in 1969/1986, confers on a State, and now on an intergovernmental organization, which has not become a party to a treaty a right, unlimited in time, to become a party to *that* treaty, regardless of whether the parties to that treaty have subsequently amended it. This is subject only to article 40, paragraph 5, of the Vienna Convention of 1969 and the corresponding provision of the 1986 Convention.

With regard to substantive third party rights under the unamended Conventions, I do not interpret article 36 of the Vienna Convention as conferring on the States and the organizations the right to prevent any amendment of that treaty by its parties. If such a State or organization wants to become party to the unamended treaty and later enter into treaty relations with other parties to the unamended treaty, that is another matter, and article 40, paragraph 4, of the Vienna Convention applies.

In this connection, I think it should be stressed that in the nature of things, Part IV of the Vienna Convention, on the amendment and modification of treaties (articles 39 to 41), only applies to treaties which have already entered into force. «Amendment» of a treaty *before* its entry into force is a political operation pure and simple, to which the rules of the Vienna Convention do not and cannot apply. This is indeed well brought out in article 312 of the Law of the Sea Convention of 1982, and the introduction of a close period after entry into force during which amendments are not permitted is common practice.

I am not sure that article 41 has any real relevance for our mandate.

With regard to article 59, my understanding of it is that it only applies in respect of parties to the earlier treaty. On that basis, it cannot apply in relation to a State which is not a party to the earlier treaty.

6. No.

7. I have discussed the issue you have raised in question 7 in my *Breach of Treaty* at pages 85 onwards, and at present do not feel able to go much beyond that. The question really brings us into the uncharted realm of remedies in international law, and the inadequacies of the present system of international organization, including its judicial aspects. However, with regard to the second sentence in your question, I think we have to take the position that if the later treaty at the time of its conclusion conflicts with a peremptory norm of general international law, as explained in article 53 of the Vienna Convention, that treaty will be void. But I am not convinced that article 311, paragraph 6, of the Law of the Sea Convention is really a good example. The legislative history of that provision, if I read it correctly, shows that there was strong opposition, in the informal negotiations, to accepting the idea that anything in the 1982 Convention is itself and *per se* to be classed as a rule of *jus cogens*, and the language of paragraph 6 was carefully crafted with that in mind.

8. I do not think so. In my experience, the negotiation of these clauses can be a very difficult matter, both politically and from the point of view of legal technique and good craftsmanship.

9. In principle I would imagine that the thought underlying this question is correct. Nevertheless, in the long run the presumption, if such it is, would be rebuttable, so that normally this would be a matter for the negotiation.

10. First sentence, yes. Second sentence, again I think that this would be a matter for negotiation, or at any rate would be dependent upon the intention of the parties.

11. No.

12. I doubt it.

13. Again I doubt it, but of course it is all a question of degree and of perspective, and in the nature of things all schools of thought can find support for their particular point of view in the general thesaurus of modern international case-law. Be that as it may, surely it is in the first instance to State practice that one must really look to find the answer to the general question of the extent to which customary law is generated by a treaty, especially by a treaty which has not yet entered into force. This indeed was stressed by the International Court in paragraph 27 of its judgment in the *Malta/Libya Continental Shelf* case, [1985] ICJ *Reports*

13, 29. I think that general developments in the law of the sea, or in the law of treaties, over say the last two decades illustrate that to the extent that the provisions of a treaty meet in acceptable terms a widely recognized international need, the treaty rules may well be or soon become accepted as customary law for the matters with which they deal. There is no question that part of the 1982 Convention on the Law of the Sea is codificatory of existing customary international law (including law which was «codified» and accepted first in 1958), part of it has on the whole been seen as generating new customary law, while part of it is certainly not codificatory, nor has it been accepted, even by signatory States, as the last word on the subject. I am referring always to the substantive rules, not to procedures.

In this connection, a word of caution must be sounded. Experience in modern cofidication conferences — the Conferences on the Law of Treaties for instance, and to some extent the Conferences on the Law of the Sea, demonstrates that on the political level the general issue of the settlement of disputes, and the relationship of the provisions on the settlement of disputes to the substantive rules of law, may assume a prominence which is not encountered when the issues are discussed on the purely legal level. This is well illustrated, in my opinion, by the fact that the International Court of Justice has been quite free in applying different provisions taken from Part V (articles 42 to 72) of the Vienna Convention on the Law of Treaties of 1969 without paying particular regard to the political linkage of those substantive rules with the procedures of articles 65 to 67 of the Convention. I have examined this in my *Developments in the Law of Treaties, 1945-1986,* shortly to appear, at pages 336 ff., and even more closely at pages 347 ff., and I am allowing myself to bring this to your notice (I am assuming that the book will be published shortly and that you will have no difficulty in gaining access to it).

14. State practice must refer to the practice of *all* States whose attitudes and actions can be relevant in the particular circumstances of the case.

15. With respect, I do not fully understand the question. *Any* judicial pronouncement can only state the law as of its own date and in relation to the instruments being encountered by it then.

16. I would reserve my position on this question, but perhaps this should be one of the issues on which, under your guidance, we should concentrate when we meet at Santiago de Compostela.

17. Same answer.

18. Same answer. The three questions are really different aspects of the same problem. However, with regard to a possible general recommendation, I would add that while I think that these resolutions are

of doubtful utility, there can be no harm in such a general recommendation as you seem to have in mind.

19. Subject to the foregoing, I think that you have covered all the main points, at all events for the moment, but I do not exclude that our future deliberations could bring out some new questions.

* * *

Let me again congratulate you on the important study you have prepared for us, and wish you all success in your difficult task as rapporteur of our Commission.

With warm personal regards,

Yours sincerely,

Shabtai Rosenne

2. *Réponse de M. Fritz Münch*

23 avril 1989

Cher Confrère,

Votre Exposé préliminaire est une excellente introduction au droit des traités, donc à la base du problème dont notre Commission doit s'occuper. Le problème essentiel cependant apparaît dans le questionnaire, et il me semble que sa solution demande encore des réflexions supplémentaires. On n'a pas encore tenu compte suffisamment des particularités des textes conventionnels de codification. Le *Law of Treaties* de 1969 les néglige entièrement, et les textes codificateurs se révèlent comme insuffisants pour y rendre justice.

Certes, l'idée originale de la codification officielle du droit international général par voie de traité entre les sujets principaux de ce droit semble bien simple : écarter les doutes sur l'existence et le contenu par l'établissement d'obligations écrites et précises, reconnues formellement par les Etats. Le succès de ce procédé est indéniable dans le droit de la guerre avec les textes de La Haye de 1899 et 1907, et il ne faut pas se laisser troubler par le fait que le Règlement de la Guerre sur Terre a pris la forme d'instruction commune pour les armées. Le parallèle avec la codification du droit interne reste évident ; on pouvait se réclamer du succès des codifications nationales qui se sont suivies à partir de la fin du 18ème siècle — succès mondial même parce que les codes européens ont été reçus largement en Amérique latine et en Orient.

Ce parallèle trompe pourtant. La société internationale manque de législateur. A sa place, on a recours à la force obligatoire des traités comme source d'un droit universel à une époque qui ne croit plus au droit naturel, reposant après tout sur la seule autorité des auteurs qui l'enseignent. Mais le but n'est pas atteint intégralement ; il peut y avoir toujours des Etats qui ne ratifient pas tel texte codificateur, soit simplement par négligence du service des affaires étrangères, notamment dans les nombreux mini-états d'aujourd'hui.

On peut sortir de cette aporie en disant que l'universalité du droit international ne doit pas être comprise au pied de la lettre ; en effet les Etats non parties à la convention de codification l'observent souvent dans la pratique. On a même vu qu'un texte codificateur, le droit des traités (*L.o.T.*), a été pris pour valide avant son entrée formelle en vigueur. On suppose même que les textes codificateurs se doublent d'un droit coutumier concomitant ce qui constitue un cas d'application de l'article 43 *L.o.T.* Mais cette pratique serait à prouver.

En tout cas on arrive à se douter que la règle *'pacta tertiis'* souffre une exception ; et en effet elle ne correspond pas àl'intention des textes codificateurs. Seulement notre doctrine n'a pas encore aperçu le problème, et elle ne voit pas la différence intrinsèque entre traité, *id est* transaction ou règlement commun d'une part, et texte codificateur, *id est* législation d'autre part. Vous avez mis le doigt sur un point important lorsque vous avez distingué la codification de la *«regulatory convention»* ; est-ce pour cela que vous avez exclu de la catégorie des codifications les deux textes de 1961 et de 1973 que vous mentionnez p. 3 paragraphe 3 ? Quant à moi, j'approuve cette distinction et je pense qu'il faudrait l'élaborer plus amplement.

Créer des obligations, des régimes et des normes sont des faits tout différents et exigent des procédés différents ; on ne saurait tourner la difficulté par des inventions comme le *'soft law'*.

Encore une remarque sur la succession des textes codificateurs. L'idée idéale voudrait que les parties, un moment donné, se rendent compte des défauts et des insuffisances d'un texte, qu'elles se mettent ensemble pour l'amender (éventuellement pour le remplacer *in toto*) et qu'alors l'ancien texte disparaisse absolument. En réalité, il peut arriver comme pour la codification originale que nombre d'Etats ne terminent pas cette oeuvre, il peut même arriver qu'une partie s'oppose à la modification et veut maintenir l'ancien texte. Alors il y a vraiment conflit entre deux textes contradictoires dont aucun ne peut plus prétendre à la validité générale mais continue à exister comme traité multilatéral 'normal' si l'on peut dire. Mais il peut y avoir plus. Des nouveautés peuvent être introduites par une flagrante violation du droit existant. Citons la Proclamation Truman

sur le plateau continental à laquelle dans le temps on n'a pas osé s'opposer, citons l'adoption des douze milles de mer territoriale et de la zone économique exlusive. C'est par le mécanisme de l'art. 60 al. 2 c) que toutes les autres parties de la codification antérieure vont se libérer, et par analogie les Etats qui n'étaient pas formellement liés par un texte mais vivaient sous le droit coutumier concomitant. Beaucoup d'Etats l'ont fait parce qu'ils y trouvaient leur avantage, mais il y a aussi des victimes, par exemple les satellites de l'URSS riverains des mers secondaires. Autre cas : le droit de la guerre avait atteint une sorte d'équilibre en ce que la population des territoires occupés jouissait de certaines garanties mais était obligée de s'abstenir de l'action militaire. Il est inutile de rechercher dans le détail qui les premiers ont contrevenu à ce système ; en tout cas on a sanctionné la résistance et rebarbarisé la guerre. Ceci pour dire que le développement du droit international n'est pas toujours un progrès.

Peut-être que je m'éloigne de notre thème, mais je pense qu'il ne faut pas oublier ces aspects.

Réponses au questionnaire :

1. Il faudrait tenir compte des codifications régionales, car en tant qu'il nous concerne leur problème est le même.

2. Non. Les codifications en droit international privé et les textes d'unification du droit interne peuvent comporter des aspects qui nous intéressent.

3. Non. Il est à souhaiter qu'un texte codificateur devienne droit coutumier, et il en a la tendance, mais cela n'entre pas dans sa définition. Néanmoins nous pouvons laisser de côté les *regulatory conventions* pour autant qu'elles établissent des obligations et des régimes sans poser des normes de droit international général.

4. Non.

5. Oui, et il faut encore penser aux art. 13 et 60.

6. Non, cela va trop loin. Les textes codificateurs peuvent obtenir force obligatoire pour les Etats tiers dans des circonstances et développements à définir encore.

7. Non. Les parties sont libres d'abolir un article défendant la conclusion d'un nouveau traité ou l'amendement de l'ancien. Est excepté la priorité des normes impératives (*jus cogens*).

8. Non.

9. Oui, mais cela dépend de beaucoup de considérations.

10. Oui, mais cela dépend des détails.

11. Non.

12. Non. La Cour n'avait à juger que sur sa compétence.

13. Non, et nous ne devrions pas nous occuper trop de la question qui ne nous est pas posée.

14. Je ne vois pas que la question soit pertinente.

15. Je ne vois pas comment dans un doute sur l'existence de normes on puisse argumenter *res sic stantes*. Aucun jugement n'empêche les Etats de conclure des nouveaux traités codificateurs.

16. Nous devrions formuler une question précise relative àl'existence de deux ou plusieurs textes conventionnels codificateurs, et y donner la réponse.

17. Conclusions à approuver par l'Institut.

18. Oui.

19. Je n'en vois pas pour le moment.

Veuillez bien agréer, cher Confrère, l'expression de toute ma considération distinguée.

Fritz Münch

3. *Réponse de M. Santiago Torres Bernardez*

30th April 1989

Dear Friend and Confrère,

I read with great interest your «Preliminary Exposé» circulated by our Secretary-General on 27 January. My congratulations for your efforts. It is really very illuminating on the various problems of the topic. The members of the First Commission have now at their disposal an Exposé of high quality which, I have no doubts, will facilitate an early progress in the study entrusted by the Institute to the Commission.

I am enclosing herewith my answer to the nineteen questions of the Questionnaire as requested. Some different views in the appraisal of matters relating to questions 12 and 13 oblige me, to clarify my position, to develop in the attached annex, with some detail, my answer to those two questions.

With warm personal regards,

Yours sincerely,

Santiago Torres Bernardez

Question 1.

As indicated in my previous comments, I consider like you that substantive, rather than procedural, criteria should be used to determine what is the meaning of the expression «*codification convention*» for the purpose of the study of the topic referred to the First Commission. The definition of the expression you suggest corresponds to my own preoccupations and it is fully satisfactory for me. I am, therefore, in favour of excluding «*regional* conventions» even if designed, in whole or in part, to codify rules of international law at a given regional level. To proceed otherwise would contradict the suggested definition of «codification conventions» as conventions designed to codify or progressively to develop rules of *general* international law and open to universal or very widespread participation. I would also impinge on the second aspect of the topic relating to the relationship between treaty and custom. I do not believe that the *Commission des travaux* had in mind the different question of the relationship between general international law and regional international law when selecting the topic «Problems arising from a succession of codification conventions on a particular subject» and entrusting its study to the First Commission.

Question 2.

I agree that the study should be confined to codification conventions dealing with topics of «*public* international law». The object and purpose of the various private international law codification and other conventions is less uniform and actual or potential participation less universal than in the case of the public international law codification conventions listed in your «Preliminary Exposé». Substantive as well as methodological reasons advise that problems arising from a succession of codification conventions on private international law topics be studied by the Institute separatly.

Question 3.

«Treaty law» and «codified law in treaty form» are not identical concepts. Consequently, my answer to the first part of the question is a definitive yes in the sense that «provisions» in codification conventions may be binding even upon non-parties to the convention concerned *qua* customary principles or norms. As to the second part, my position is that the «chains» of regulatory or technical conventions referred to therein should be ignored because of its very nature. The fact that the matters regulated by these conventions may be important and participation quite universal or widespread is not enough to characterize them as «cofidication conventions» in the sense defined above. I agree with the conclusions you reach concerning the identification of the public international law codification conventions to be embraced by the study recorded in paragraphs 2, 4 and 16 of section B of the «Preliminary Exposé».

Question 4.

On this question my position is less conclusive than the one you are suggesting. It is not infrequent in practice the adoption by States of mixed instruments and, in particular, of instruments containing rules declaring general international law or purported to become general international law as well as rules regulatory in character. The 1982 Law of the Sea Convention is not an exception in this respect. In addition, the 1982 Law of the Sea Convention is a constituting conventional instrument of an international organization : the International Sea-Bed Authority. There are certainly several provisions in the Convention regulatory in character, but not only in the «maritime law» field as, for example, in connection with the Authority and administration of the area and in the field of the peaceful settlement of disputes. It should not be forgotten either that they are other existing codification conventions which contain also provisions regulatory in character. Should under the circumstances the First Commission consider the «maritime law regulations» included in the 1982 Law of the Sea Convention as a «particular case» ?

In my opinion only if, and in the cases in which, by doing so the States intended to make regulations on «maritime law» incorporated into the Convention future rules of general international law. The information at my disposal does not allow me to conclude that the States adopted the said regulations with such an intention, at the least, in all cases. We should avoid doubtful over-expandings and complications in the study of the topic. In any case, we should try always to avoid confusing «rights» recorded or established in the Convention with «conditions for its exercise» because general international law is, generally speaking, more concerned with the former than with the latter.

I reserve for the time being my position on the particular problem of the relationship between the 1982 Law of the Sea Convention and earlier or future «maritime law» conventions until seeing the result of the study of the problem by the First Commission.

At present, I think that the best way of dealing with this kind of matters would be the insertion in the final conclusions of the First Commission of a «general reservation» concerning possible regulatory provisions incorporated in otherwise codification conventions, without further ado.

Question 5.

I agree that the *main* relevant provisions of the Vienna Convention on the Law of Treaties regarding the treaty law aspect of the topic are Articles 30, 40, 41 and 59 of the Convention. See also answer to question 19 below.

Question 6.

Yes and no. Yes in the sense that the main object and purpose of the provisions in Article 30 is to preserve the *pacta sunt servanda* rule to a maximum bearing in mind the intentions of the parties, the compatibility of the provisions in the instruments concerned and the circle of participants in each of such instruments. Not if the *ratio* of the provision is seeing as an attempt to circumscribe the contractual freedom of States to conclude international undertakings in matters which are not in conflict with a peremptory norm of general international law (*jus cogens*). The provision is for me «neutral» as to the «right to conclude», elaborating only on some «treaty law» effects which may result at the «application» level from the exercise by States of such a «right to conclude», without prejudice of other possible consequences in treaty law or in the law of international responsibility for wrongful acts or resulting from the customary law concept of «desuetude». With this caveat, one cannot dispute that Article 30 of the Vienna Convention expresses also the principle of the law of treaties that States parties to a convention are not entitled to deprive States which do not become parties to that convention of their rights under an earlier convention.

Question 7.

Being the *sedes materiae* of Article 30 of the Vienna Convention on the Law of Treaties the regulation of the question of the application of successive treaties relating to the same subject-matter, Article 30 is right to concentrate «on the order of priority in the application».

Questions of treaty law relating to the eventual violation by a later treaty of provisions of an earlier one are dealt with by the Vienna Convention in the parts and sections devoted to modification, invalidity, termination and suspension of the operation of treaties and the Convention makes a *renvoi* for other kind of questions to the rules governing international responsibility for international wrongful acts. This, in my view, corresponded at the time of the conclusion of the Vienna Convention, and continues to correspond, to the situation in general international law. I do not understand very well, therefore, the alternatives in the second part of question 7. For me the Vienna Convention as a whole does not treat the eventual violation by a later treaty of provisions of an earlier treaty *simple* as a question of responsibility, but also as a question of treaty law although not as a question of treaty law dealt with in Article 30 of the Convention. Provisions in Articles 41, 59 and 60 of the Vienna Convention are obvious examples in this respect.

I have no difficulties in accepting treaty law consequences — in the hypothesis of conclusion of a treaty «in violation of a prohibition to conclude the treaty contained in an earlier treaty» — going beyond what

is stated in Article 30 of the Vienna Convention, but I do not think that *per se*, and in general international law, the violation of such a treaty prohibition, expressed by the conclusion of the later treaty, is a ground or cause of «invalidity» in treaty law of the new treaty. I do not think that the new treaty is a «void treaty», a treaty which «has no legal force», to use the terms of Article 69 of the Vienna Convention on the Law of Treaties.

In any case, the violation of an earlier treaty by the conclusion of a later treaty is not included among the general grounds or causes of invalidity of treaties codified by the Vienna Convention, even in cases when the earlier treaty contains an express provision prohibiting the conclusion of the later treaty ; and Article 42, paragraph 1, of the Vienna Convention specifies that the validity of a treaty or of the consent to be bound by a treaty may be impeached *only* through the application of the Convention. The States concerned will be treaty bound by both treaties. In cases of problems, for example of a conflict of obligations, they should try to solve them in good faith through consultations and arrangements with the other States concerned. This is said, of course, without prejudice of the particular problem of treaty obligations conflicting with obligations set forth in the United Nations Charter (Article 30 of the Vienna Convention is expressly subject to Article 103 of the United Nations Charter). On the other hand, the existence of conflicting or other relationship problems between the earlier and the later treaty is not without a bearing on the second part of our topic (relationship between custom and treaty) and in particular on the use to be made of the treaties in question in a demonstration of evidence of *opinio juris* in general international law on the same or a related subject-matter.

Finally, regarding the example of *jus cogens,* the new treaty, as any other treaty, will be void or invalid if it conflicts with a norm of *jus cogens*, but the invalidity has nothing to do with the problem of the relationship between successive treaties relating to the same subject-matter. Invalidity because of conflict with a norm of *jus cogens* operates independently of the source of the norm of *jus cogens* in question. In the example given, the new treaty will be invalid, but not because of the relationship between the two treaties. It will be invalid because it is in conflict with the norm of *jus cogens*, namely with a norm of general international law accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. The concept of *jus cogens* should not be confused with treaty law situations resulting from treaty provisions prohibiting the parties to the treaty to contracting out or against a provision or principle embodied in the treaty, of the type of the provision

in paragraph 6 of Article 311 of the 1982 Law of the Sea Convention regarding the principle of «common heritage of mankind» as a principle governing «the Area». In *itself* a provision like paragraph 6 of Article 311 of the said Convention does not give birth, and cannot give birth, to a norm of general international law accepted and recognized by the international community of States as a whole as a norm having the character of *jus cogens*. Further evidence is needed.

Questions 8 to 11

I agree, in general, with the learned analysis of precedents relating to the matters mentioned in all these questions as well as with the tentative conclusions concerning questions 8, 9 and 11 contained in your «Preliminary Exposé». With respect to question 10, I do not consider wise to introduce the distinction between «*lex generalis*» and «*lex specialis*» into the study of the topic. You have probably in mind the relationship, in the future, between a convention on the courier and the bag and previous codification conventions on diplomatic and consular relations. The criteria of «earlier treaty» and «later treaty» would suffice for a situation in which, as in the example, the «*specialis*» would follow the «*generalis*». In an inverse situation, it is reasonable to presume that the «*generalis*» will incorporate the «*specialis*» or taking it into account in the drafting of the new treaty. As you have very rightly underlined «treaties», including «codification conventions», are not similar to internal «legislation». We should avoid complications in the negotiation of treaties by States. It is not easy at the international level to qualify a treaty as «*generalis*» or «*specialis*» and we all know that such a distinction is not playing any relevant role in the selection of international law topics for codification or in the determination of the scope of a particular set of draft articles or in the final presentation and form adopted by States to incorporate into conventions the outcome of a codification undertaking on a given topic. The single set of draft articles on the law of the sea prepared by the International Law Commission was split by the 1958 Conference, becoming four separate «codification Conventions». The Third United Nations Law of the Sea Conference, twenty-four years later, adopted a single Convention for the whole of the law of the sea. Is it possible under the circumstances to consider today the 1958 four Conventions on matters of the law of the sea to be «*lex specialis*» and the 1982 Montego Bay Convention as a «*lex generalis*» on the law of the sea ? Frankly, I do not believe so. One cannot have recourse in international law to concepts or expressions, particularly in the treaty law field. What I do consider necessary, on the other hand, is to devote some time in the First Commission to clarify and refine further the meaning of the expression «*the same subject-matter*» used in Article 30 of the Vienna Convention on the Law of Treaties (some questions were asked to the Expert Consultant

in the Conference in this respect) as well as the meaning of the expression «*a particular subject*» in the title of the topic referred to the First Commission of the Institute.

Question 12

I will begin by stating some general propositions I share concerning the relationship between treaty and custom in international law. I am of the view : (a) that treaty and custom are two autonomous sources of international law ; (b) that international law does not establish an *a priori* hierarchy between those two different sources ; (c) that to conclude at the existence of a given customary norm the actual practice and *opinio juris* of States must uphelp such a conclusion, while in the case of a treaty rule its existence is originally governed by the part of the law of treaties relating to the conclusion and the entry into force of treaties ; (d) that treaty norms and customary norms are also distinguishable in international law from the standpoint of their interpretation, application, validity, modification, suspension and termination, even if *in casu* the content of the treaty norm and the content of the customary norm are similar or identical ; (e) that notwithstanding the indicated autonomy, the lack of an *a priori* hierarchy and the differences in the features of their respective norms and of the rules governing them, treaty law and customary law influence each other as parts of a single normative order called «international law» primarely originated from and applied by the same subjects, namely by the States.

This last proposition — confirmed by the general practice of States, judicial decisions and the teachings of the most highly qualified publicists of the various nations — is not restricted to some areas of international law with the exclusion of others. It is as the others a general proposition. In the *Corfu Channel* case, for example, adjudicated by the ICJ, after the entry into force of the United Nations Charter, under «international law» exclusively, it is obvious that the answers given by the Court to certain allegations of the Parties concerning the obligation to notify the existence of a minefield, intervention to secure possession of evidence in the territory of another State and the so-called methods of self-protection or self-help reflect an evolution of «international law» in the humanitarian law field, as well as in the regulation of the use of force, to which the treaty law contained in certain multilateral conventions is certainly no alien, although the Judgment refrains itself to say so expressly. The possibility to establish at present an international responsibility in matters concerning the use of force «under general international law» — which cannot be other than the general international law contemporary to the case in whose evolution treaty law has played a very important role — has been recognized by the ICJ in 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran,* when commenting an

incursion into the territory of the respondant by military units of the applicant during the proceedings, in the following terms :

> «... The Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and *under general international law*, nor any possible question of responsibility flowing from it, is before the Court. It must also point out that this question can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier, on 4 November 1979, which is the subject-matter of the United States' Application. It follows that the findings reached by the Court in this Judgment are not affected by that operation (ICJ, *Reports* 1980, pp. 43-44) *(emphasis supplied).*

The mutual influences of treaty law and customary law in their respective evolutions, even when treaty norms and customary norms on a same subject-matter run parallel to each other, is not in itself an obstacle for international courts and tribunals adjudicating on the basis of both, treaty law only or customary law only. The following passage of the 1984 Judgment of the Court on jurisdiction and admissibility in the case concerning *Military and Paramilitary Activities in and against Nicaragua* is a mere elaboration of what the Court has done and stated in this respect in previous judicial decisions :

> «(The Court) ... cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of conventions relied upon by Nicaragua. The fact that the above mentioned principles, *recognized as such*, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary law, despite the operation of provisions of conventional law in which they have been incorporated (ICJ, Reports, 1984, p. 424) *(emphasis supplied).*

It is also well established in the practice of international courts and tribunals to look into written texts (multilateral conventions and declarations, final acts of conferences, resolutions of international organs, proclamations and other unilateral acts, etc.), as well as into attitudes and comments made on the occasion of their elaboration, adoption, interpretation or application, in the process of ascertaining evidence of an *opinio juris* on the existence and content of a given customary principle or norm. Sometimes even, international judicial decisions when applying principles or norms of customary international law make references to written texts of the kind referred to above with a confirmatory purpose. Passages in

judgments of the ICJ as these quoted below are frequent in international judicial decisions :

> «... the Court would recall not only that the obligation to negotiate which the Parties assumed by Article 1, paragraph 2, of the Special Agreements arises out of the Truman Proclamation, which for the reasons given in paragraph 47, must be considered as having propounded the rules of law in the field, but also that this obligation merely constitutes a special application of a principle which underlines all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted» *(North Sea Continental Shelf cases,* ICJ, *Reports* 1969, p. 47).
>
> «International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary-law on the subject of the termination of a treaty relationship on account of change of circumstances» *(Fisheries Jurisdiction Case (jurisdiction),* ICJ, *Reports,* 1973, p. 18).
>
> «Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole *corpus* of the international rules of which diplomatic and consular law is comprised, rules the fundamental character of which the Court must here again strongly affirm» *(United States Diplomatic and Consular Staff in Tehran,* ICJ, *Reports,* 1980, p. 42).

International courts and tribunals have always acknowledged the autonomy of treaty law and of customary law as two different sources of international law, but also possible mutual influences in the evolution of their respective principles and norms. Consequently, they make frequent use of treaty law norms when identifying customary law norms, or of customary law norms when interpreting treaty law norms, with a two-fold purpose : (a) as elements of evidence of the norm they are applying, and/or (b) as a confirmation of the existence and content of the norm they are applying. The codification of customary international law in «conventional form» provides a well known example of the influence of customary law in

treaty law. The examples of the impact of treaty law in international customary law are likewise numerous. We will mention here a single one : the «General Treaty for the Renunciation of War» of 27 August 1928. It is not contested that the Briand-Kellogg Pact facilitated the development of an *opinio juris* of States that ultimately lead to the formation of a new customary norm of international law reversing the former presumption in favour of the right to war.

Multilateral conventions and other written legal instruments play an important role in recording and defining principles and norms deriving from custom or in developing them. That role is, however, an indirect one. Treaty law never generates *per se* customary law. Customary principles and norms are always generated through the characteristic procedure of production of norms of customary international law, namely through the actual practice (objective element) and *opinio juris* (subjective element) of States. Only when these two constituent elements of customary law are present *in casu* it is possible to conclude that we are in the presence of a customary principle or norm of international law. It is exclusively with respect to the assessment of the constituent instruments of a customary principle or norm and, in particular, with the assessment of the subjective element (*opinio juris*) that multilateral conventions and other written legal instruments may be relevant. For example, multilateral instruments may be the occasion of further definitions and developments by States of customary principles and rules by creating conditions favourable to the adaptation or change in the *opinio juris* of States concerning the customary principle or rule in question. Hence that, in certain cases, such multilateral instruments, particularly when their stated object and purpose is the establishment of a general normative order with respect to their subject-matters, may provide evidence of attitudes of States revealing that their *opinio juris* on a particular customary principle or norm has been changed or adapted. On the other hand, multilateral instruments as the codification conventions may record customary principles and norms previously established by the actual practice and *opinio juris* of States. In this kind of situations, the only role that multilateral instruments may play is a confirmatory one. This considerations explain the above-mentioned two-fold purpose of the use made by international courts and tribunals of multilateral conventions and other written legal instruments when identifying customary principles and norms.

The 1986 Judgment on the *Military and Paramilitary Activities in and against Nicaragua (merits)* case is a good example of the utilization of multilateral conventions and other relevant legal written statements with the indicated two-fold purpose in a same judicial decision. When the Court has no doubt that the prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law,

the Judgment mentions certain multilateral conventions with a confirmatory purpose only. This happens, broadly speaking, with respect to the customary principles and norms applied by the Court concerning the duty to respect the territorial sovereignty of States, including the laying of mines in internal and territorial waters, the freedom of communications and of maritime commerce, including access to ports and the right of innocent passage, and certain general principles of humanitarian international law. The 1944 Chicago Convention on Civil Aviation, the 1958 Geneva Convention on the Territorial Sea, the 1982 Montego Bay Convention on the Law of the Sea, the 1907 Hague Convention N° VIII and certain provisions common to the four 1949 Geneva Humanitarian Law Conventions are referred to in the Judgment in connexion with the customary principles and rules on the above mentioned subject-matters for confirmation purpose only.

On the other hand, when the Court has to determine the substance or content of the customary principles and norms relating to the prohibition of the use of force in international relations, non-intervention and self-defence applicable to the dispute, the Judgment refers to certain constituting instruments of international organizations and other multilateral treaties, as well as to certain declarations, resolutions and final acts, not to confirm the customary principles and norms in question, nor for the purpose of establishing if such instruments have generated customary principles and norms, but only and exclusively to ascertaining whether the attitudes of the Parties and other States, on the occasion of the elaboration, adoption, interpretation or application of the said instruments, provide elements of evidence of an *opinio juris* on the substance or content of present day customary international law on some aspects of the prohibition of the use of force, non-intervention and self-defence. As the Judgment states : «...in the present case, apart from the treaty commitments binding the Parties to the rules in question, there are various instances of their having expressed recognition of the validity thereof as customary international law *in other ways*. It is therefore in the light of this subjective element' —the expression used by the Court in its 1969 Judgment in the *North Sea Continental Shelf* cases ... — that the Court has to appraise the relevant practice» (ICJ, *Reports*, 1986, p. 98) (*emphasis supplied*). It is in connection with the *opinio juris* of States on the substance or content of the applicable customary principles and norms that the Court, in order to satisfy itself of the existence and scope of that *opinio juris,* takes account in the Judgment of the attitudes of States in relation to provisions in the United Nations Charter, the OAS Charter, the Friendly Relations Declaration, the 1928 inter-American Convention on the Rights and Duties in the Event of Civil Strife, the Definition of Aggression, the 1947 Inter-american Treaty of Reciprocal Assistance, the 1933 Montevideo Convention on Rights and Duties of States, the 1975 Final Act of Helsinki and some

other declarations and resolutions of the United Nations and of the Organization of American States. In doing so, the 1986 Judgment makes the necessary distinctions between statements of political intention and statements and formulations having a legal meaning as, for example, in the passage concerning the United Nations General Assembly Declaration on the Inadmissibility of Intervention (ICJ *Reports*, 1986, p. 107). The use made in the Judgment of inter-American conventions and resolutions is fully justified in the light of the circumstances of the case because of both : the Parties to the dispute and their way of pleading and the customary rules of international law in question. We all know the original reason for the insertion of Article 51, with its reference to «collective self-defence», in the United Nations Charter as well as the historical contribution of American nations to the formulation of the principles and norms of international law concerning non-intervention.

Taking into account all the above-mentioned considerations, my answer to question 13 of your *Questionnaire* is that the 1986 Judgment of the Court in the *Military and Paramilitary Activities in and against Nicaragua (merits)* case sheds, certainly, «light» on the relationship between treaty and custom in international law, but not a «*new* light». The obligation not to use force against another State, not to intervene in its affairs, not to violate its sovereignty, not to interrupt peaceful maritime commerce and to respect general principles of humanitarian law existed in contemporary international law in treaty law and in customary law independently of differences in scope or content. They are important, indeed fundamental, principles and rules. But importance is irrelevant as a legal factor in the formation, life and termination of treaty norms and customary norms, as well as in the possible mutual influences and relationship between treaty norms and customary norms. Questions of competence and admissibility in a particular international jurisdiction have also nothing to do in matters of principle relating to the formation, evolution, relationship and termination of international law norms. The faculty of States to insert in their declarations accepting the compulsory jurisdiction of the ICJ reservations drafted by themselves is the privilege and responsibility of the declaring State, corresponding to the Court, in the event of a dispute within proceedings before it, the interpretation of the reservation and, eventually, to give effect to the reservation in the said proceedings. All this is so well known for having prompted the reference in question 12 of the Questionnaire to a «*new* light». Looking for an explanation, it seems to me that the reference to a «*new* light» in the question has something to do with the preoccupations and conclusions contained in paragraphs 78 and 79 of your Preliminary Exposé, preoccupations and conclusions which I do not share. I will therefore add below a few comments in order to explain generally my position on the issues dealt with in those paragraphs.

The United Nations Charter did not purport to codify existing custom about the non-use of force and self-defence, a proposition that at the least in general terms you would seem to accept. On the other hand, the adoption of the United Nations Charter did not stop the possibility for customary international law to continue to develop, including in respect of matters regulated also by the Charter. Legal pronouncements of States, international jurisprudence and doctrine agree today, for example, that the provision concerning the principle prohibiting the use of force in international relations in Article 2, paragraph 4, of the United Nations Charter expresses also a related customary principle of international law although, as admitted, it innovates with respect to the existing custom prior to the adoption of the United Nations Charter. This proves that there are at present treaty law as well as customary law on the non-use of force in international relations and also that the UN Charter law has influenced the development of the relevant customary law.

There are still some problems concerning the meaning of the expressions such as «international relations» as a result mainly of decolonization situations, but in general it is accepted that Article 2, paragraph 4, of the United Nations Charter has had the effect of facilitating the development, outside the treaty law of UN Charter system, of an *opinio juris* of States leading to a modification of the content of the former customary law principle on the non-use of force, modification which *in casu* has made the content of the said customary principle practically identical to the content of the same principle in the United Nations Charter. In other instances, the impact of UN Charter provisions in the development of *opinio juris* in general international law may not have lead to the formation of customary principles or norms practically identical, in content or with respect to all aspects of the matter. In self-defence, for example, is today general recognized that the concept of «collective self-defence» referred to in Article 51 of the United Nations Charter is also an institution of customary international law, but we all know likewise that the condition «if an armed attack occurs» in Article 51 of the UN Charter is still the object of different interpretations concerning not only its meaning in the said Article 51. It is also questioned by some if such a condition has already passed into customary international law on self-defence modifying the traditional doctrine of the *Caroline* case. It may also happen, as in the example, of self-defence, that the Un Charter contains only a partial regulation which needs to be supplemented by customary law. Finally, to appraise the extent of the impact of the United Nations Charter, in always possible developments of *opinio juris* of States in general international law, it is necessary to ponder certain limitations inherent to the very nature of customary principles and norms of international law. Institutional provisions in the United Nations Charter belong, for instance, to the category of treaty provisions difficult to admit

as incorporated into customary law in view of the very nature of the latter. The situations vary certainly from a rule to another, but a general conclusion seems to me indisputable : that the United Nations Charter principles and rules on the non-use of force in international relations and self-defence have had a bearing on the development of *opinio juris* of States relating to the corresponding principles and norms in customary international law and that, consequently, the content at present of these customary principles and norms is not *necessarily* similar to the one pre-existing the United Nations Charter.

At the end of paragraph 79 of the Preliminary Exposé you argue that «the United Nations Charter could hardly have generated new rules of customary law on the use of force and self-defence, given the fact that subsequent State conduct is *wholly explicable* on the basis that the States concerned (leaving aside those very few non-members of the UN whose practice could hardly count in an evaluation of this kind) were bound by the Charter itself» (*emphasis supplied*). I cannot accept such a far reaching conclusion. For me subsequent State conduct is *not* «wholly explicable» on the basis of United Nations membership. It is true, of course, that *at present* United Nations membership is quasi-universal, but during many years after 1945 «universality» was not more than an aim. It was not at all an accomplished fact. Several years after the United Nations Charter entered into force situations and disputes occurred in which those involved were not all of them members of the United Nations, the wars in Korea and Vietnam being outstanding examples of that. At the same time, the decolonization process provided the basis of a new debate on issues such as the lawful/unlawful use of force in implementing the right of self-determination and the lawfulness/unlawfulness of force to prevent the exercise of the said right, without mentioning other related questions to the regulation of the non-use of force in international relation as, for example, the relationship between that regulation and the principle of non-intervention or the institution of repraisals. It was only normal that in dealing with such situations and disputes, or issues, representatives of States and doctrine assessed the principle of non-use of force in international relations and self-defence by references to both the United Nations Charter and general international law. Even international judicial jurisdictions, as the International Court of Justice, applied after 1945 «general international law» in cases involving the use of force. At the time of the *Corfu Channel* case, Albania was not a member of the United Nations and the case was adjudicated by the Court «under international law». And nothing prevents States, including members of the United Nations, to be applicants or respondants before the International Court of Justice in legal disputes that the Court is called to adjudicate under customary or general international law although the dispute could involve claims relating to the use of force in international relations, as it has

happened in the *Military and Paramilitary Activities in and against Nicaragua* case.

But the main reason why I cannot accept the conclusion under consideration here is of another kind. I simply cannot accept that the condition of being a member of the United Nations deprives member States of their capacity to act «as subjects of general international law» in the formulation, codification or development of international law customary principles and norms on the non-use of force and self-defence or of any other principle or norm of customary international law. Practice, on the other hand, proves beyond any reasonable doubt that States do not consider either to having been deprived of such a capacity by joining in the United Nations Charter. The process of «codification and progressive development» of international law undertaking under the auspices of the Organization of the United Nations, as well as in the framework of regional organizations proves exactly the contrary proposition and has provided numerous occasions for States to express their views on the non-use of force and self-defence «as subjects of general international law», quite independently of the interpretation and application of relevant provisions of the United Nations Charter in connexion with concrete cases. These views are the ones which are particular pertinent statements as elements of evidence of the *opinio juris* in general international law. The acceptance of a conclusion as the one I am commenting here would be tantamount as to deny the possibility of evolution of the principles and norms of customary international law relating to the non-use of force in international relations and self-defence by depriving member States, namely today the immense majority of States, of their capacity of participating in that evolution through participation in the process of codification and progressive development of international law as subjects of general international law. Conduct of member States may in particular cases be explicable in terms of Charter obligations only, but no in other cases or in all cases. Member States may adopt conduct or express views in matters concerning the non-use of force and self-defence in their capacity of subjects of general international law or, even simultaneously, as both member States and subjects of general international law. It is ultimately a question of interpretation of the capacity in which the State has acutally acted in the light of the aim pursued by the views expressed or the conduct adopted and other circumstances surrending the particular case concerned.

I disagree likewise with the summary dismissal of the value of the Friendly Relations Declaration as a piece of evidence of *opinio juris* in general international law made in paragraph 78 of the Preliminary Exposé by stating that the «Declaration was formulated as an *elaboration* of Charter principles, not as an expression of principles of customary

international law». The Firendly Relations Declaration is both an elaboration of Charter principles *and* an expression of principles of customary international law. This is underlined by the very title of the Declaration : Declaration *on Principles of International Law* concerning Friendly Relations and Co-operation among States *in accordance with the Charter of the United Nations*». As to the text it refers to «all States» or to «every State» and not to «Member States» as the United Nations Charter and its very last provision, included in its «General part», states : «The principles of the Charter which are embodied in this Declaration *constitute basic principles of international law*, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles» (*emphasis supplied*). The draft was prepared by the Sixth Committee of the General Assembly and by a subsidiary body of the Assembly, a special committee, composed by representatives of States which were also eminent international jurists. The secretariat was provided by the Office of Legal Affairs of the United Nations Secretariat. The methods followed and stated aim was codification and progressive development. Consensus was very much emphasized all through the process of elaboration and adoption of the Declaration. Following its adoption, the Declaration has been frequently referred to by representatives of States and by doctrine and the content of the various principles contained therein analyzed legally and quoted when considering not only UN Charter provisions but also customary international law principles. Practically, all international law treatises and articles written after the adoption of the Declaration make use of the content of the principles embodied therein. The International Law Commission quotes provisions in the Declaration in its commentaries to draft articles, the *Académie de Droit international* devoted some lectures to specifically study the Declaration and its content (for example, the lectures of our colleagues Milan Sahovic and Gaetano Arangio-Ruiz in 1972) and our Institute has considered questions such as the influence of those General Assembly declarations, including the Friendly Relations Declaration, on the emergence of *opinio juris* and as evidence of *opinio juris* (for example, in the context of the work done by Krzysztof Skubiszewski and the Thirteenth Commission within the topic entitled «The elaboaration of general multilateral conventions and of non-contractual instruments having a normative function or objective»). Certainly, there are different views here and there on the Declaration and its content, but nobody appears to deny legal value to the Friendly Relations Declaration as an elaboration of the UN Charter principles *and* as an expression of principles of customary international law.

Gaetano Arangio-Ruiz, a colleague by no means uncritical of several aspects of the Declaration, begins the chapter on the status of resolution

2625 (XXV) contained in his lecture in the *Académie de Droit International* with the following words :

> «Considering all the *considerata* — far too many — of the relevant resolutions, the purpose for which the General Assembly adopted the declaration was the codification and progressive development of the seven principles, rightly or wrongly deemed to be a part of the law of the United Nations as it was at the time of the coming in force of the Charter and as it had developed in the meantime. This was done, *inter alia*, on the strength of Article 13.1 (a) of the Charter, according to which the Assembly is to initiate studies and make recommendations for the purpose of ... promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. In comparison with other declaratory resolutions of the General Assembly, it would seem that the development/codification intent of resolution 2625 (XXV) seems to be emphasised. Some of the relevant instruments, including preambular paragraph six of resolution 2103 and preambular paragraph four of resolution 2625 itself, point to the declaration as something that should constitute or did constitute, respectively, a landmark in the development of international law» *(Recueil des cours*, 1972, III, vol. 137, pp. 519-520).

The Friendly Relations Declaration is particular relevant for the study of the relationship between treaty and custom because it was precisely an attempt to elaborate Charter principles *and* to express principles of customary international law. As such, it is not only an important element of evidence of an emergent *opinio juris*, or of an *opinio juris*, on the content of the seven principles in customary international law, *but also an affirmation that the content of the seven principles as embodied in the Declaration are «in accordance» with the corresponding principles of the United Nations Charter as elaborated.*

Regarding the specific question of the right of individual or collective self-defence, mentioned at the end of paragraph 78 of the «Preliminary Exposé», it is true that the text of the Declaration on Friendly Relations has nothing to say about such a right except for the general safeguard clause inserted at the end of the formulation adopted for the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. But the matter was not at all ignored during the process of elaboration of the Declaration, being considered within the general framework of exceptions from the non-use of force. Although the Special Committee members had a similar general conception about the lawful use of force, and all proposals submitted to the Committee contained provisions concerning its use, opinions differed on how to put it in practice. Hence no agreement could be reached on a list of anticipated

exemptions from the use of force and no list of such exemptions was incorporated in the formulation of the above-mentioned principle as embodied in the Declaration. The right of individual or collective self-defence found, however, its place in all the proposals submitted to the Special Committee concerning lawful exemptions from the use of force and nobody questioned that the right of self-defence, both individual and collective, is recognized under general customary international law as well as by the United Nations Charter.

Views were expressed on the basis of specific United Nations Charter provisions, as well as under customary international law, on very important questions relating to the right of individual and collective self-defence such as self-defence in order to remove an impending danger, the use of force in self-defence against economic aggression, the concept of «reasonable and corresponding measures» as a criterion of the force authorized to use in the exercise of the right of self-defence, the relationship between the use of regional agreements to enforce coercitive measures and situations of self-defence, etc. One of the most difficult questions addressed in this respect by members of the Special Committee and representatives in the General Assembly, which probably had much to do with making not possible to draw up a list of permitted exemptions from the general ban on the use of force, was precisely an issue concerning the right of self-defence. Some were in favour of the admission of the right of self-defence, and thereby the use of force, for the peoples struggling to assert their right to self-determination in certain colonial situations. The supporters of this conception stressed the appearance of a new rule in contemporary international law which grants colonial peoples the possibility of using self-defence to preserve their national identity and achieve their independence. View which was certainly opposed by others but which, at the same time, illustrated how much customary international law, and not only UN Charter provisions, were very much in the minds of representatives when they discussed in particular the «right of individual and collective self-defence» as an exemption to the prohibition of use force in international relations formulated in the Declaration.

The final solution of the «general safeguard clause» means, in so far as the «right of individual and collective self-defence» is concerned, that nothing in the paragraphs of the principle prohibiting the use of force in international relations, as formulated in the Friendly Relations Declaration, shall be interpreted «as enlarging or diminishing in any way *the scope* of the provisions of the Charter» (*emphasis supplied*) concerning the «right of individual or collective self-defence». Nothing less but nothing more either, the reason being that there were differences of view on the interpretation of the relevant provisions of the UN Charter, on the relevant principles and norms of customary international law and on how the

relevant Charter provisions and the relevant principles and norms of customary international law interplay each other in this particular question.

Question 13

I do not see any basic change of criteria in recent judicial pronouncements of the ICJ concerning what you call the «generation of customary law by treaty», meaning for me the use of treaties as an element of evidence of an *opinio juris* or of an emergent *opinio juris* in customary international law. In the cases mentioned in the question, the corresponding judicial pronouncements of the Court may have, here and there, some differences of language, presentation or, even, of emphasis, but there is not basically, by comparison with previous pronouncements, any change of criteria on the relationship between treaty and custom in international law.

The admitted differences of language, presentation and emphasis are in part due to the evolution of the applicable material law and the progress experienced by codification in international law and in part to the particular circumstances of the cases as submitted to the Court. Among the latter, I would include the fact of whether or not a related customary principle or norm pre-exist the treaty containing the rule, the very nature of the rule ' in question in the light of the general features of customary international law, the position of the parties as to the law applicable to the case, as well as other factors more linked to proceedings before the ICJ : the object of the dispute and its definition, the form in which proceedings were instituted the basis and scope of the jurisdiction exercised *in casu* by the Court, the way of pleading of the parties and the conclusions formulated by them, the particulars of proceedings in cases of non-appearence, the moment in which the judgment was passed, etc. But on the essentials for the study of our topic — namely, the need of actual practice and *opinio juris* of States to conclude at the existence and determine the scope of a given principle or norm in customary international law and the use of multilateral treaties and declarations, together with other written instruments, as a point of reference to ascertaining in the attitudes of States an *opinio juris* — the three Judgments mentioned in the question are perfectly coherent in the way of reasoning.

The most recent judicial pronouncements of the Court in maritime delimitation cases as well as in the *Nicaraguan* case inscribe themselves in the established legal doctrine that to conclude at the existence of a customary principle or norm of customary international law, is necessary to direct attention to the actual practice as well as to the *opinio juris* of States. As the 1969 Judgment of the Court on the *North Sea Continental Shelf* cases states : «the frequency, or even habitual character of the acts is not in itself enough». The States concerned must «feel that they are

conforming to what amounts to a legal obligation» (ICJ, *Reports*, 1969, p. 44). This observation of the Court is amply confirmed in the most recent judicial pronouncements. One reads, for example, in the 1985 Judgment in the *Libya/Malta Continental Shelf (merits)* case that it is «axiomatic» that the material of customary international law «is to be looked primarely in the actual practice and *opinio juris* of States» (ICJ, *Reports*, 1985, p. 29), and the 1986 Judgment in the *Nicaraguan (merits)* case is truffled with numerous references to the need of the subjective element for a customary principle or norm to be established, as in the following passage :

> «In considering the instances of the conduct above described, the Court has to emphasize that, as was observed in the *North Sea Continental Shelf* cases, for a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio juris sive necessitatis*» (ICJ, *Reports*, 1986, pp. 108-109).

On this fundamental question of principle the consistency of recent pronouncements of the Court with previous Judgments is, therefore, complete. In this respect, at the least, it is not possible to speak of «a greater flexibility in the application of the criteria laid down in the *North Sea Continental Shelf* cases». On the contrary, recent Judgments show a particular preoccupation on the part of the Court for making itself secure of the existence of an *opinio juris* regarding the principles and norms of customary international law applied to in the different cases, recording the Judgments the process followed by the Court to determine the actual existence of such an *opinio juris*. There is a more ample, detailed and intense reasoning on the matter that in the past, the establishment of the *opinio juris* becoming in fact a major subject of attention in the Judgments.

It is true, that at a certain moment, the 1969 Judgment in the *North Sea Continental Shelf* cases introduces a note of caution by saying that the *result* for a provision in a treaty of passing into the general *corpus* of international law, a procedure that the Judgment considers as «perfectly possible», is «not lightly to be regarded as having been attained» (ICJ, *Reports*, 1969, p. 41). But when and in respect to what is this note of caution, always valid, introduced by the Court into the reasoning of the Judgment ? When the Court begins to consider whether or not a *given* method of delimitation has in fact passed into the general *corpus* of international law following the adoption of the 1958 Geneva Continental Shelf Convention *qua* a mandatory rule of customary international law. The nature itself of the rule contained in the particular treaty provision considered explains the referred caveat of the Judgment that, retrospectively, appears fully justified in the light of developments experienced by the law of the sea since 1969. In this connection it is not without relevance

to recall below the following passages of the Special Chamber of the Court which in 1984 adjudicated in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area* :

> «In a matter of this kind, international law — and in this respect the Chamber has logically to refer primarily to customary international law — can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective. It cannot be expected to specify the equitable criteria to be applied or the practical, often technical, methods to be used for attaining that objective — which remain simply criteria and methods even where they are also, in a different sense, called 'principles' ... The same may not, however, be true of international treaty law. There is, for instance, nothing to prevent the parties to a convention — whether bilateral or multilateral — from extending the rules contained in that convention to aspects which it is less likely that customary international law might govern. In that event, however, the text of the convention must be read with caution. The first thing to remember in examining the text, and sometimes even a single clause, is the distinction, the importance of which has just been indicated, between principles and rules of international law enunciated in the convention and the criteria and methods for whose application it might provide in particular cases» (ICJ, *Reports*, 1984, p. 290) *(emphasis supplied).*

The 1969 Judgment of the Court in the *North Sea Continental Shelf* cases qualified the rules contained in Articles 1 to 3 of the 1958 Geneva Continental Shelf Convention as declaratory, at the time of the Judgment, of customary international law. Some other Judgments of the Court have done the same in connection with other treaty rules of codification and other multilateral conventions. Recent legal pronouncements of the Court would seem less inclined to make qualifications of that kind, perhaps because the material customary law to be applied *in casu* appears to the Court less certain or in a process of change. One of the few exceptions is the statement of the Court in the *Nicaraguan (merits)* 1986 Judgment to the effect that Article 18, paragraph 1 (b), of the 1982 Montego Bay Convention on the Law of the Sea does not more than codify customary international law on this point (ICJ, *Reports*, 1986, p. 111). The provision relates to the meaning of passage in relation to the right of innocent passage through the territorial sea. When recent Judgments make reference to treaty rules in codification conventions is rather in connection with the reasoning aiming at the establishment of an evidence of *opinio juris* concerning the alleged principle or norm of customary international law. Furthermore, the Judgments, by no means, base the Court's findings on the matter because of the existence in treaty law of a corresponding principle or rule only, or conclude at the existence of a given customary principle or norm or at the definition of their content, on the exclusive basis of a positive finding on the *opinio juris*. The

objective element of customary international law — the actual practice of States — is likewise stressed as in the passage you have quoted, with approval, in paragraph 78 of your «Preliminary Exposé».

In general, recent Judgments of the Court avoid assuming or presuming that because of the existence of a treaty principle or rule on the subject-matter the content of such a principle or rule was necessarily the same as the content of the corresponding customary principle or norm of international law. They proceed to an independent inquire of the scope of the customary principle or norm in question in the light of the actual practice and *opinio juris* of States. As the 1986 Judgment in the *Nicaguan (merits)* case observes, the evidence of a considerable degree of agreement between the Parties as to the content of the customary international law relating to the non-use of force and non-intervention does not, however, dispense the Court from having itself to ascertain what rules of customary international law are applicable :

> «The mere fact that States declare their recognition is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States ... in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice» (ICJ, *Reports*, 1986, pp. 97-98).

The particular preoccupation of Court's recent Judgments to inquire the *opinio juris* of States in cases submitted to its consideration could be explained by a series of factors such as the unprecedented evolution of international law since 1945, both customary and in written form, the possibility under present circumstances of changes in customary law in a short period of time (recognized in the 1969 Judgment on the *North Sea Continental Shelf* cases, ICJ, *Reports*, 1969, p. 43), the aggregated effects of the preceeding factors which begin to emerge at the application law level, the evaluation by parties to cases before the Court of the evolution experienced by the law, the law they ask the Court to apply *in casu*, etc. The latter observations should be borne particularly in mind in cases concerning maritime delimitations because the codification made in the 1958 Geneva Conventions has been followed twenty-four years later by an overall review of the whole of the law of the sea culminating in the adoption of the 1982 Montego Bay Convention on the Law of the Sea.

The 1982 Judgment in the *Tunisia/Libya Continental Shelf* case was decided short before the adoption of the 1982 Montego Bay Convention, but the special agreement by the notification of which the case was brought before the Court provided that in rendering its decision the Court should take account, *inter alia*, of the «recent trends admitted at the Third (UN) Conference on the Law of the Sea». Other special agreements

concerning maritime delimitation cases subsequent to the 1982 Montego Bay Convention did not mention that Convention or the «trends admitted» at the Conference. The Parties, however, invited the Court to take account, to a certain extent, of the Montego Bay Convention. The special agreement concerning the *Libya/Malta Continental Shelf* case was silent as to the material law to be applied by the Court. The Parties, both of which were signatories of the 1982 Montego Bay Convention, agreed during the proceedings that the case was to be adjudicated under customary international law. In doing so, however, they did not consider that the Montego Bay Convention was «irrelevant», being in accord in considering that some provisions of the Convention constituted, to a certain extent, the expression of the customary international law in the matter, although they did not agree in identifying the provisions which had this status, or the extent to which they were so treated (ICJ, *Reports*, 1985, p. 29). In the *Gulf of Maine Area Delimitation* case, the special agreement asked the Chamber of the Court to decide «in accordance with the principles and rules of international law applicable in the matter as between the Parties», but the evolution of the law of the sea expressed in the Montego Bay Convention appeared clearly in the pleadings of the Parties and the 1984 Judgment of the Chamber took account of certain principles and rules embodied in the Montego Bay Convention particularly in connection with the definition of what was called in the Judgment the «fundamental norm» of delimitation. The Judgment of the Chamber states, for example, the following :

> «Turning lastly to the proceedings of the Third United Nations Conference on the Law of the Sea and the final result of that Conference, the Chamber notes in the first place that the Convention adopted at the end of the Conference has not yet come into force and that a number of States do not appear inclined to ratify it. This, however, in no way detracts from the consensus reached on large portions of the instrument and, above all, cannot invalidate the observation that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any objections ... In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question» (ICJ, *Reports*, 1984, p. 294).

The Parties to the cases invited the Court to take into account the text of provisions embodied in the 1982 Montego Bay Convention as well of certain relevant *travaux préparatoires* and the Court did it. In doing so, the Court and the Chamber took likewise account of the degree of support received by the provisions concerned at the Conference. This appears as particularly justified because of the very process of negotiation

and elaboration of text followed in the codification, consolidation and development, of the new law of the sea. The process has been a collective concious inter-States undertaking lasting, so far as the United Nations involvement only, at the least from 1970 to 1982. This gives an added value to the text of the Convention and its *travaux* in ascertaining evidence of present *opinio juris* in general international law with respect to several aspects of the current law of the sea. Representatives of States were the actors all through the process and participation was practically universal. Right or wrong, States took the whole ground and did not limit themselves to make oral statements in the Sixth Committee of the General Assembly or to provide written comments on drafts prepared by others and to participate, thereafter, for some weeks in a plenipotentiary conference, as in the case of most of the codification conventions elaborated on the basis of draft articles prepared by the International Law Commission. By comparison, the use made in the 1969 Judgment on the *North Sea Continental Shelf* cases of the *travaux* of the International Law Commission on some aspects of the régime of the «continental shelf» was much more daring, in this respect, than the said recent judgments of the Court on maritime delimitation cases.

The added value of the 1982 Montego Bay Convention on the Law of the Sea referred to above, for the indicated purpose, would appear to have been very much in the mind of the Court in addition to the invitations made by the Parties to the cases. As the 1985 Judgment in the *Libya/Malta Continental Shelf* case states :

> « ... it cannot be denied that the 1982 Convention is of major importance, having been adopted by an overwhelming majority of States ; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law» (ICJ, *Reports*, 1985, p. 30).

If the Court has a duty to consider in what degree relevant provisions of the 1982 Montego Bay Convention on the Law of the Sea are binding upon the Parties as a rule of customary international law because of the «major importance» of the Convention and the «overwhelming majority» of those concerned adopting it, it is clear that the Court has a similar duty — in a case as the *Military and Paramilitary Activities in and against Nicaragua* — to look after, for the same purpose and within the same limits, relevant provisions in multilateral conventions such as : the UN Charter, the OAS Charter, the 1944 Chicago Civil Aviation Convention, the 1958 Convention on the Territorial Sea, the 1949 Humanitarian Law Conventions ... and the very 1982 Convention on the Law of the Sea.

Such a legitimate technique has been applied in recent Judgments within perfectly admitted limits. What the Court did, generally speaking,

when looking at individual provisions of multilateral conventions and attitudes of States relating to such provisions, was to consider whether or not such a conduct of States, together with other elements, reveals the «subjective element» (an *opinio juris*) in the light of which «to appraise the relevant practice», in order to determine the existence or content of a customary principle or norm relevant to the case. In a few occasions, the Court made use of multilateral conventions, in particular of codification conventions, just to confirm a customary principle or norm the *opinio juris* of which was not in doubt.

The 1985 Judgment in the *Libya/Malta Continental Shelf* case provides a good example of the way of reasoning by the Court in matters relating to the relationship between treaty and custom in international law. The relevant part of the Judgment begins by quoting certain provisions in Article 76 (definition of the continental shelf) and Article 83 (delimitation of the continental shelf) of the 1982 Montego Bay Convention in order to confirm the «self-evident» truth that «the legal basis of that which is to be delimited, and of the entitlement to it, cannot be other than pertinent ... to delimitation (ICJ, *Reports*, 1985, p. 30). Then, and with regard the «delimitation of the shelf», the Court applies, as agreed by the Parties during the proceedings, both the criterion of «the application of equitable principles» and the criterion of «the solution as being equitable», whatever the status of Article 83 of the 1982 Montego Bay Convention might be and notwithstanding the actual roding of the said treaty provision (*ibid.*, p. 31). Finally, regarding the legal basis or definition of the «continental shelf» to be delimited, and of the entitlement of the Parties to the case to it, the Judgment refers to the 1982 Montego Bay Convention as a «demonstration» that in modern law the institutions of «continental shelf» and of the «exclusive economic zone» are linked together without, however, the concept of «continental shelf» been absorbed by that of the «exclusive economic zone» (*ibid.*, p. 33). This obvious legal situation, already referred to, in more indirect terms, in the 1984 Judgment in the *Gulf of Maine Area Delimitation* case (ICJ, *Reports*, 1984, pp. 294-295), leads the Court to conclude that the principles and rules underlying the concept of «exclusive economic zone» cannot nowadays be left out of consideration in the assessment of the law governing «continental shelf», since «the rights enjoyed by a State over its continental shelf would be also possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State» (*ibid.*, pp. 33-34) *(emphasis supplied)*. The result is, as the Judgment underlines it, that a greater importance must be attributed to elements, such as «distance» from the

coast, which are common to the concept of «continental shelf» and to the concept of «exclusive economic zone».

We are quite far from legal pronouncements qualifying a given treaty law provision as being declaratory or not declaratory of a customary international law rule as was the case concerning Articles 1 to 3 and Article 6, respectively, of the 1958 Geneva Continental Shelf Convention in the 1969 Judgment in the *North Sea Continental Shelf* cases in connection with the answer given by the Court to the question of the obligatory use of the equidistance method of delimitation of the shelf. We are, however, not so far apart from the way of reasoning of the court, in the 1969 cases ; when it turns its attention to the principles and rules of law to be applied to the delimitation as to provide the Parties with the requisite directions without a detailed indication of the methods.

The 1969 Judgment in the *North Sea Continental Shelf* cases, had no difficulty in giving a judicial blessing to the concept of «continental shelf» as an institution of general international law. According to the Judgment the Truman Proclamation which had, in the opinion of the Court, «a special status», «soon came to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated,» came to prevail over «all others, being now reflected in Article 2 of the 1958 Geneva Convention on the Continental Shelf» (ICJ, *Reports*, 1969, pp. 32-33). Recent legal pronouncements of Court's Judgments on the reception in general international law of the institution of the «exclusive economic zone» met, by all means, the requirements applied by the 1969 Judgment concerning the «continental shelf». A series of unilateral proclamations «soon came to be regarded as the starting point of the positive law on the subject» as reflected first in official documents concerning the overall review experienced by the law of the sea and now in part V of the 1982 Montego Bay Convention. There is, therefore, no reason for surprise to read in the 1982 Judgment in the *Tunisia/Libya Continental Shelf* case that «the concept of the exclusive economic zone» may be regarded «as part of modern international law» (ICJ, *Reports*, 1982, p. 74) or in the 1984 Judgment in the *Gulf of Maine Area Delimitation* case that certain provisions of the 1982 Montego Bay Convention concerning the «exclusive economic zone» may be regarded «as consonant with general international law on the question» (ICJ, *Reports*, 1984, p. 294) or in the 1985 Judgment on the *Libya/Malta Continental Shelf* case that «As the 1982 Convention demonstrates, the two institutions — continental shelf and exclusive economic zone — are linked together in modern law» (ICJ, *Reports*, 1985, p. 33). In this question, as in several others, the 1969 Judgment was a very important contribution to the clarification of the customary international law governing then the institution

of the «continental shelf», marking as such subsequent developments of the law, but so far as the question under consideration here the Judgment was inspired by a more daring judicial approach than the Judgments in the cases of the *Libya/Tunisia Continental Shelf* the *Gulf of Maine Area Delimitation* and the *Libya/Malta Continental Shelf.*

In the *Military and Paramilitary Activities in and against Nicaragua* case, as it is generally the case in disputes concerning the alleged international responsibility of a State, questions of fact concerning the proof of the alleged conducts as well legal questions of imputability relating to the establishment of the said conducts as «acts of the State» play a more significant role, in the final decision of the Court, than the definition of the content of the customary principles and norms applicable to the case referred to under my answer to question 12 of the *Questionnaire.* In comparison with such questions, the definition of the customary law applied plays a very relative role. Nevertheless, the Court paid also attention to the matter with considerable detail because the need to satisfy itself that the claims were well founded in the light of the non-appearance of the respondant in the merits phase (Article 53 of the Statute of the Court) and the effect given by the Court to the «Vandengerg reservation» of the respondant's Declaration accepting the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2 of the Statute.

Question 14

As to the States not parties to the treaty the taking into account of their practice does not pose, in general, any particular problem for the purpose indicated in the question. With respect to the States *parties* to the treaty, it is necessary to ascertain whether or not *in casu* they act : (a) actually or potentially in the application of the treaty only and in inter-parties relationship ; (b) in the exclusive framework and as subject of general international law ; (c) both in the application of the treaty and in the framework of general international law. The practice under hypothesis (a) is the sole to be disregarded as a matter of principle, if evidence supports such a conclusion.

Ultimately, therefore, it is a question which concerns the qualification of the «conduct» alleged or actually adopted by the State more than the «condition» of the State being a party to the treaty. In giving a doctrinal answer to the question, the First Commission should be conscious that it will impinge on two important social values for the international community : (a) the need to preserve the vigor of customary international law and the possibility of its evolution at a time when codification *latu sensu* in «conventional form» has achieved considerable sucess and (b) the convenience to avoid undermining actually or potentially the creation

of the so-called «objective régimes», a possibility recognized as feasible by the Vienna Convention on the Law of Treaties, albeit indirectly, by the interplay of the application of the rules set forth in its Articles 36 (Treaties providing for rights for third States) and 38 (Rules in a treaty becoming binding on third States through international custom).

Question 15

Judicial pronouncements are supposed to state the law as it stands *at the moment* when the pronouncement is made. A judicial pronouncement stating that a particular provision of a codification convention is declaratory of customary law cannot mean anything else but that at the time of the decision the situation in general international law was as described in the pronouncement concerned. In other words, the adoption of a codification convention does not dry up further developments of the related customary general international law. The clock is not stopped for customary international law by the fact that a codification convention has been adopted and entered into force. For example, the ICJ in 1969 in its *Judgment in the North Sea Continental Shelf* cases admitted the customary declaratory character of provisions in Article 1 to 3 of the 1958 Geneva Convention on the Continental Shelf. Since then, as indicated, the law governing the continental shelf, in particular the very definition of continental shelf has undergone certain changes — reflected in the text of the 1982 Montego Bay Convention and in its *travaux préparatoires* — some of which may well have already passed into the corpus of general international law. If this is the actual case, the referred 1969 judicial pronouncement of the ICJ will not be in all respects an accurate description of the present legal situation. Such a conclusion, however, would not detract a iota from the judicial value of the pronouncement as a true description of the legal situation in 1969.

I do not see, therefore, the need to speak, in the context, of «tacit conditions» in judicial pronouncements or of making references to a concept such as «*rebus sic stantibus*» which, as we all know, has a precise «special meaning» in international law. The conclusion mentioned above does not impair either, in any way, the legal force that the 1958 Geneva Continental Shelf Convention continues to have as between Parties *qua* treaty law. As to the conventional relationship between Parties to the 1958 Geneva Continental Shelf Convention and/or to the 1982 Montego Bay Convention (once in force), Article 30 of the Vienna Convention on the Law of Treaties and Article 311 of the 1982 Montego Bay Convention provide the answer.

The above applies, *mutatis mutandis*, to legal pronouncements made by States concerning the customary law declaratory character of a rule incorporated into a given text.

Questions 16 and 17

It is still too early to define the content of the First Commission's resolution. It should be defined at the outcome of the consideration by the Commission of the various aspects of the topic following an inductive method of work. It is likewise premature to discuss now the recommendation to be made to the Institute on the best way of adopting our conclusions. I will add only that at the moment the work of the Commission should not proceed on the assumption that *necessarily* we are going simply to recommend that the Institute take note of the conclusions as conclusions of the First Commission.

Question 18

Definitely yes. It is a very good idea. We could perhaps also try to draft some «model clauses» of that kind which could be added as an annex to the Commission's conclusions to serve as a guidance for negociators of future codification conventions.

Question 19

The Commission should review possible problems arising from a succession of codification conventions on a particular subject in connection with :

(a) the formulation of «reservations» and its eventual effects on the topic ;

(b) the interplay of the conventions in matters of «interpretation».

Concerning the latter, doctrine, as it is well known, has advanced certain theses under headings such as «*interprétation par subordination ou coordination à d'autres textes conventionnels*», «*interprétation par recours aux principes généraux régissant la matière*», «*interprétation par référence au droit international commun*», etc. (see, for example, Ch. De Visscher, *Problèmes d'interprétation judiciaire en droit international public*, Paris, 1963) ; and the Vienna Convention on the Law of Treaties provides that there shall be taken into account, together with the context *inter alia* «any relevant rules of international law applicable in the relations between the parties» (Article 31) and admits the possibility of recourse, in certain cases, to «supplementary means of interpretation» (Article 32).

Santiago Torres Bernardez

4. Réponse de M. Vicente Marotta Rangel

May 2, 1989.

Dear Colleague,

Let me begin by expressing my admiration for your illuminating *Preliminary Exposé* on the subject «Problems arising from a succession of codification conventions on a particular subject».

Herewith my answers to the *Questionnaire* :

1. Yes. The expression «codification convention» should be taken to mean any convention designed to codify or progressively to develop rules of general international law and open to very widespread participation by States. So, we can exclude problems arising from the relationship between regional conventions designed to codify or progressively to develop a particular branch of international law.

2. It seems to me that our study should not exclude codification conventions operating in the field of private international law, provided they are linked together in a particular «chain of conventions». I am in favour of making any effort to avoid different treatment between the two branches of international law, mostly in regard to issues on common international sources (treaties and customs).

3. We agree that one of the distinctive characteristics of a «codification convention» for the purpose of our study is that it should contain provisions which are declaratory of customary law or may crystallize emergent rules of customary law. The question concerning a «codification convention» that may generate new rules of customary law, binding even upon non-parties, seems to be a different one. The generation of new rules should be envisaged as an eventual result of the «codification convention» rather than one of its distinctive characteristics.

In any case, we can largely ignore «chains» of regulatory conventions.

4. No. However, the study might encompass the relationship between the 1982 UN Convention and other law conventions according to provisions of the Montego Bay treaty : *e.g.*, Articles 35(c) ; 237(1)(2) ; 311(5)(6).

5. and 6. Yes.

7. As to the first question : Yes, without prejudice to the exceptions or conditions contemplated in the same Article 30. Concerning the second question : It seems to me that there are some circumstances in which the later treaty can be considered as invalid, *e.g.* in violation of a norm of *jus cogens* contained in the earlier treaty.

8, 9, 10, 11. The answers to these questions depend on the precise delimitation of the scope of our study.

12 and 13. Notwithstanding recent judicial pronouncements, notably in the *Nicaragua* case and the *Libya/Malta Continental Shelf* case, it seems to me that the criteria laid down in the North Sea Continental Shelf cases are still valid.

14. I think we should primarily take into account the practice of States acting actually or potentially in the application of the treaty.

15. As to the first question : Yes.

As to the second question : No.

16, 17, 18. I should prefer to wait for the results of further examination and precise delimitation of the subject matter of our study.

19. For the moment, I have no suggestion for other questions.

That is all, for the time being.

Cordially,

Vicente Marotta Rangel

5. *Réponse de M. James Crawford*

15 May 1989

Enclosed is a reply to the questionnaire in relation to your excellent preliminary survey of the topic. I do apologize for the delay in sending this comment.

I look forward to seeing you again in September.

With kindest regards,

James Crawford

1. In principle I agree that we should focus on the relationship between general rather than regional codification conventions. There are in any event relatively few of the latter, if one excludes regional human rights treaties (these are, in any event, rather more an enactment of human rights than a codification). Some of the inter-American treaties were attempts at codification, and some of these (*e.g.* the Montevideo Convention

on the Rights and Duties of States) have had a certain currency, partly because they deal with issues which are rarely dealt with in codification conventions at the general level. I would not want entirely to exclude consideration of this relatively small category, but in terms of detailed investigation I agree with the view that our principal concern is with general codification conventions.

2. Yes.

3. Yes. The problem of «chains of conventions» raises its own issues, but these are distinct from the problem of codification convention in the proper sense of the term.

4. Yes, provided that the earlier regulatory conventions should only be dealt with to the extent that they purport to regulate issues to general international law (or contribute to the crystallization of new rules of international law) in respect of matters subsequently dealt with by the 1982 Convention. In this context I would note that one issue dealt with in paragraph 49 of the Preliminary Exposé raises a general issue of principle. The question relates to the impact of Articles 28 and 322(2) of the 1982 Convention on Article II of the Brussels Arrest Convention of 1952. Article II refers to the arrest of a ship «in the jurisdiction of any of the contracting States». This might be thought to create a right to arrest in respect of civil claims over ships passing through the territorial sea, extending beyond the right of arrest recognized by the 1958 and 1982 Conventions. However, it seems to me quite clear that the parties to the 1952 Convention did not intend to create a right of arrest in respect of ships merely transiting the territorial sea, going beyond the recognized position in international law. The purpose of the 1952 Convention was to deal in general terms with the scope of rights of arrest, and to seek to bring into concordance the different common law and civil law approaches to the subject of arrest or *saisie conservatoire*. In other words the drafters of that Convention were concerned with what might be described as the «general maritime law» or private law aspects of arrest, and were not directly concerned with public international law constraints such as the right of innocent passage. The matter was discussed by the Australian Law Reform Commission in its Report 33, Civil Admiralty Jurisdiction (Australian Government Publishing Service, Canberra, 1986) at paragraph 113. I attach a photocopy of the relevant pages of that report[164]. It should be noted that the Commission's recommendation on this point, limiting the right of arrest in respect of ships in innocent passage, was subsequently implemented in the Admiralty Act 1988 (Cth) section 22(4).

---

164 Texte non reproduit dans le présent *Annuaire*.

5. Yes.

6. Yes. Indeed article 34 is merely a reflection of the more fundamental principle of international law, based upon the equality and independence of states, that agreements, arrangements or acts by other states cannot as such impair the rights of third parties, apart from the possibility of the creation of new rules of particular or general intenrational law.

7. Clearly the rules contained in Article 30 of the Vienna Convention (or their customary international law analogue) are presumptively the appropriate rules to apply in determining what the law is in a case of successive lawmaking or other conventions. There are perhaps three possible exceptions to this proposition, one of which is not a true exception.

(1) Article 103 of the United Nations Charter clearly has a special role in this field, one which has been analysed in some detail elsewhere.

(2) The Vienna Convention itself accepts the possibility of a rule of *jus cogens* invalidating a subsequent treaty. This is, I think, not an exception to Article 30 but an application of a distinct rule about the status of rules of *jus cogens*. Logically a rule of *jus cogens* could never be established merely by virtue of a treaty. A treaty can of course embody rules of international law (including *jus cogens*), but their status as such would always have to be determined apart from their status as treaty rules.

(3) There is the possibility that states may be able to establish some form of regime, usually a territorial regime, which has effects which cannot simply be overridden by any later convention. This may also apply to certain forms of status such as the status of a neutralised state. Again it is perhaps most elegant to refer this possibility to the law of territorial status and neutrality rather than to the law of treaties.

8. I do not have anything to add to the comments in the Preliminary Exposé on this point. Plainly, attempts such as that in Article 311(6) of the 1982 Convention to preclude later amendments relating to certain issues, do represent a strong attempt by States parties to establish the predominance of a particular rule. But there is a logical difficulty in establishing by treaty a rule which supersedes the legal foundations of treaties. If the provision is effective as a treaty obligation, this can only be because of the law of treaties. A provision cannot at the same time rely upon the law of treaties for its force and deny its fundamental principles. The problem is not wholly dissimilar from the problem of a «sovereign» parliament limiting its future law-making authority. The common law rule is that such a parliament cannot limit its law making authority in future, other than by that mysterious process which involves the exercise of constituent rather than legislative authority. Article 103 of the United Nations Charter might perhaps be described as one of the first

attempts at the international level at a form of constituent authority (whether successful or not is another question). In the end all that such provisions can probably do, *qua* treaty provisions (and analogously all that legislative provisions can do) is to create presumptions, more or less strong, about the effect of later rules. That such presumptions may have a very real effect is shown, for example, in the analogous area of the relations between treaty implementing provisions and later statutes : for example, *Garland v. British Rail Engineering Ltd* [1982] 2 *WLR* 918 (House of Lords), or the recent *PLO* case in the United States (*United States v. Palestine Liberation Organization* 27 ILM 1055 (1988)).

10. I certainly think that there is room for the *lex generalis/lex specialis* distinction here, especially as a rule of interpretation. As the cases referred to in the previous paragraph show, there is real room for legal technique in synchronising and bringing into concordance potentially conflicting treaty rules.

11. I have nothing to add to the comment in the Preliminary Exposé.

12. This is a matter of fundamental significance and interest, though it goes well beyond the scope of the present topic. It is also liable to lead to disagreements over the International Court's approach to the Vandenberg Amendment in the *Nicaragua* case. Whether it would be rewarding for the Institute to focus on this very particular and unusual situation may be open to doubt.

The problem with focussing on the *Nicaragua* case is that the issue there was a jurisdictional one, and the fundamental rule of curial jurisdiction in international law is one requiring consent. Thus although the Vandenberg Amendment implicated or entailed a problem of «choice of law» (treaty or custom), it did so only for the purpose of determining whether the Court had jurisdiction over a particular dispute. The Court dealt with the issue by asserting that treaty law coexists with general international law, rather than, as it were, extinguishing it *pro tanto*. I have no difficulty with that general proposition, for two reasons. First, if treaties extinguished or suppressed general international law, it would be impossible for treaty practice ever to constitute or contribute to customary practice, and what is sometimes referred to as the «Baxter paradox» (viz, that the more universal a treaty, the less contribution it can make to general international law) would hold. Secondly, if treaties extinguished or suppressed general international law, it is difficult to see how new rules of *jus cogens* could ever be created : a rule of *jus cogens* is a rule of international law which has a special status, and again that status could not be contributed to or affirmed if treaties excluded general international law. Thus the Court's thesis of the «parallelism of sources of international law» is correct.

But the difficulty is that the issue in the *Nicaragua* case was not directly one of sources but of jurisdiction. If the dispute there met the description in the Vandenberg Amendment of being a dispute arising under a multilateral treaty, then the United States had not consented to the Court's jurisdiction over the dispute (the condition to jurisdiction not being met). It was irrelevant that the dispute could also be described in other ways (*e.g.* as a dispute which apart from any treaty would have involved issues of general international law). The Vandenberg amendment did not simply exclude jurisdiction over certain sources of law (that would have been problematic under the Statute) ; it did not exclude jurisdiction over disputes of a certain description. The case involved, the Court held, such a dispute.

I do not deny that the Court had power, and was required, to interpret the Vandenberg amendment. I would myself have interpreted that amendment as not affecting the Charter (of which the Statute is an integral part), since by definition all matters before the Court involve the Charter, and including it would have made nonsense of the amendment. But simply to assert jurisdiction by reference to a different source of law made nonsense of the amendment in another way : in a real sense there is always a general international law solution to any problem (there cannot be a *non liquet* in respect of any case where there is jurisdiction). This view is reinforced by the rules about the priority of sources : although treaties do not extinguish or suppress general international law, they prevail over general international law (except where the rule of general international law is one of *jus cogens*, or the matter is otherwise beyond the scope of treaties to affect (*e.g.* with respect to the legal position of third states). Thus to decide a dispute which met the description of a dispute «arising under a multilateral treaty» within the meaning of the Vandenberg Amendment required the application of the treaty (provided that the issue did not involve a matter of *jus cogens* — something the Court was careful to avoid deciding). In such a case the treaty provided the active source of law, under which the dispute actively — that is, actually — arose. Parties do not cease to have disputes under treaties because the International Court has no jurisdiction over their disputes.

For these reasons in my view Judge Jennings was correct in his dissent in relation to the Vandenberg Amendment. But I do not think that issue either falls within this Commission's mandate, or constitutes a fruitful subject for debate. It may perhaps be helpful to discuss the issue of the relationship between treaty and general international law at the level of the sources of law, although the principal issue for this Commission is the relationship between consecutive lawmaking treaties. Whether — and how — a treaty can be lawmaking (apart from its status as a treaty) is not doubt within our mandate, at least as a preliminary or definitional

issue. But it also relates to much wider issues of the relationship between the sources of law, which perhaps ought to be the subject of separate study.

13. It is clear that the Court has recently adopted a more flexible (some would say cavalier) approach to the generation of rules of custom by treaty (as well as by the resolutions of international organizations). In relation to the former, at least, one can say in its defence that treaties have taken over from the older customary law processes as the principal generators of international law, and that the Court has a major role in ensuring the integrity of international law as a system by ensuring reasonable concordance between general international law and widespread treaty practice. It is perhaps not too much to say that the Court's role is to ensure the systematic character of general international law against the ravages of the Baxter paradox ! But for the reasons stated in paragraph 12 above, I am not sure that this is a matter which falls squarely within our mandate, extensive as that is.

14. For the reasons stated in paragraph 12 above, the practice of all states (including states parties to law-making treaties) is relevant to the generation of general international law.

15. Essentially I would answer yet to both questions, using the term *rebus sic stantibus* here in a broad rather than a technical sense. A good example is the rather incautious statement of the Court in the *North Seas Continental Shelf* cases to the effect that Article 1 of the Convention was a rule of general international law, despite the imprecision of the definition of the extent of the continental shelf. Given the tension between that imprecision and the basic principle of the freedom of the seas (with its continuing element of common heritage), it would not have taken much to displace the earlier definition with one that is more precise and more consistent with other rules and principles of international law. This is a good example of what I referred to in paragraph 13 as the systematic character of general international law. More generally, in a «customary law» system in which the law does not reside in *gremio judicis*, all judicial pronouncements must be subject to a tacit qualification of this kind, although the occasion for applying it should be few.

16. One of the most useful roles that the Institute can play, given the enormous range of specific, *ad hoc* lawmaking activity that goes on in intergovernmental forums, is to reflect on the more fundamental systematic issues about international law, of which this is one. That may call for a method of presentation which is less dogmatic and propositional than the Institute has generally adopted. One possibility is some form of commentary or annex succinctly outlining the issues, which could be adopted in a brief resolution in some appropriate terms. On that basis I think the

commentary or annex should include a brief statement of the issues discussed and of the conclusions reached, without undue attempts at reducing those conclusions to the form of general laws.

17. See paragraph 16 above. I would have no objection to the Institute merely «taking note of « the conclusions, if as a consequence it was possible to state the conclusions in a more meaningful and fuller way.

18. Yes.

19. I have no other suggestions at present.

James Crawford

6. Réponse de M. Geraldo do Nascimento e Silva

22 May 1989

Dear Sir Ian,

Congratulations on your excellent Preliminary Exposé on «Problems arising from a Succession of Codification Conventions on a Particular Subject».

I now turn to your Questionnaire.

1. In principle, we should limit ourselves to codification conventions of a universal character. This does not mean that we should exclude automatically those of a regional character. Many Latin American Conventions have a widespread participation. In the field of the Law of the Sea, some regional European Conventions contain rules more advanced than those we find in the 1982 Convention on the Law of the Sea, and which should prevail over the 1982 rules as *lex specialis.*

2. Yes, but never in a dogmatic way.

3. Yes. It would be advisable to ignore «chain conventions».

4. Personally I would avoid taking up the relationship between the 1982 Convention and earlier maritime conventions of a regulatory character. In this sense, the Tenth Consultative Meeting of Contraction Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (the London Dumping Convention) charges its Legal Experts to consider «*inter alia*, implications regarding the United Nations Convention on the Law of the Sea for the London Dumping Convention». The 1988 XIth Meeting of the London Dumping Convention

accepted the conclusions of the Legal Group «that there were no fundamental inconsistencies between the Convention on the Law of the Sea and the London Dumping Convention which would suggest the need to amend the London Dumping Convention». It then agreed that the London Dumping Convention «should be interpreted in the light of development in international law since the adoption of the London Dumping Convention in 1972, including those reflected in Part XII of the United Nations Convention on the Law of the Sea. An identical approach to other maritime law conventions would be a sensible way.

5. Definitively so.

6. Yes. Article 34 of the Convention on the Law of Treaties expresses a fundamental and undisputed rule of international law.

7. I see no reason why we should stray from the rule set down in article 30. In the case of norms of *jus cogens*, articles 53 and 64 apply.

8. I see no special advantage in taking up this issue.

9. Normally, it will reflect the will of the negotiating States to give priority of primacy to one of the conventions, usually to the new convention. But we cannot brush aside the possibility of a later treaty claiming such a priority.

10. Yes. *Lex specialis* should prevail over *lex generalis*. In the case of some articles of UNCLOS as compared with rules to be found in some specific maritime law conventions of a regulatory character the 1982 rule is a step backwards.

11. Yes. One can discern a particular pattern in the variety of amendments clauses to be found in multilateral treaties, but I see no special advantage in departing from the rules laid down in articles 39, 40 and 41 on the Convention of the Law of Treaties.

12. Yes, but only slightly.

13. Yes. The greater flexibility does not annul the criteria laid down in the *North Sea Continental Shelf* case.

14. The practice of States party and of States not party to a treaty can be taken into account. We can also consider in the same way certain codification conventions even before they enter into force.

15. Even though I find merits in your ideas, I still hesitate to endorse them and wonder if the problem should be included in the final text.

16. With the provisional conclusions of the Rapporteur we may be in a position to take a decision on this matter.

17. We must see how the question evolves and the reaction of the other members of the Institute.

18. The rules laid down in the Convention on the Law of Treaties are satisfactory. The inclusion of a specific clause should only occur in certain special cases.

19. I have no suggestions at this stage.

Geraldo E. do Nascimento e Silva

7. *Réponse de M. Vladimir-Djuro Degan*

25 May 1989

Dear Confrère,

I congratulate you for your excellent Preliminary Exposé. I hope that it will be of great use for further discussion in regard to many particular problems arising from succession of codification conventions in the same subject-matter.

Prior to answering your exhaustive Questionnaire, I would like to explain some of my views on essential points.

There are some domains in international cooperation which seek uniform legal regulation by normative (or «norm-creating» or impersonal) rules of universal character. I can point here out only two examples among others : law of the sea and diplomatic and consular relations. Because all seas and oceans are interconnected and constitute a whole, it is useful for peaceful uses of the sea (navigation, fisheries, overflight, etc.), that uniform rules of such a general character regulate all the main problems of the law of the sea. Similar is with diplomatic and consular intercourse.

Thus all codification conventions in these domains provide rules of normative and general character. From their very text proceeds *prima facie* intention of their parties to attibute to these treaty provisions the validity of rules of general international law, thus also in respect to third States. Moreover, for most of participating States at diplomatic conferences which took an active part in stipulating these normative provisions, and which later refused for some other reasons to become parties to the convention in question, the same intention can reasonably be presumed. This is the case in particular with participating States at the Third UN Law of the Sea Conference in regard to all parts of the 1982 Convention providing normative rules except its part XI.

Conventions of this type, like all others, must nevertheless be envisaged from two different aspects : treaty law and relationship between treaty and general customary law, exactly as you did it.

In regard to the first aspect I generally agree with the view of D. P. O'Connell concerning the principle *pacta tertiis nec nocent nec prosunt*, that : «In proportion, then, to the extent to which the instrument escapes the conception of contract and enters that of the law-making process, the civil law maxim is weakened». (*International Law*, First Edition, London 1965, vol. I, p. 266). Therefore it seems highly appropriate to draw a conclusion from your exhaustive analysis of clauses of codification conventions governing their relation with other treaties, whether or not there are some specific features in applying on them rules on succession of treaties from the 1969 Vienna Convention, in comparison with similar provisions in other chains of conventions of simply regulatory character.

Also in regard to the first aspect, I do not entirely agree with all your conclusions concerning the obligation not to defeat the object and purpose of a treaty (paragraph 67). Mark E. Villiger : *Customary International Law and Treaties*, pp. 315-326 (whom you quote at other places), seems to prove that Article 18 of the 1969 Vienna Convention has been at least after 1969 widely recognized as a rule of general customary law. He discusses also arguments that a treaty can have more «unrelated objects and purposes». I agree, in addition, with conclusions of Paul V. McDade : «The interim obligation between signature and ratification of a treaty issues raised by the recent action of signatories of the Law of the Sea Convention with respect to the mining of the deep seabed», *Netherlands International Law Review* 1985, N° 1, pp. 5-47.

*

The problem of relationship of codification conventions with customary process is of a much more complex character. There is an obvious and growing necessity for a kind of world wide legislation, not only in the law of the sea and diplomatic relations, but also in regard to the reduction and control of all kinds of pollution, or protection of the ozon layer, etc. But the international community at the present stage of its development has obviously no means for such a kind of law-creating.

Because general principles of law as a source *per se* have a very limited importance in international law, the only remaining source (or «law-creating process») of rules of general international law is customary process. And aside some judicial decisions, some declarations of the UN General Assembly and some unilateral acts of States, the main «tool» for voluntary articulation of general customary rules remain diplomatic conferences which adopt conventions providing normative rules and having

either codifying, or crystallizing or generating effect on general customary law.

The Third UN Law of the Sea Conference however revealed how this technique is risky of grave abuses. All interested States participated in it, and all of them advocated their particular interests in building common «package deal», which was almost reached near the end of the Conference. However, this «package deal» was negotiated under a naive presumption that all or almost all participating States will soon become parties to the Convention. It was presumed that under such circumstances all its normative rules will soon transform into general customary law. It was discovered too late that no State, whatever its commitments in negotiating process would be, is under legal obligation to ratify or to accede to the Conventions.

That situation proved that for protection of a State's national interests is very profitable to take part in negotiations and latter on to dissociate itself from the convention adopted. Unlike the parties to such a codification convention, a State third to it, first of all is not bound by its contractual provisions including financial obligations, obligations on dispute settlement, etc. And in regard to normative rules provided in it, a pick and choose game is open, notwithstanding their attitudes or informal agreements at the conference. For all normative provisions favourable to them they will pretend to have declaratory or at least crystallizing effect of general customary rules, providing rights to all States in the world. And for the rest of normative rules they will pretend that they have no more than generating effect of new provisions which are at present time only being *lex ferenda*, and thus not providing rights or obligations on third States to the convention. However, even these normative rules were probably agreed at the conference by all participating States as a part of common «package deal». Here the principle of good faith is gravely compromised.

Thus, unlike contractual provisions, normative rules at codification conventions are not intended to operate in the first place between their parties only and on the basis of the law of treaties. They were intended to codify, or to crystallize, or to generate general customary rules, obligatory on all States. When the matter is of succession of these conventions in the same subject-matter, this aspect seems to be more important than purely contractual one.

*

I have some reservation with regard to your criticism of the *Nicaragua* Judgment of 1986. I strongly sympathize with your conclusions concerning law declaring effect of general customary law by the Court's pronouncements. In particular you wrote at paragraph 88 : «... any pronouncement by the Court as to the content of rules of customary law

which may have been generated by treaty must be treated as subject to a tacit condition *rebus sic stantibus*». But, strictly speaking, we have no legal ground in positive law of nations for such a reasoning. In spite of Article 59 of the Court's Statute we do all believe that the Court declares or even creates customary legal rules, probably on the same ground as late J. L. Brierly explained the binding force of all law — « ... that man ... is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live». (*The Law of Nations*, Sixth Edition, Oxford 1963, p. 56).

In this light I accept such pronouncements by the Court at their face value even if a particular judgment, taken as a whole, does not seem convincing in all its aspects. In particular, the 1969 Judgment on *North Sea Continental Shelf* did not prove the legal nature of so-called «equitable principles» in maritime delimitations as allegedly being «the principles and the rules of international law». In the matter of maritime delimitations no objective principles of legal or even of extra-legal character are logically possible, except contested equidistance and special circumstances principle. That was in fact confirmed by the Chamber of the Court in its 1984 Judgment in the *Gulf of Main Area* case (p. 290, paragraph 81 ; p. 299, paragraph 111 ; etc.). Therefore, I do not believe that natural prolongation or geophysical or geological factors have ever been legal rules in the matter of delimitation of continental shelf, and thus the tacit condition *rebus sic stantibus* cannot operate in regard to them as such. The Court can however tacitally rectify its former wrong practice, and that is in fact its duty. Such «factors» from that Judgment are not more than «equitable considerations» by the Court, or more precisely — advices to parties how to reach an equitable delimitation by themselves, or rather how the Court should act if the parties entrusted it with the task of delimitation of their continental shelf. I explained more details in my article — «'Equitable Principles' in Maritime Delimitations», *Mélanges Ago*, II, pp. 107-137.

In spite of these essential aspects of the 1969 Judgment in regard to which the latter practice of the Court itself proved to be inconsistent, its main statements on relationship between normative rules from codification conventions and customary process seem to be entirely accurate. What is more important, on the basis of these propositions of the Court the Third UN Law of the Sea Conferences acted, especially building its «package deal» and laying down normative rules of generating character.

And pronouncements by the Court in the *Nicaragua* Judgment of 1986 seem to be the continuation of that what was affirmed in its previous practice. Even if some objections by the United States on the jurisdiction of the Court or on admissibility of the application were justified, the

Court's statements *in abstracto* on relationship between treaty rules and general customary law should not be rejected all together.

It would be extremely difficult to prove a hierarchy of sources of international law from Article 38(1) of the Court's Statute (paragraphs 74-77 of your Exposé). At least for States parties to the 1969 Vienna Convention on the Law of Treaties such a hierarchy is not admissible. According to its Article 53, a peremptory norm of general international law, as being «accepted and recognized by international community of States as a whole», can only be a general customary norm, and it is thus put above all treaties. In your book — *The Vienna Convention on the Law of Treaties*, Second Edition, 1984, pp. 203-236, you did yourself recognize the existence of *jus cogens*, although with some hesitation.

However, even a supposed hierarchy of sources would mean only a sequence of application of legal norms of different origins. It is not a basis for use of an obsolete principle of treaty interpretation : *expressio unius exclusio alterius est*. In such circumstances in case that the Court is prevented to apply a treaty, it shall resort to a customary rule, and in its absence to a general principle of law if any.

The same is with your asserted distinction between jurisdiction and applicable law (paragraph 75). The absence of jurisdiction of the Court to deal with disputes arising under multilateral treaties does not necessarily mean the absence of its jurisdiction in regard to disputes arising under bilateral treaties, or customary rules of law, or even general principles of law. The item «any question of international law» from the Declaration of acceptance of the Court's jurisdiction by the United States of 1946, clearly covers the disputes arising all sources of that law (except these specifically arising under a multilateral treaty).

I do not entirely agree in another aspect of your Preliminary Exposé. At paragraph 81, you quoted a part of the 1969 Judgment on the *North Sea Continental Shelf* where the Court discounted the subsequent practice of States «acting actually or potentially in the application of the Convention» (*Reports* 1969, p. 44, paragraph 76). That should be an argument in favour of the thesis that in generation of customary rules only practice of third States to a codification or other convention would be pertinent.

The Court put that argument first of all against the equidistance principle as general customary rules, which was laid down in Article 6 of the 1958 Geneva Convention on the Continental Shelf. At the same time, in my view without justification, the Court neglected «special circumstances» which were another part of the same rule (*ibid.*, p. 46, paragraph 82). That was thus only a subsidiary argument in favour of

the general conclusion of the majority and not a pronouncement by the Court as a matter of principle.

The above argument contradicts the conclusion of the Court from the same Judgment that : «a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected» (*ibid*, p. 43, paragraph 73). That means that participation in a convention can be considered as a part of customary process, sometimes as «practice» of respective States, and sometimes even as their *opinio juris*, depending *inter alia* of terms in which respective principles were couched.

Even you did in your Preliminary Exposé (paragraph 12) quote the part from the Nuremberg Judgment of 1946 concerning the rules of land warfare, expressed in the 1907 Hague Convention IV, and that in spite of its «general participation clause». If for the Nuremberg Tribunal was not decisive in customary process the practice of Czechoslovakia only — which was a third State to the Convention, I do not see the reason that today we only examine practice of a few non-members of the UN organization in regard to Articles 2 and 51 of the Charter.

Thus, when the Nuremberg Tribunal said : «... but by 1939 these rules laid down in the Convention (of 1907) were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war ...», — the same can reasonably be presumed in 1986 for some rules of the 1945 UN Charter and of the 1949 Geneva Conventions — which do not provide a *si omnes* clause.

Moreover, in Article 3 common to four Geneva Conventions on humanitarian law of 1949 I see an application of the content of the Martens clause which was provided in renunciation clauses of all of them. It embraces also «the laws of humanity and the dictates of the public conscience». The Court thus could not neglect laws of humanity from Article 3, even if there was conclusive evidence that its content did not transform into general customary law in the long period between 1949 and 1986, in what I do not believe.

Summing up, I do not find decisive reasons for rejecting the Court's statements on relationship between treaty provisions and customary rules from its 1986 *Nicaragua* Judgment.

*

Notwithstanding the entire practice of the International Court, the central issue of our discussion remains — can participation to a codification or other convention such as the UN Charter, be a substitute for practice of respective States, and can it be a proof of *opinio juris*, especially when a particular treaty provision has only a generating effect of a new

rule. Because all parties to the 1949 Geneva Conventions do not wage wars with all others, their genuine practice in this domain is scarce or non existing. Similar is with some other domains of international relations covered by codification conventions. Your answer to this question seems to be very restrictive, not to say negative.

I will give you an example where your conclusions on separability of treaties and corresponding customary rules can hardly be applicable. Prior to 1958 a number of coastal States expressly proclaimed their continental shelf. These States which did not do that were considered not to possess it, just as is the case now with archipelagic waters of archipelagic States, with contiguous zone and exclusive economic zone. Article 2(3) of the 1958 Geneva Convention on the Continental Shelf provided that : «The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation». Since the adoption and signature of that Convention, and not waiting its entry into force, all coastal States considered to be entitled to their continental shelf without proclamation. How can you apply here strict separability between conventional rights and a right under general customary law ? And regardless this aspect, was in this case satisfied the requirement of practice of States followed by *communis opinio juris* for appearance of a new general customary legal rule ? Like for other «equitable principles», the International Court in its 1969 Judgment neglected at least the element of State practice (if not also that of *opinio juris*), finding — «the most important of all rules of law relating to the continental shelf», enshrined in Article 2 of the 1958 Geneva Convention, «namely that the right of coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exists *ipso facto* and *ab initio* ...» (*Reports* 1969, p. 22, paragraph 19).

In fact an *opinio juris* of a particular State will be behind any pronouncement of a general rule so far as it favours its national interests. That can be a treaty provision (especially one of normative and peremptory character) ; or a pronouncement of the International Court (*e.g.* «equitable principles» *versus* the rule of equidistance in maritime delimitations) ; or even a declaration of the UN General Assembly ; or a unilateral proclamation of another State (*e.g.* the 1945 Truman Proclamation). In such a situation the State claiming a right will not require the uniformity, duration, generality and consistency of previous practice by a greater number of other States, nor it will base its claim on its own former practice if any. And inversely, that same State will seek all arguments in order to prove that a particular pronouncement is not a legal rule, or at least that it is not binding on it, when it opposes its specific national interests.

In all that mass of States' claims, which are necessarily inconsistent, our Commission should discern some objective and reasonable criteria on the impact of treaty provisions on general customary process, especially of rules of normative character which repeat in a chain of codification conventions.

In the law of the sea in particular, my hypothesis is that — if the same normative rules happen to be embodied both in one of the 1958 Geneva Conventions and again in the 1982 UN Law of the Sea Convention, there is a strong presumption in favour of the existence of generally recognized customary rules of international law. That is because the 1958 Conventions are still in force between the strongest and other important maritime States, including some which refused to become parties to the 1982 Convention. And the new Convention has been signed by 155 States, and it has been so far ratified or acceded by more than 35 States. Thus, a rule formulated in general terms, and having the same content in the 1958 and 1982 Conventions, can be considered as having been adopted as such by practically the entire international community of States (*cf.* my article «Internal Waters», *Netherlands Yearbook of International Law 1986*, pp. 5-6). Exactly these normative rules form parts of the minimal legal order of the seas. And the proof of their existence as general customary rules of universal scope is that at seas, including the high seas, the rule of law still predominates chaos and acts of piracy.

*

Now follow my answers to your Questionnaire which are to be taken in the context of my above explanation.

1. I entirely agree with your suggestion for excluding regional conventions.

2. Yes. You persuaded me that the omission from our analysis of chains of conventions adopted by the Hague Conference on Private International Law is entirely justified.

3. I agree with your suggestion to ignore chains of regulatory conventions, in particular in the fields of international commercial aviation, the protection of industrial property, etc. However, as I suggested above, a comparison of clauses from at least some regulatory conventions on their relations with other treaties, with the same clauses from codification conventions, would be very useful. That is only in order to establish possible differences between two types of conventions. However, if you find any practical difficulty in doing so, I withdraw this suggestion.

4. The analysis you made in this respect in your Preliminary Exposé seems to be entirely satisfactory.

5. Our analysis must necessarily be based on the text of the 1969 Vienna Convention on the Law of Treaties. In doing so I do not see the reasons to ignore its Articles 53 and 64 concerning *jus cogens*. Because of my suggestion concerning your question 7, it seems to me than neither we can ignore its Article 60.

6. The answer to this question does not seem to be a simple one especially if we bind it with the larger conception of revision of a codification convention. As we all know, treaties establishing international organizations usually do not require unanimity for their modification, but revised text still applies to all their member States. When the matter is of codification conventions *stricto sensu,* I quoted you the view of O'Connell that in regard to treaties of similar character, «the civil law maxim is weakened». Probably is the same with treaties establishing objective régimes. Thus, the maxim from Article 34 is useful for pedagogic purposes in teaching international law to students, but it does not seem to be absolute even in the matter of the treaty law only.

7. The aspect of simple priority in the application of successive codification conventions does not seem to be sufficient. In my view we cannot ignore *jus cogens*, and thus also not invalidity of treaties.

8. See my answer to question 3.

9. and 10.

I find the conclusions from your Preliminary Exposé on these problems entirely satisfactory.

11. I do not feel competent enough to give you a useful answer.

12. Yes, in many substantial aspects. I shall cite here some statements by the Court on relationship between treaty and custom : «... Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as parts of customary international law, despite the operation of provisions of conventional law in which they have been incorporated». (*Reports* 1984, p. 424, paragraph 73 ; again *Reports* 1986, p. 93, paragraph 174). «... the multilateral treaty reservation / cannot / be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which has caused the reservation to be effective» (*Reports* 1986, p. 94, paragraph 175). «... It cannot ... be held that Article 51 is a provision which «subsumes and supervenes» customary international law ...» (*ibid.*, p. 94, paragraph 176). «... there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter «supervenes» the former, so that the

customary international law has no further existence of its own». (*ibid.*, p. 95, paragraph 177). «... if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other in declining to apply the other rule». (*ibid.*, p. 95, paragraph 178). «... the Charter gave expression in this field / questions of the use of force / to principles already present in customary international law, and that law has in the subsequent four decades developed under the influence of the Charter, to such an extent that a number of rules contained in the Charter have acquired a status independent of it...» (*ibid.*, pp. 96-97, paragraph 181). «... in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice» (*ibid*, p. 98, paragraph 184).

Of great importance is distinction made by the Court between Article 51 of the Charter as a treaty obligation for its parties, and the content of customary legal rule on individual and collective self-defence, as defined by this Judgment (*ibid.*, p. 103-106, paragraphs 194-201 ; pp. 110-111, paragraphs 210-211).

This Judgment has defined State sovereignty on different areas of land, sea and air space on the basis of some multilateral conventions, and concluded : «... The Court has no doubt that these prescriptions by treaty-law merely respond to firmly established and longstanding tenets of customary international law». (*ibid.*, p. 111, paragraph 212).

In regard to the right of innocent passage of foreign vessels in order to enjoy access to ports, the Judgment as confirmed the following : « ... Article 18, paragraph 1(b), of the United Nations Convention on the Law of the Seas of 10 December 1982, does no more than codify customary international law on this point ...» (*ibid.*, p. 111, paragraph 214).

And, « ... if a State lays mines in any of waters whatever in which the vessels of another State have right to access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention N° VIII of 1907 ...» (*ibid.*, p. 112, paragraph 215). The «principles of humanitarian law» mean in this context peremptory norms of general customary international law.

I explained above my views on principles of humanitarian law from Geneva Conventions of 1949.

I am afraid that disregard of foregoing statements, which were all supported by «substantial judicial authority», would make our analysis of relationship between treaty and custom incomplete.

13. In regard to this question you quoted with approval (paragraph 91) the conclusion of Professor Jenning of 1981 on partial abandonment of orthodox tests of custom, *i.e.* State practice and *opinio juris*, in recent judicial practice. However, it is hard to agree with his further conclusion that «much of the new law is not custom at all». If he means new general international law in force, it has obviously not been prescribed by a legislator and its legal basis must necessarily be sought in custom. The abandonment of orthodox tests of custom I see already in the 1969 Judgment on *North Sea Continental Shelf* where the Court stated that even a very widespread and representative participation in a codification convention «might suffice of itself» (*Reports* 1969, p. 43, paragraph 73). Therefore, such a participation is itself a kind of custom-creating practice and/or *opinio juris*. Since that Judgment, until the 1986 *Nicaragua* Judgment, I do not find substantial contradictions in the Court's practice on relationship between treaty and custom.

14. For reasons I explained in my answer to question 13, the practice of third States to a treaty is by no means sufficient, in particular when the matter is of genuine application of normative rules provided in codification conventions. This argument seems to be highly artificial and arbitrary. As we all agree, the aim of codification conventions is laying down rules of codifying, crystallizing or generating effect on customary law. Therefore, the application of these normative rules of all kinds is part and parcel of customary process. If parties to such a convention specifically intended that a new normative rule has generating effect on customary law, then their own practice in its application as such seems to be at least of equal importance with the same practice by third States, for whom such an intention is not to be presumed.

15. Judicial pronouncements on what customary law is, must critically be assessed in each particular case. I explained by reservations with respect to the nature of so-called «equitable principles» in maritime delimitations as alleged «principles and rules of international law». Customary process is progressive, fluid and it never ends. It is expected that a judicial organ will establish in its decisions all its modifications in time, even if they happen regardless any formal changes in texts of codification conventions. Nevertheless, the adoption and signature of these conventions at diplomatic conferences is the main mean of their voluntary articulation by participating States. In this narrower aspect of customary process, the question may be raised of applicability of Article 62 of the 1969 Vienna Convention on the Law of Treaties on codification conventions which are already in force. But I would rather not bind the notion of *clausula rebus sic*

stantibus, which is one of the law of treaties, to judicial pronouncements concerning the level of development of customary law, even if it has been incited by a new codification convention. I do not deny by this the persuasive value of a statement by the Court that a new normative rule provided in the latest codification convention has transformed into customary law.

16-18.

The answers to these questions largely depend on new aspects of relationship between successive codification conventions and customary process, that we should absolve.

19. Late Sir Humphrey Waldock was right stressing that the formation of customary law is a mysterious phenomenon. Probably even more mysterious than *opinio juris* is its objective element of custom-creating practice. Does such a practice consist only of acts, and maybe also of omission of States to act ? Mark E. Villiger has embraced into State practice, *inter alia* statements of State representatives and their votes in the UN General Assembly, at diplomatic conferences, and commentaries of States on draft conventions made by the International Law Commission. Conclusions 20-22 of the Thirteenth Commission, of which our Institute took notice at its last Cairo Session, and scholarly reports of Krzysztof Skubiszewski, have shed some light on this problem when the matter is of resolutions by the UN General Assembly.

Because the doctrine has so far not offered clear answers to the above questions, our Commission cannot avoid discussing the problem to what extent participation of States to one or more treaties may constitute evidence, or it can be an essential part of custom-creating practice and/or of *opinio juris*. Without considering this aspect our job will probably remain unfinished and we shall hardly be able to offer our proposals to the Institute.

That research cannot even be confined to normative, or non-creating, or impersonal rules couched in peremptory language in codification conventions. We must examine also provisions providing rights and duties of parties of some law-making multilateral conventions, such as the Briand-Kellogg pact of 1929, Article 2 of the UN Charter, etc. And if the same rule or principle repeats in a number of even bilateral contractual treaties, that phenomenon can sometimes also be interpreted as «practice» and/or *opinio juris* of their parties.

Especially in regard to the phenomenon of repetition of the same normative rules in a chain of codification conventions we should draw some conclusions in form of a draft resolution, to what extent that repetition can be an evidence of general customary law. That evidence will probably depend on number of parties to each of these conventions,

of admissibility of reservations, etc. I explained above my view with regard to repeated normative rules from codification conventions in the law of the sea.

In these chains of codification conventions, sometimes all of them formally do not enter into force. It can happen that the 1982 UN Law of the Sea Convention never comes into force. Our Commission should examine to what extent such factors may be an obstacle in customary process.

With all best wishes and congratulations.

Sincerely yours,

Vladimir-Djuro Degan

8. Réponse de M. Sompong Sucharitkul

27 May 1989

Dear Confrère,

I write to thank you for your Preliminary Exposé of «Problems Arising from a Succession of Codification Conventions on a Particular Subject». It is a well-constructed exposé which has made reading all the more enjoyable in spite of the many delicate problems detected and exposed for further examination.

As one who had an opportunity to reply to an earlier set of six questions annexed to the forerunner of this exposé, I shall refrain from answering the Questionnaire in depth. For want of time and belated as I am in answering another series of nineteen questions for which the deadline has been past, the attached replies may suffice for present purposes, reserving further comments for discussion at the meeting in Spain.

Thank you once again for not ceasing to supply members of the First Commission with inexhaustible inspirations.

With esteem and best wishes,

Yours sincerely,

Sompong Sucharitkul.

Replies to the Questionnaire :

1. My answer to the first part of question N° 1 is in the affirmative. For the second part, it would appear difficult to exclude entirely problems arising from the relationship between a *regional* convention and a subsequent convention on the same subject. Attention is directed to the problems arising from obligations assumed by a State under a regional convention and under the universal or global convention in the fields of human rights, including civil and political rights as well as social, economic and cultural rights. Do they in fact cover precisely the same subject-matter ? Should the State be bound to accord greater protection or to assume heavier burden in favour of human rights, whichever happens to be the case, whether regional or universal ? Other fields which may also deserve attention include fishery management and conservation as well as environmental protection and regulation concerning depletion of ozone layers and allocation of geostationary orbits. Questions relating to fragmentation or attribution of rights and obligations on regional basis as an essential part of the integral global unit would appear to fall squarely within the scope of our present study. In the latter category of successive conventions, the global ones invariably contemplate further regional arrangements as in the exploitation of certain migratory species of fish, such as tuna, salmon, turbot, etc., and other living resources of the sea such as seals and whales. Alternatively, regional arrangements should anticipate global regulations, such as problems of transboundary pollution and its regulations by an international or regional authority. Transboundary pollution could not always be contained within a sub-regional or region, but tends to spread to the entire global unit.

2. Our study should begin initially with conventions in the field of public, as opposed to private, international law, but we should remain mindful of the need for a parallel study in the field of private international law. The appointment of a second commission should not be ruled out. After all, it is the techniques of the interpretation and application of the law of treaties which is public international law that conventions on the harmonization and unification of private laws will be interpreted and applied. The problems raised in connection with the interpretation and application of successive conventions, such as the Hague, Hague-Visby Rules and the Hamburg Rules, may result in fundamentally different amount of compensation owing to different limitation of liability which may depend on the venue or forum of the Convention or conventions to which the State of the forum happens to be Party. At least the parts closely linked to public international law rules relating to interpretation and application of conflicting or overlapping successive treaties on the same subject-matter deserve our attention. Of course private international law problems do not stop there although they start from there in connection

with the choice of law and of jurisdiction, which may open the door also to forum shopping to obtain higher compensation.

3. The criteria contained in the first part of question N° 3 appear to be sound and tenable. At this stage, the «chains» of regulatory conventions need not occupy our primary consideration, as they are of administrative character although the conventions may bear the same distinctive characteristics of a «codification convention». By their very nature, commercial aviation, intellectual property and postal telecommunication services technically belong to the service sectors which must continue progressively to develop their own distinctive regulatory régimes. They constitute special régimes which could regulate their own growth and survival or extinction. Thus, the Warsaw Convention 1929 is continually being overhauled in regard to the limitative clause on liability of carriers with continuing depreciation of currencies and inflation.

4. If we could leave out special regulatory régimes in question N° 3, there would appear to be no harm in leaving aside also the relationship between the Law of the Sea Convention of 1982 and earlier maritime law conventions. Despite some overlap and even confusion on the notions of the law of the sea as an important part of public international law, maritime law or the law of the carriage of goods and passengers by sea and other incidents of navigation form distinct parts of private or commercial law. Their international regulations, harmonization and unification have often been effected through the process of conventions. It should be pointed out, however, that several aspects of navigation, safety at sea and pollution from vessels cannot be regulated exclusively by national legislation, but have been subjected to some measure of international control as part and parcel of the modern law of the sea. Tangentially there is not marginally, there may be occasions to make allusion to problems arising out of maritime law conventions which are intimately connected with the problems of marine environment and conservation of the living resources of the sea.

5. I agree that the key provisions of theVienna Convention for our current mandate are Articles 30, 40, 41 and 59.

6. Your reading of Article 34 coincides with my understanding. This is but an application of the maxim : *pacta tertiis nec nocent...* Or course, there is nothing which precludes a third party from consenting to abandon its rights under the earlier convention.

7. To begin with, the breach of a treaty provision appears plainly to engage State responsibilities for the party violating such prohibition. The answer to the question whether or not the later treaty is to be considered as invalid must be found in the law of treaty itself. Clearly a later treaty in violation of an imperative norm which admits of no derogation cannot

be regarded as valid. Thus, if the prohibition under the earlier treaty is constitutive of an imperative norm beyond mere treaty obligation, the later treaty would be invalid. A treaty purporting, for instance, to explore and exploit the common heritage of mankind outside of and in competition with the international régime set up by the United Nations would be as invalid as a treaty to conduct narcotic trade or traffic in white slavery, nor could a State party to a subsequent convention be compelled to perform an obligation which would destroy the object and purpose of an earlier convention to which it was party.

8. As the Exposé appears to reflect, there is no single particular pattern, although several different patterns may have emerged, depending on the subject-matters of the successive conventions. An endeavour may be made to classify them into categories, such as, revision, substitution, replacement, abrogation, supplementing or complementing or indeed implementing existing rules at regional or sub-regional levels, etc.

9. The content of clauses clarifying relationship between the new convention and existing ones may help reflect the will of the parties to the new convention as to its status vis-à-vis existing conventions. This may be but need not be a relationship of primacy, or priority or superiority. It could be anything from a wide range of relationship, abrogation, substitution, replacement, amendment, revision, modification, supplementary protocol, complementary accord or implementation in different geographical or temporal dimensions.

10. This may indeed occur. There may thus be room for permissible derogation by subsequent *lex specialis* which should prevail in cases of possible conflict or incompatibility with the *lex generalis*. The next question is the definition of what constitutes «conflict» or «incompatibility». Clearly, a later convention dealing with seizure of sea-going vessels on the high-sea may serve to correct or expand the classical definition of «piracy» under the Convention of 1958, transplanted into the Convention of 1982. Piracy need not be from vessel to vessel or aircraft to aircraft, nor for private end.

11. Different particular patterns are discernible in the variety of amendment clauses to be found in the later multilateral treaties. Instances of such particular patterns, relating to the reasons or *raison d'être* for the amendment, include the need to update or revise the substantive content which has fallen into desuetude, being out of time or out of tune with the new conditions (Warsaw Convention) ; the necessity to expand the scope of application because of newly emerged situations such as armed conflict of non-national character, wars of national liberation (The Hague laws and Geneva laws for the wounded and the sick), and the need for more detailed specialization and specification in actual implementation

because the existing convention has fallen out of place, *rebus sic stantibus* or fundamental change of circumstances necessitating substantive amendment for effective implementation such as the South Pacific Forum Treaty concerning management of highly migratory species in the South and Southwest Pacific.

12. To some extent, the answer may be in the affirmative. Some new light may have been shed. Or more accurately, new emphasis may have been placed on some aspects of the relationship *inter se* between treaty and custom. The Court has been careful in refraining from generalization by way of *obiter* in spite of temptations.

13. The answer is yes. The criteria remain generally valid, but are subject of necessary qualifications, varying with time, place and circumstances.

14. One should look at the practice of States generally, including parties and non-parties to the treaty in question. There is an inherent relativity between non-parties, prospective parties including signatories and parties. Parties may also withdraw and re-enter or re-ratify a convention as they wish, *e.g.*, Poland and the Brussels Convention of 1926.

15. A judicial pronouncement must be given the effect to which it is entitled. A pronouncement by the Court regarding the declaratory character of a codification convention is only evidence of existence or emergence of a rule of customary law. It does not entail any freezing effect, custom or its progressive development is not frozen by a judicial pronouncement labelling its character as being customary law or becoming one. The status of custom, not unlike that of other sources of international law, has no place out of time. It must exist only within the running or passage of time. Out of time, there is no law. A frozen law is dead law. It has no time frame within which to operate. There is no need to explain this fundamental truth on any tacit condition of *rebus sic stantibus*. In the ultimate analysis, nothing is permanent. Nothing stands will relative to the living custom. Without the need to identify the reason for non-freezing of any custom with *rebus sic stantibus,* there is no necessity to reply to the second question, which conveys a restrictive implication.

16. The content of a plausible resolution should reflect the summation of the results of our enquiry with classification or categorization of patterns discernible from the practice of States.

17. Certain tentative conclusions may be the logical and natural outcome of our study, so long as no sacrosanctity or immutability is attached to them. We need not request endorsement of the conclusions which are only at best tentative, as we are still well within the time flow. Besides, it would be premature in longer time-frame to expect endorsement. It would be sufficient to request that the Institute take note of them.

18. Yes, without prejudice to question 17 and answers thereto, we should not be precluded from presenting a general recommendation along the line intimated in question N° 18.

19. The eighteen questions raised in the Questionnaire adequately cover most problems. Other questions which the Commission might take up for study in this connection include :

(1) Should codification conventions in general contain provisions for self-revision, amendment, modification, abrogation, substitution or detailed implementation by future conventions ?

(2) Should subsequent conventions on the same subject matter provide for the precise relationship with earlier conventions ?

9. Réponse de M. Francis Wolf

28 July 1989

My Dear Eminent Colleague,

It is with the greatest pleasure and deep interest that I have read your Preliminary Exposé on the «Problems arising from a Succession of Codification Conventions on a Particular Subject». Allow me to congratulate you most warmly for this magnificent analysis which is not only extremely thorough but also very rich in substance. We are all most grateful to you for this contribution.

I am enclosing the note which I have prepared for our meeting as well as the answers to the Questionnaire attached to your Exposé.

Looking forward to seeing you again, please accept my very best and sincere wishes.

Sincerely,

Francis Wolf

1. Je me rallie entièrement aux critères et exemples proposés par Sir Ian Sinclair dans son remarquable rapport, pour définir, en particulier à la lumière des travaux de la Commission du Droit international, les instruments successifs (et, le cas échéant, déjà révisés) portant essentiellement et progressivement codification de règles de droit sur un

même sujet. La liste des conventions énumérées au début de son Exposé préliminaire est particulièrement éloquente.

2. Une référence spécifique au *corps* des conventions successivement adoptées dans le cadre de l'Organisation internationale du Travail, depuis 1919, pourrait éventuellement avoir aussi sa place ici (à titre d'illustration, l'on pourrait mentionner l'*ensemble* des conventions «maritimes», adoptées aux sessions *maritimes* de l'Organisation).

3. Parallèlement, certaines dispositions de conventions adoptées par des conférences plénipotentiaires, sur convocation des Nations Unies — et auxquelles l'OIT a été associée — reflètent le principe de complémentarité entre les institutions intéressées, pouvant aboutir à un faisceau de normes nouvelles se reliant les unes aux autres.

4. C'est ainsi que l'OIT a été amenée à maintes reprises àprendre part à l'élaboration de tels instruments de codification dans le cadre de conférences diplomatiques (ce qui a, par exemple, été le cas pour la Convention des Nations Unies sur le droit de la mer).

5. Pour ce qui est des conventions internationales du travail, c'est dès 1939 que le Bureau international du Travail a publié un ouvrage, sous la direction de Wilfred Jenks, présentant les conventions et recommandations adoptées successivement — depuis la création de l'Organisation vingt ans plus tôt — par la Conférence internationale du Travail, sous la forme méthodique d'un «*Code international du Travail*». En 1954, une édition de mise à jour est parue, en deux volumes de plus de mille pages chacun.

6. La liste des conventions «de codification» énumérées au début du Rapport de Sir Ian, adoptées dans le cadre des Nations Unies àl'occasion de conférences de plénipotentiaires, est particulièrement éloquente. Il paraîtrait peut-être indiqué d'ajouter, en note de bas de page, après la mention «... the 1949 Geneva Conventions ...», une référence particulière, à l'apport de l'OIT, par projection, dans ces instruments, de ses propres normes, en ce qui concerne essentiellement le traitement et les conditions de travail des personnes protégées au titre des Conventions de Genève[165]. Les normes de codification se rejoignent ici, éloquemment, d'une institution à l'autre.

7. Au paragraphe 16, je me rallie totalement à la définition du Rapporteur des conventions de codification et à leur destination aussi universelle que possible. Et il paraît en effet essentiel de veiller

165 Voir F. Wolf, «L'OIT et la Croix-Rouge — Convergences de leur action», *Mélanges Pictet*, pp. 1011-1019.

particulièrement à ce qu'il n'y ait pas de contradictions sur les principes majeurs.

8. En ce qui concerne la Convention sur le droit de la mer de 1982 et les instruments antérieurs, l'on pourrait peut-être souligner aussi combien, d'une part l'*ensemble* des instruments adoptés progressivement, depuis 1919, aux «Sessions maritimes» de la Conférence internationale du Travail[166] et, d'autre part, la Convention des Nations Unies elle-même, se rejoignent, tout en se complétant, ici aussi, sur nombre de points communs.

9. Au paragraphe 19, je suggérerais d'ajouter, à la mention des «conventions on the humanitarian law ...», certains instruments (à titre d'exemple, la Convention internationale du travail sur le travail forcé, de 1930) qui ont ouvert la voie à des mesures de protection et qui s'intégrent de plus en plus aux normes internationales généralement établies. Il devrait d'autre part être précisé que la Commission devrait au minimum poursuivre la question de la codification des instruments énumérés au paragraphe 1, ainsi que la Convention sur le droit de la mer de 1982 et les conventions «humanitaires» applicables aux conflits armés. Peut-être pourrait-on y ajouter certaines références aux conventions internationales du travail en mentionnant, à titre d'exemple, les instruments s'appliquant au travail forcé, au travail de nuit des enfants, à la prévention des accidents, etc.

10. Sur le *contenu de l'étude* (paragraphes 20 et suivants), je me rallie largement aussi à l'analyse riche d'enseignements de Sir Ian Sinclair. Peut-être pourrait-il être rappelé qu'au cas où l'ordre du jour de la Conférence internationale du Travail comporte une révision totale ou partielle d'une convention antérieure, «et à moins que la nouvelle convention ne dispose autrement ... :

> a) la ratification par le Membre de la nouvelle convention portant révision entraînerait de plein droit, nonobstant l'article «x» ci-dessus, dénonciation immédiate de la présente convention, sous réserve que la nouvelle convention portant révision soit entrée en vigueur[167] ;
>
> b) à partir de la date de l'entrée en vigueur de la nouvelle convention portant révision, la présente convention cesserait d'être ouverte à la ratification des Membres.

---

166 Voir, par exemple, dans la Troisième Conférence des Nations Unies sur le droit de la mer, Vol. XVI, l'intervention de M. Rosenne, p. 61 ; et Francis Wolf, «L'OIT et la Convention des Nations Unies sur le droit de la mer», *Mélanges Rosenne*, 1989.

167 Voir les articles 43 à 45 du Règlement de la Conférence.

2. La présente convention demeurerait en tout cas en vigueur dans sa forme et teneur pour les Membres qui l'auraient ratifiée et qui ne ratifieraient pas la convention portant révision».

11. Sur la *révision* des Conventions internationales du Travail, lorsqu'il apparaît que le «Code» pourrait être modifié ou mis à jour, l'ensemble de la procédure fait l'objet des articles 43 à 45 du Règlement de la Conférence générale.

12. J'ai lui avec beaucoup d'intérêt le paragraphe 48 qui expose l'affaire du filetage dans le Golfe du St. Laurent. L'on pourrait s'interroger sur l'opportunité qu'il y aurait eu, en un tel cas, d'y associer, à la recherche d'une solution, le BIT, compte tenu des aspects *sociaux* aussi bien qu'*économiques* qui étaient en cause[168].

13. Sur le problème évoqué au paragraphe 49, je me rallie à la démonstration éloquente et aux conclusions du Rapporteur. L'analyse détaillée qu'il nous présente est appelée à guider toujours davantage les efforts de l'Organisation, comme ceux d'autres institutions, sur le plan humanitaire à travers le monde.

14. Au paragraphe 51 du rapport, concernant en particulier les relations avec d'autres conventions et accords internationaux, il conviendrait peut-être de rappeler que l'Organisation internationale du Travail n'admet ni modification ni réserve de la part d'un Etat membre ratifiant une Convention internationale du Travail[169].

15. Les paragraphes 3 à 5 de l'article 311 de la Convention sur le droit de la mer concernant la relation existant entre d'autres conventions et accords internationaux ne pourraient s'étendre à des instruments tels que les Conventions internationales du travail, un groupe d'experts ne pouvant avoir lui-même ici la possibilité de modifier ou de suspendre les dispositions conventionnelles dont il s'agit (paragraphe 51). Les développements qui suivent concernant directement le droit humanitaire mettent admirablement en relief le véritable code qui s'est forgé progressivement sous l'égide de la Croix-Rouge, depuis le siècle dernier, à travers des efforts convergents et au plan mondial — auxquels des institutions internationales, dont l'OIT, ont été associées.

---

168 Les Terre-neuviens rapportent leur pêche à la côte où le travail de préparation et de conservation du poisson est en général confié essentiellement, au retour de navigation, aux femmes, tandis que les pêcheurs canadiens opèrent déjà en cours de navigation.

169 Voir Nicolas Valticos «*Droit international du Travail*» 2e édition, pages 551-552.

16. Aux paragraphes 67 et suivants, je ne peux, ici aussi, que me rallier à la logique de l'analyse du Rapporteur. Tout ce qui suit sur l'obligation de ne pas priver un traité de son objet «avant son entrée en vigueur», comme le dit Cahier, est évidemment de grande importance.

17. Sur les relations entre codification et coutume (article 38 du Statut de la Cour internationale de Justice), l'on peut sans doute s'interroger parfois sur la «*hiérarchie* des sources» (conventions internationales, coutume ou principes généraux de droit). Le cas échéant, il appartient alors à la Cour d'appliquer les conventions internationales, la coutume ou les principes généraux pertinents, compte tenu des faits et arguments.

18. Sur les principes généraux du droit international concernant les relations entre des conventions de codification et le droit coutumier, d'une part, (paragraphes 68 à 79 du rapport) et, d'autre part, sur les traités «déclaratoires» ou se rattachant au droit international coutumier, je ne peux que remercier le Rapporteur, là aussi, de son éloquente et savante prestation.

19. Pour ce qui est des conclusions du Rapporteur, à ce stade, et d'un programme futur, je me rallie tout à fait à ses propositions et au programme qu'il suggère pour poursuivre nos communes réflexions.

Réponses au Questionnaire

Question 1. Je ne suis pas certain qu'une «convention de codification» puisse toujours être identifiée comme telle. Je songe à la diversité des accords ou conventions entre Etats à l'échelle mondiale, continentale ou régionale, etc., ou encore à un Etat qui adopte la législation d'un autre Etat. Par exemple, j'ai à l'esprit l'adoption par la Turquie du Code civil suisse.

Questions 2. et 3. Ceci dit, je pense que l'on pourrait s'en tenir, dans le cadre actuel, aux problèmes relevant du droit public. Je suis enclin à m'en tenir, à ce stade, aux traités et conventions conclus entre Etats et ouverts à ratification. Mais il me paraît difficile de faire une différence entre de tels traités et des conventions ouvertes à la ratification des Etats en matière d'aviation commerciale, de propriété intellectuelle ... ou de conventions internationales du travail.

Question 4. Il me paraît très prudent de maintenir, sur le plan du droit de la mer, la législation internationale applicable en matière maritime, dans la mesure où elle pourrait suppléer ou confirmer les dispositions de la Convention sur le droit de la mer de 1982.

Question 5. Oui

Questions 6. et 7. J'ai déjà fait part de mon opinion.

Question 8. Sur ce point, je ne puis que rappeler la mise à jour pratique qui s'opère à l'OIT lors d'une révision d'une ancienne convention internationale du travail.

Question 9. Dans le système de l'OIT, une convention ancienne demeure en vigueur, sauf dénonciation, pour les Etats qui l'ont ratifiée et qui n'ont pas ratifié la convention révisée.

Question 10. Non applicable dans le système OIT.

Question 11. Une convention de l'OIT soumise à révision est adoptée en tant que telle par la Conférence internationale du Travail comme toute autre convention

Question 12. —

Question 13. —

Question 14. et 15. Non applicable pour l'OIT.

Question 16. —

Question 17. La réponse ici me paraît dépendre des résultats de notre prochaine session.

Question 18. Il est possible, au moins dans certains cas, qu'il serait utile d'inclure dans la nouvelle convention des dispositions qui assureraient en quelque sorte un pont entre l'ancienne codification et la nouvelle — et entre les Parties à l'un ou l'autre instrument.

Francis Wolf

10. Réponse de M. Dietrich Schindler

August 5, 1989

Dear Confrère,

Please pardon the tardiness of my reply. Your Preliminary Exposé has been extremely helpful in order to recognize the problems of the topic of the First Commission. I would answer your questions as follows.

1. I think that our study can limit itself to conventions designed to codify or progressively to develop rules of *general* international law and open to *universal* participation. This does not exclude taking into consideration regional codification conventions whenever such conventions contain clauses or lead to problems identical with those of universal conventions. I do not believe, however, that existing regional conventions can contribute much to the subject of our Commission.

2. Insofar as codification conventions on private international law show problems identical with those of conventions on public international law it would seem logical to include them into our study. However, as I am not an expert in private international law, I feel unable to judge whether this is the case.

3./4. I agree that the expression «codification convention» should be taken to mean conventions designed to codify or progressively to develop customary law. As you suggest, it would therefore seem appropriate to consider the relationship between the particular conventions on the law of the sea and the UN Convention of 1982, but largely to ignore «chains» of other regulatory conventions.

5. Yes.

6. Yes.

7. I would assume that a later treaty must be considered as invalid in at least two cases :

a) if it violates a norm of *jus cogens*. In this connection I may point to the following provision of the four Geneva Conventions of 1949 (art. 6, paragraph 1, of Conventions I-III, Art. 7, paragraph 1, of Convention IV) : «No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains [prisoners of war / protected persons], as defined by the present Convention, nor restrict the rights which it confers upon them». I would assume that a prohibited agreement of this kind would be considered as invalid, presumably because any agreement restricting rights which the Geneva Conventions confer upon victims of war must be considered as violating *jus cogens*.

b) If a convention explicitly states that certain agreements concluded in violation of the convention are void, invalidity ought to be assumed among the parties to the convention.

8. I could not add anything to what you state in paragraphs 105 and 106 of the Preliminary Exposé.

9. Yes.

10. I do not think that a convention which regulates in greater detail questions regulated in a more general way by an earlier convention necessarily prevails over the earlier convention by virtue of the *lex specialis* rule. Every norm has to be interpreted individually. Thus common Article 3 of the Geneva Conventions of 1949 on non-international armed conflict has not become obsolete by Additional Protocol II of 1977 (This is also confirmed by Article 1, paragraph 1, of Additional Protocol II).

11. I do not believe so.

12. The judgment of the *Nicaragua* case has clearly affirmed that treaty law and identical customary law can coexist and can be applicable side by side.

13. The criteria for the generation of customary law laid down in 1969 seem still to be considered as valid, but the International Court of Justice has applied them with greater flexibility in more recent decisions.

14. In assessing the element of State practice it seems correct to me to look also to the practice of States acting in the application of the treaty. However, in the case of States parties to a convention the element of *opinio juris* is more important for evidencing customary law.

15. It seems evident to me that judicial pronouncements lose their validity when the conventional or customary law on which they are based changes. This is also true if new rules of customary law come into existence by other means than by codification conventions. A continental lawyer has probably less problems in this respect than an Anglo-Saxon.

16. I would assume that a resolution — as the Preliminary Exposé — should deal with (1) the general principles of the law of treaties, (2) the general principles of international law concerning the relationship between codification conventions and customary law. The first part would inevitably to a large extent be a commentary on and a completion of the relevant provisions of the Vienna Convention on the law of treaties, the second part would take up the problems dealt with in the Preliminary Exposé but rather avoid to touch the general problems of the relationship between treaty and custom.

17. I think that we should seek to formulate conclusions and decide at a later moment whether they can form a resolution endorsed by the Institute or whether the Institute should only take note of them.

18. Yes.

19. No proposal.

I am looking forward to seeing you in Santiago de Compostela.

Yours sincerely,

Dietrich Schindler

Provisional Report

May 1994

The Rapporteur wishes to thank very warmly all those confrères who responded so fully and so positively to the Questionnaire circulated with his Preliminary Exposé, and who participated in the fruitful meetings of the First Commission at Santiago de Compostela in 1989 and Basel in 1991. This has enabled the Rapporteur to prepare the present Provisional Report which, it is hoped, will enable further progress to be made in the study of the topic.

1. Scope of the topic

Replies to the Questionnaire indicated a broad measure of agreement that the expression «codification convention» should be interpreted as meaning any convention designed to codify or progressively to develop rules of *general* international law and open to universal or at least very wide participation by States. On the other hand, a number of members of the Commission were of the view that the Commission should not *a priori* exclude problems arising from a succession of *regional* codification conventions or indeed from the relationship between a regional codification convention and a subsequent universal codification convention. Mr *Rosenne* pointed out that various provisions in the 1982 UN Law of the Sea Convention envisage a role for regional agreements, especially in the field of the protection and preservation of the marine environment. Mr *Münch* was definitely of the view that regional codification should be taken into account. Mr *Crawford* believed that the study should, in principle, focus on the relationship between general rather than regional codification conventions ; there were relatively few of the latter if one did not take into account regional human rights treaties, but inter-American codification treaties should not be entirely excluded. Both Mr *do Nascimento e Silva* and Mr *Schindler* considered that the Commission should concentrate on the problems arising from a succession of *general* codification conventions, but should not automatically exclude consideration of regional codification conventions, at least to the extent that they might raise problems identical with those raised by a succession of general codification conventions. Mr *Sucharitkul* wished the study to go even wider and encompass the relationship between regional and general codification conventions, pointing out *inter alia* that there could be a disparity between the obligations

assumed by a State under a regional convention on human rights and under a universal convention on the same subject. Mr *Degan*, Mr *Torres Bernardez*, Mr *Marotta Rangel* and Mr *Wolf* were all in favour of excluding regional codification conventions, although Mr *Wolf* expressed some doubt as to whether a «codification convention» can always be identified as such.

Also relevant to the scope of the topic is the question whether the study should be confined to successive codification conventions in the field of *public* international law or should also embrace successive codification conventions in the field of *private* international law. The majority favoured confining the study to legal problems arising from successive conventions on the same subject in the field of public international law, but Mr *Münch*, Mr *Marotta Rangel* and Mr *Schin*dler thought that there were aspects of successive codification conventions in the field of private international law which might be of interest. A compromise view, favoured by Mr *Rosenne*, Mr *Torres Bernardez* and Mr *Sucharitkul*, was that the problem of successive codification conventions in the field of private international law might be studied separately, and possibly at a later stage, by another Commission.

Related to this is the question whether one of the distinctive characteristics of a codification convention for the purposes of the study is that it should contain provisions which are declaratory of customary law, or may crystallise emergent rules of customary law, or may generate new rules of customary law, binding even upon non-parties. There was virtual unanimity within the Commission that this was so, although Mr *Marotta Rangel* preferred to regard the process whereby provisions of a codification convention may generate new rules of customary law as being a *result* of the convention rather than one of its distinctive characteristics. In consequence, there was also virtual unanimity within the Commission that, in principle, the study should *not* extend to legal problems which might arise from «chains» of regulatory conventions in such fields as the regulation of international civil aviation, the protection of industrial or intellectual property and the regulation of postal and telecommunications services, Mr *Münch* commenting that such conventions can be ignored insofar as they establish obligations and régimes without posing norms of general international law. Mr *Degan* did however make the point that clauses from at least some regulatory conventions on their relation with other treaties might usefully be compared with similar clauses from codification conventions.

Opinion within the Commission was more divided on the question whether the study should embrace the relationship between the 1982 Law of the Sea Convention and earlier maritime law conventions of a regulatory character. Mr *Rosenne* was of the view that the study should in principle

consider that relationship. Mr *Degan* was of the same opinion, and Mr *Crawford* was also in principle favourable to this point of view, subject to the qualification that earlier regulatory conventions should be considered only to the extent that they purported to regulate issues of general international law. As against this, Mr *Münch*, Mr *do Nascimento e Silva* and Mr *Sucharitkul* were of the opposite point of view. Mr *Marotta Rangel* also expressed himself in the negative on this point, while suggesting that the Commission might consider the relationship between the 1982 Law of the Sea Convention and earlier conventions in the field of maritime law in the light of the relevant provisions of the 1982 Convention (*i.e.* Articles 35(c), 237(i) and (2) and 311(5) and (6)). The replies of other members of the Commission on this issue were inconclusive, but Mr *Torres Bernardez* made the important point that some codification conventions were of a *mixed* character and might contain rules declaratory of general international law together with rules which were essentially regulatory in their nature. The 1982 Law of the Sea Convention itself was an example of this phenomenon and in addition constituted, at least in part, the constituent instrument of an international organization (the International Sea-Bed Authority). Accordingly, it might be wise to incorporate in any final conclusions of the Commission a general reservation concerning possibly regulatory provisions contained in what were otherwise codification conventions.

In the light of the foregoing, the Rapporteur believes that there is a sufficiently broad measure of agreement on the following points :

1) For the purposes of the study, a codification convention should be taken as meaning any convention designed to codify or progressively to develop rules of *general* international law and open to universal or at least widespread participation by States. Codification conventions of this nature should be the main focus of the study, but it should not exclude consideration of the legal problems arising from a succession of *regional* codification conventions or from the relationship between a regional codification convention and a subsequent universal codification convention.

2) The study should be confined to successive codification conventions in the field of *public* international law and should not take into consideration successive codification conventions in the field of *private* international law, which could be studied separately if the Institute so desired.

3) One of the distinctive characteristics of a codification convention as defined in (1) is that it should contain provisions which are declaratory of customary law or may crystallize emergent rules of customary law or may be capable of generating new rules of customary law, binding even upon non-parties.

4) In consequence, legal problems arising out of «chains» of regulatory conventions are in principle excluded from the scope of the topic. However, in the context of the U.N. Law of the Sea Convention, 1982, the study should consider the relationship between that Convention and earlier conventions in the field of maritime law in the light of the relevant provisions of the 1982 Convention.

5) Bearing in mind that some codification conventions as defined in (1) may be of a *mixed* character in the sense that they include not only provisions of the kind described in (5) but also provisions which are essentially regulatory in character, it would be desirable in any final conclusions to include a general reservation preserving the special nature of those essentially regulatory provisions.

2. *Treaty law aspects of the topic*

The majority view within the Commission is that the *principal* provisions of the Vienna Convention on the Law of Treaties (VCT) relevant to the topic are Articles 30, 40, 41 and 59. But Mr *Rosenne* doubts the relevance of Articles 40, 41 and 59, pointing out that :

a) As regards Article 40, a distinction has to be drawn between the «right» of a State to become party to an unamended convention after it has been amended (which will depend on the appropriate participation clause) and any substantive third party rights which a State not party to an amended convention may enjoy under the earlier unamended convention, it being understood that Article 36 does *not* confer on the States are organizations concerned the right to prevent any amendment of the treaty by its parties ;

b) Part IV of the VCT (Articles 39 to 41) applies only to treaties which have already entered into force, so that «amendment» of a treaty before its entry into force is a political operation pure and simple to which the VCT rules do not or cannot apply ;

c) Article 41 has no real relevance for the mandate of the Commission ;

d) Article 59 applies only in respect of parties to the earlier treaty and cannot apply in relation to a State not party to the earlier treaty.

Mr *Münch* considers that Articles 43 and 60 may also be relevant, and Mr *Degan* suggests that account should also be taken of Articles 53 and 64, and of Article 60.

The Rapporteur also raised in the Questionnaire the related question whether Article 34 of the VCT (expressing the basic *pacta tertiis* rule) represented a fundamental principle of the law of treaties, so that the States parties to a later convention cannot purport, as a matter of treaty law, to deprive States which do not become parties to the later convention

of their rights under an earlier convention. The majority of the Commission responded affirmatively to this question, Mr *Crawford* commenting that Article 34 of the VCT was merely a reflection of the more fundamental principle of international law that agreements, arrangements or acts of other States cannot impair the rights of third States, and Mr *Sucharitkul* observing that third States can of course abandon their rights under an earlier convention. But Mr *Rosenne* and Mr *Münch* responded in the negative and Mr *Degan* was doubtful, maintaining that Article 34 was not absolute.

From the foregoing, it is evident that there is virtual unanimity within the Commission that Article 30 of the VCT is the most relevant provision as regards the treaty law aspects of the topic. But there is a division of view as to whether Article 30 of the VCT sufficiently covers all the legal problems which may arise in connection with the application of successive codification conventions on the same subject. Mr *Torres Bernardez,* Mr *do Nascimento e Silva*, Mr *Marotta Rangel* and, with some qualification, Mr *Crawford* think that Article 30 of the VCT is right to concentrate on the *order of priority* in the application of successive treaties relating to the same subject-matter. But a variety of views were expressed on the related question whether the conclusion by two or more States of a later treaty in violation of a prohibition to conclude the treaty contained in an earlier treaty by which one or more of these States is bound should be treated simply as a question of responsibility or whether there were circumstances in which the later treaty could be considered as invalid. Mr *Torres Bernardez* rightly points out that certain treaty law consequences will flow from the conclusion of such a treaty (consequences dealt with in Article 60, and possibly Articles 41 and 59, of the VCT), so that it cannot be said that it should be treated simply as a question of responsibility. He, and indeed all other members of the Commission, expressed the view that there certainly were circumstances in which the later treaty could be considered invalid - for example, where it conflicted with an existing rule of *jus cogens*, whether contained in the earlier treaty or otherwise. But both Mr *Torres Bernardez* and Mr *Crawford* believed that this resulted from the operation of a distinct rule about the status of rules of *jus cogens* and had little or nothing to do with the application of successive treaties relating to the same subject-matter, Mr *Torres Bernardez* commenting that the concept of *jus cogens* should not be confused with treaty law situations resulting from treaty provisions of the kind typified by Article 311(6) of the 1982 U.N. Convention on the Law of the Sea. Mr *Rosenne* was likewise of the view that Article 311(6) of that Convention did not express a rule of *jus cogens* ; but Mr *Sucharitkul* appeared to think otherwise. Mr *Schindler* was alone in taking the view that the invalidity of a later treaty might result, not only from the violation of a rule of *jus cogens* (and in this context, he drew attention to Article

6(1) of the first three Geneva Conventions of 1949 on international humanitarian law and Article 7(1) of the fourth Geneva Convention of 1949), but also from the breach of a provision in the earlier convention stating that treaties concluded in violation of that provision were void ; as against this Mr *Torres Bernardez* argued that the violation of an earlier treaty by the conclusion of a later treaty is not included among the general grounds or causes of invalidity of treaties codified by the VCT, and that Article 42(1) of the VCT specifies that the validity of a treaty or of the consent of a State to be bound by the treaty may be impeached only through the application of the Convention.

In the light of these differing expressions of view, the Rapporteur believes that such differences as exist among the members of the Commission on the treaty law aspects can be reconciled if action on the following lines is taken :

1) In the final conclusions to be formulated by the Commission, primary emphasis should be put on the rules contained in Article 30 of the VCT, while bearing in mind, where appropriate, the provisions of Articles 40, 41 and 59 of the VCT.

2) There should be a saving in the final conclusions in respect of the operation of Articles 53 and 64 of the VCT.

3) There should likewise be a saving in the final conclusions in respect of the treaty law consequences of breach of a provision in the earlier treaty, with reference to Article 60 of the VCT, and also in respect of the other consequences of breach of such a provision deriving from the law of State responsibility.

The Rapporteur simply notes for the record that there is an interesting discussion of the relationship between treaty law and the law of State responsibility in the event of a breach of treaty in the recent arbitration between New Zealand and France, the award of the three-man tribunal (under the chairmanship of Judge Jimenez de Arechaga) having been rendered on 30 April, 1990.

In addition, the vast majority of members of the Commission were unable to discern any particular pattern in the variety of clauses inserted in new codification conventions and designed to clarify the relationship between the new convention and earlier or later conventions on the same subject. Mr *Rosenne* comments that «the negotiation of these clauses can be a very difficult matter, both politically and from the point of view of legal technique and good craftsmanship». Mr *Degan*, without pressing the point, suggests that there could be value in comparing clauses from at least some regulatory conventions on their relationship with earlier or later treaties on the same subject with corresponding clauses in successive codification conventions. Mr *Sucharitkul* suggests that an endeavour might

be made to classify the variety of such clauses into categories, such as revision, substitution, replacement, abrogation, supplementing or complimenting existing rules, etc. ; but the Rapporteur is not entirely persuaded that this would be productive. Mr *Wolf*, on the other hand, rightly draws attention to the consideration that successive treaties on the same subject concluded under the auspices of an international organization may follow a particular pattern in this respect as a result of the operation of rules of the organizations applicable to the matter. He refers in particular to Articles 43 to 45 of the Regulations of the Conference (within the ILO system) which govern the case where total or partial revision of an earlier ILO Convention is under consideration in the International Labour Conference and which envisage inclusion in all ILO Conventions of a provision along the following lines :

«... unless the new convention otherwise provides ...

a) ratification by the Member of the new revising convention would entail *ipso jure* notwithstanding Article «X» below, the immediate denunciation of the present convention, provided that the new revising convention has entered into force ;

b) as from the date of entry into force of the new revising convention, the present convention would cease to be open to ratification by Members.

2. The present convention would in any case remain in force for those Members which have ratified it but which do not ratify the revising convention».

This pertinent reminder by Mr *Wolf* suggests that the Commission, in its final conclusions, should include a further saving in respect of successive treaties on the same subject concluded within the framework of those international organizations which have adopted particular rules or practices regulating the relationship between such treaties. This would correspond to the similar saving in Article 5 of the VCT.

Again, the great majority of members of the Commission accept that the content of a clause in a codification convention governing the relationship between it and earlier or later conventions will reflect the will of the negotiating States to give as much priority or primacy as possible to the new convention, or indeed to an earlier or later convention on the same subject. But several, including Mr *Rosenne* and, it would appear, Mr *Münch*, would regard this as being no more than a rebuttable presumption ; and Mr *Sucharitkul* points out that while it may reflect such a will, it need not do so, given the wide range of alternative objectives sought by such a clause, including abrogation, substitution, replacement, amendment, revision, modification, supplementary protocol,

complementary agreement or implementation in different geographical or temporal dimensions.

Finally, while all members of the Commission thought that a distinction could be drawn between a successive codification convention which covers all the ground covered by an earlier codification convention or conventions, and a successive codification convention which regulates in greater detail only a small part of the ground covered by an earlier codification convention or conventions, there was some division of view on whether, in the latter case, there was room for the application of the distinction between *lex generalis* and *lex specialis* so that the *lex specialis* might prevail in case of incompatibility. The majority of the members of the Commission thought that, in the latter case, there was room for application of the *lex generalis/lex specialis* distinction, but Mr *Rosenne* thought that this would depend on the intention of the parties, and both Mr *Torres Bernardez* and Mr *Schindler* were doubtful about the applicability of the *lex generalis/lex specialis* distinction in this context, Mr *Torres Bernardez* pointing out that it was not easy at the international level to characterise one treaty as incorporating the *lex generalis* and another as incorporating the *lex specialis*, and that it might be preferable to concentrate more on clarifying the meaning of «the same subject-matter» in Article 30 of the VCT and of «a particular subject» in the title of the topic referred to the Commission. This having been said, the Rapporteur does not interpret the reservations made by Mr *Torres Bernardez* and Mr *Schindler* as precluding the application of the *lex generalis/lex specialis* distinction *in appropriate cases.*

3. *Relationship between treaty and custom*

A much broader variety of views was expressed on the implications of the two judgments of the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua* as regards the relationship between treaty and custom. There was a division of opinion on whether the judgment on the merits of that case shed *new* light on the relationship between treaty and custom. Three members of the Commission (Mr *Münch*, Mr *Marotta Rangel* and Mr *Rosenne)* thought that the judgment did *not* shed new light on the issue or doubted whether it did. Another *(*Mr *Torres Bernardez)*, in a lengthy and interesting exegesis on the judgment, believed that it did clarify the relationship between treaty and custom but did not shed any *new* light on that relationship. As against this, three members of the Commission (Mr *do Nascimento e Silva,* Mr *Sucharitkul* and Mr *Schindler*) thought that the judgment did, at least to some extent, shed new light on the relationship between treaty and custom, while one (Mr *Degan*) thought that, in many substantial respects, the judgment did clarify that relationship and that important

statements in the judgment could not be disregarded in any analysis of that relationship.

Mr *Crawford* believed that the most controversial issue in the case concerning *Military and Paramilitary Activities in and against Nicaragua* was the *jurisdictional* issue and particularly the approach to the Vandenberg reservation. He had no difficulty with the basic proposition that treaty law might coexist with general international law, nor with the proposition that treaties did not extinguish general international law, although they might prevail over it (except where the rule of general international law was a rule of *jus cogens*). However, his view was that if the dispute could properly be said to have arisen under a multilateral treaty, then the United States, by virtue of the Vandenberg reservation, had not consented to the Court's jurisdiction over the dispute. It was irrelevant that the dispute might also be capable of being characterised as arising under another source of law (*i.e.* general international law). The Vandenberg reservation did not simply exclude jurisdiction over certain sources of international law ; nor was it confined to excluding jurisdiction over certain disputes to the extent that they were disputes under multilateral treaties ; its real object and purpose was to exclude disputes of a particular description.

Mr *Crawford* believed it would be unwise and unrewarding for the Commission to concentrate unduly on the implications of the two judgments in the case of *Military and Paramilitary Activities in and against Nicaragua*, at least insofar as these implications bear upon the wider issue of the inter-relationship between the various sources of international law which ought perhaps to be a subject for separate study by the Institute.

The Rapporteur believes that there is much force in this last point made by Mr *Crawford*. He rightly points out that the principal issue for the Commission is the relationship between successive codification treaties. But, given that codification treaties, by their very nature, may be to a large extent declaratory of existing rules of customary law or may have the effect of crystallising emerging rules or generating new rules of customary law, the Commission cannot, in the Rapporteur's view, escape the task of advancing some generalised conclusions about the relationship between treaty and custom, without seeking to lay down rigid guidelines as to the scope and content of what is and will continue to be an ever-evolving relationship. There appears to be general agreement within the Commission that treaty and custom from two autonomous sources of international law ; and that norms deriving from one of those sources may have an impact upon the content and interpretation of norms deriving from the other source. Where there may be differences between members of the Commission concerns the question whether international law establishes a hierarchy between these two different sources ; some insist

that international law establishes no such *a priori* hierarchy, while others, although not disputing this as a matter of theory, would qualify the proposition by maintaining that, as a matter of the *application* of international law in cases of dispute, treaty norms prevail over customary law norms as between the parties to the treaty, save where the treaty norm contravenes a rule of *jus cogens*.

The responses to the Rapporteur's questionnaire indicate that there is well-nigh unanimous agreement that the criteria laid down in the *North Sea Continental Shelf* cases for the generation of customary law by treaty remain valid. But some members of the Commission (Messrs *Crawford, Degan, do Nascimento e Silva, Sucharitkul* and *Schindler)* detected in recent pronouncements of the Court a greater flexibility in the application of these criteria. Mr *Crawford* supported what he saw as the Court's aim to ensure the integrity and systematic character of international law by seeking gradually to harmonise general international law and rules derived from treaty. Mr *Degan* argued that a partial abandonment of the orthodox tests of custom can already be seen in the Court's judgment in the *North Sea Continental Shelf* cases. Both Mr *Crawford* and Mr *Münch* doubted whether the mandate of the Commission extended so far as to encompass detailed analysis of how the criteria laid down in the *North Sea Continental Shelf* cases are in practice being applied ; and others (Messrs *Rosenne, Torres Bernardez* and *Sucharitkul*) stressed that this depended to a considerable extent on differences of emphasis, perspective and circumstances.

There was general agreement within the Commission that, in assessing the element of State practice in the process whereby a rule of customary law may be generated by treaty, one should take into account the practice of *all* States, whether or not parties to the treaty. One or two minor qualifications were expressed. Mr *Torres Bernardez* distinguishes, in the case of the practice of States *parties* to the treaty, between :

a) whether they are actually acting or potentially in the application of the treaty alone and in all *inter partes* relationship ;

b) whether they are acting within the exclusive framework of general international law ;

c) whether they are acting *both* in the application of the treaty and within the framework of general international law.

For Mr *Torres Bernardez*, State practice (a) can, as a matter of principle, be disregarded if the evidence supports the conclusion that the State was acting *only* in that capacity. Mr *Schindler* puts forward the interesting rider that, in the case of States parties to a treaty and acting

in the application of the treaty, the element of *opinio juris* will be more important in evidencing customary law.

In response to a question directed towards the continuing effect of judicial pronouncements to the effect that a particular provision of a codification convention is declaratory of customary law, or has crystallised an emergent rule of customary law, or has generated a new rule of customary law, in the face of a subsequent change or development in the law upon which such a pronouncement was based, the members of the Commission were unanimous in their view that no «freezing» effect can or should be attributed to such judicial pronouncements. A number of members (Messrs *Rosenne, Torres Bernardez, Sucharitkul* and *Schindler*) based this conclusion on the simple premise that any judicial pronouncement can only state the law as of the date upon which the pronouncement is made.

Although all seemed to agree that this conclusion certainly applied in the case where a successive codification convention may be held to have generated new rules and new concepts incompatible with those provisions of the earlier codification convention already said to have had the declaratory, crystallizing or generating effect, some (such as Messrs *Marotta Rangel* and *Sucharitkul)* did not think it necessary or desirable to confine the conclusion to this one case. Mr *do Nascimento e Silva* had some hesitation about including any conclusion along these lines in the final text.

4. *Final product of the study*

As regards what should be the final product of the Commission's study, many members were reluctant to commit themselves. However, there seemed to be a large measure of agreement (with some reservation on the part of Mr *do Nascimento e Silva*) that the Commission might present a general recommendation to the effect that negotiating States, when formulating a successive codification convention on the same subject as that of an earlier codification convention, should include in the later convention a clause on the relationship between the two conventions. For the rest there was considerable support for the idea of preparing a series of tentative conclusions on the topic, without attempting to reduce these conclusions to definite rules. An effort should be made to formulate these conclusions and then the Commission should decide whether to ask the Institute as a whole to endorse them or merely to take note of them.

5. *General comments*

Some members of the Commission furnished interesting additional observations or suggested further aspects of the topic which might be

taken up. Thus, Mr *Torres Bernardez* suggested that attention could be focused on problems arising from the formulation of reservations to either of two successive codification conventions on the same subject and on problems arising in matters of treaty interpretation from the interplay of two successive conventions of this nature. The Rapporteur is doubtful about this. It would involve a detailed analysis of the law relating to reservations (in the one case) and of the law relating to treaty interpretation (in the other case) without much likelihood that new light would be shed on the solution of the potential problems.

Mr *Rosenne* furnished additional data on the relationship between existing regulatory conventions in the field of maritime law (particularly those adopted under the auspices of the IMO) and the subsequent U.N. Convention on the Law of the Sea of 1982. He points out that, in the 1970s, at a time when it was anticipated that UNCLOS III might be convened or when it was actually in session (but had not yet reached a conclusion), a number of conventions concluded under the auspices of the IMO contained clauses corresponding to Article 9(2) of MARPOL and the corresponding provision in the London Dumping Convention, cited at paragraph 25 of the Rapporteur's Preliminary Exposé. These included the Torremolinos Convention for Safety of Fishing Vessels of 1978 (Article 8), the London International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 1978 (Article V), and the Hamburg Convention on Maritime Search and Rescue of 1979 (Article II). Mr *Rosenne* queries whether these should properly be characterised as «typical without prejudice clauses» (paragraph 25a of the Preliminary exposé), suggesting that they were at least in part designed to leave open the way for UNCLOS III to integrate the detailed regulatory provisions laid down in the respective Conventions within the future law of the sea as it might emerge from UNCLOS III. The Rapporteur accepts that this may have been part of the object and purpose of the clause in question and that indeed they reflected *inter alia* a recognition on the part of the negotiators that UNCLOS III, as a consequence of any decisions it might take on the spatial extent of, and jurisdictional powers exercisable within, particular belts of sea, would inevitably be confronted with the task of providing the necessary guidelines so that these existing detailed regulatory provisions could, to the extent necessary, be harmonised with the future law of the sea likely to emerge from the labours of UNCLOS III. These considerations highlight the importance of ensuring that the negotiators of codification conventions, or indeed of detailed regulatory conventions implicitly or explicitly founded upon legal rules deriving from existing codification conventions, consider carefully the relationship between the projected new codification convention and the detailed regulatory conventions concerned. Roucounas, in a recently published contribution, analyses Article 30(2) of VCT and comments :

> «L'idée principale exprimée par le paragraphe 2 est que les parties devront être encouragées à insérer dans chaque traité des clauses de rapport avec d'autres traités, antérieurs ou postérieurs, ou les deux»[170].

Roucounas draws particular attention in this context to codification conventions :

> «En ce qui concerne les conventions de codification, il est également utile d'y insérer une pareille clause. Non pas tellement pour établir le rapport de ces conventions avec le droit international général où le débat continue d'être impressionant pour son ambiguïté — mais pour l'aménagement avec les autres engagements conventionnels des parties. Et la multiplication des instruments de codification sur «presque» la même matière, au lieu de viser au rassemblement normatif, augure des dispositions de relâchement»[171].

It must of course be acknowledged that the U.N. Convention on the Law of the Sea of 1982 is a special case. The decision of the international community in the early 1970s to engage in a fundamental restructuring of the law of the sea required that the nexus of detailed regulatory conventions founded upon the then existing law of the sea, reflected in the 1958 Geneva Conventions and other relevant instruments, be re-examined with a view to their eventual adaptation to the «new» law of the sea which might emerge from the negotiating process. Many of these detailed regulatory conventions fall within the competence of other international organizations or institutions such as the International Maritime Organization (IMO), the International Oceanographic Commission (IOC), the United Nations Environment Programme (UNEP), the International Civil Aviation Organization (ICAO), the International Labour Organization (ILO), and the Food and Agricultural Organization (FAO). Each of these organizations or institutions has had to study the impact of the new UN Convention on the Law of the Sea on its own activities, regulations and competence in so far as they bear on matters related to the law of the sea. The process of readjustment is by no means yet complete ; the legal repercussions of the new Convention on the galaxy of hundreds of bilateral and multilateral treaties which bear, if not on the same subject matter ; at least on related matters, are only beginning to be detected and will emerge more concretely in the near future[172].

But the law of the sea is a special case because the codification effected by the four Geneva Conventions of 1958 had spawned a myriad

---

170 Roucounas, «Engagements parallèles et contradictoires», 206 *Recueil des Cours* (1987-VI), p. 86.

171 *Loc. cit.*, p. 87.

172 *Loc. cit.*, p. 225.

of bilateral and multilateral conventions predicated upon the existence and definition of the various maritime and seabed zones recognised in the 1958 Geneva Conventions (territorial sea, contiguous zone, continental shelf and high seas). With the acknowledgment in the 1982 Convention of new definitions of the territorial sea and the continental shelf, and particularly of the new concepts of the exclusive economic zone and of the regime governing deep seabed mining in the area beyond the limits of national jurisdiction, the process of adaptation of existing bilateral and multilateral treaties is a felt necessity. With the forthcoming entry into force of the 1982 Convention, this has become all the more pressing ; and, in this context, account may well have to be taken of the draft Resolution and draft Agreement relating to the implementaiton of Part XI of the U.N. Convention on the Law of the Sea adopted *ad referendum* on 15 April 1994, within the framework of the informal consultation organized by the U.N. Secretary-General.

6. *Conclusions*

The Rapporteur takes this opportunity to apologise to the other members of the First Commission for the considerable delay in submitting this Provisional Report which has been attributable in large measure to his difficulty in finding the necessary time to devote to the task. The Rapporteur encloses with this Provisional Report the first draft of a resolution which could be adopted by the Institute on the topic referred to the First Commission, together with the first tentative draft of «Conclusions of the Commission». The Rapporteur would particularly welcome the views of other members of the Commission on the form and content of these two drafts, so that he may prepare revised versions which might more accurately reflect the views of all concerned.

Draft Resolution

May 1994

The Institute of International Law,

— *Considering* that the mandate of the First Commission is to study the problems arising from a succession of codification conventions on a particular subject,

— *Considering* that the conclusion of the United Nations Convention on the Law of the Sea of 1982 has focused attention on the particular problems which may arise when a later codification convention deals with the same subject-matter as an earlier codification convention,

— *Considering* that these problems include *inter alia* questions of the law of treaties and questions pertaining to the relationship between treaty and custom,

— *Having examined* the reports of the First Commission together with the comments and conclusions attached thereto,

1. Expresses the wish that the negotiators of any codification convention relating to the same subject-matter as that of an earlier codification convention incorporate provisions in that convention regulating the relationship between it and the earlier convention.

2. Congratulates the Rapporteur and the members of the First Commission on having succeeded in identifying and suggesting possible solutions for some of the problems which may arise from a succession of codification conventions relating to the same subject-matter.

3. Trusts that the work of the First Commission in its entirety will be the subject of thorough study by all concerned.

Conclusions of the Commission

May 1994

I. General

Conclusion 1 : Definition

For the purpose of these conclusions, the expression «codification convention» is to be taken as meaning any multilateral convention designed to codify or progressively to develop rules of general public international law.

Conclusion 2 : General and regional codification conventions

A codification convention in this sense is normally open to universal or at least very wide participation by States and, where appropriate, international organizations, in which case it is referred to as a general codification convention. Exceptionally, however, a codification convention may be concluded at the regional level, in which case it is referred to as a regional codification convention.

Conclusion 3 : Declaratory, crystallising or generating effect of codification conventions

A codification convention may contain provisions which are declaratory of existing customary law or which serve to crystallise emerging rules of customary law or which generate new rules of customary law. It may in addition embody provisions which are essentially regulatory or institutional in their nature.

Conclusion 4 : Scope of conclusions

These conclusions apply to a succession of general codification conventions relating to the same subject-matter, and may equally apply to a succession of regional codification conventions relating to the same subject-matter where a succession of such conventions raises problems identical with those raised by a succession of general codification conventions.

II. Treaty Law

Conclusion 5 : Treaty law consequences of a succession of codification conventions relating to the same subject-matter

The consequences, as a matter of the law of treaties, of a succession of codification conventions relating to the same subject-matter flow from the application of the provisions stated in Article 30 of the Vienna Convention on the Law of Treaties, bearing in mind, where appropriate, the provisions of Articles 40, 41 and 59 of that Convention, these provisions constituting in many respects a codification of existing customary law on the application of successive treaties relating to the same subject-matter, the amendment of multilateral treaties, their modification as between certain of the parties only, and the termination of a treaty or the suspension of its operation implied by the conclusion of a later treaty.

Conclusion 6 : Saving for jus cogens

Conclusion 5 is without prejudice to the possible application of the rules stated in Article 53 or 64 of the Vienna Convention on the Law of Treaties in the case of a later codification convention relating to the same subject-matter as an earlier codification convention.

Conclusion 7 : Saving for application of the law of State responsibility

Conclusion 5 is likewise without prejudice to the application of the rules stated in Article 60 of the Vienna Convention on the Law of Treaties in a case where the provisions of a later codification convention constitute a breach of an obligation in the earlier codification convention prohibiting the conclusion of the later convention, and is equally without prejudice to the other legal consequences of breach of such an obligation deriving, for example, from the application of the rules of the law of State responsibility.

Conclusion 8 : Saving for application of particular rules or practices of international organizations

In the case of successive codification conventions relating to the same subject-matter concluded within the framework of an international organization which has adopted particular rules or practices regulating the relationship between such conventions, Conclusion 5 is without prejudice to the application of any such rules or practices.

Conclusion 9 : Priority to be given to treaty provisions regulating relationship between successive codification conventions

Conclusion 5 applies to a succession of codification conventions relating to the same subject-matter only to the extent that the earlier or later codification convention does not embody a provision specifically regulating the relationship between the two conventions, in which case that provision will prevail.

Conclusion 10 : Special case of a later codification convention regulating in greater detail part of the ground covered by an earlier codification convention

Where the object and purpose of a later codification convention is to regulate in greater detail a matter or matters already regulated by an earlier codification convention and where two States or international organizations are parties to both conventions, there may, in appropriate cases and unless the later convention otherwise provides, be room in the interpretation of the two conventions for the application of the distinction between the *lex specialis* and the *lex generalis*, so that the *lex specialis* would prevail, in a case of incompatibility between the provisions of the two conventions

III. Relationship between treaty and custom

Conclusion 11 : As sources of international law

Treaty and custom form two autonomous sources of international law. Norms deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source.

Conclusion 12 : Hierarchy of sources

There is no *a priori* hierarchy among the differing sources of international law. However, as a matter of the application of international law in cases of dispute, relevant norms deriving from a treaty binding upon the parties to the dispute will prevail over norms deriving from customary law, save where the norm deriving from a treaty contravenes a rule of *jus cogens*.

Conclusion 13 : Generation of customary law by treaty

The criteria laid down by the International Court of Justice in the *North Sea Continental Shelf* cases for the generation of customary law by treaty remain valid.

Conclusion 14 : State practice in relation to the process of generation of customary law by treaty

In assessing the element of State practice in the process whereby a rule of customary law may be generated by treaty, the practice of all States, whether or not parties to the treaty, should be taken into account. In the case of States parties to the treaty, the significance of an instance of State practice in this context will be substantially reduced if there is evidence that the State concerned had been acting only in the application of the treaty.

Conclusion 15 : Effect of judicial pronouncements

A judicial pronouncement to the effect that a particular provision of a codification convention is declaratory of customary law, or has crystallised an emerging rule of customary law or has generated a new rule of customary law states that law only as of the date upon which such a pronouncement is made, and consequently constitutes no bar to the further development of the law.

Réponses et observations des membres de la Commission

1. Réponse de M. Santiago Torres Bernardez

20 June 1994

My dear Confrère,

Please let me convey to you my compliments for your Provisional Report on «Problems arising from a succession of codification conventions on a particular subject» as well as my general approval thereof. I read it with great interest and profit. The First Commission has now at its disposal excellent basis to go ahead with its work.

Attached herewith you will find my observations and comments on both the «draft resolution» «and the proposed «conclusions», as requested.

With my best regards,

Yours sincerely,

Santiago Torres Bernardez

I. Observations on the draft resolution

I think that the form to be given to the final outcome of the work should be decided once the scope of agreement within the First Commission concerning the proposed «Conclusions» would be assessed, namely at the end of our work.

In this respect, my main preoccupation concerns the formula finally adopted for the set of conclusions on the relationship between treaty and custom. As recognized by codification conventions (see, for example, Articles 38 and 43 of the Vienna Convention on the Law of Treaties), by the jurisprudence of the International Court of Justice and by doctrine,

treaty and custom are not watertight compartments. There is indeed an interaction or interplay between these two sources ; a connexion between the development of treaty norms and customary norms. But, that interaction or connexion does not mean confusion or substitution of each other source. Treaty and custom remain, as before the codification and development of international law through the conclusion of multilateral treaties, two distinct law-creating procedures of positive international law. Each of those two sources constitute a normative world of its own. It entails, quite natural, certain unavoidable legal distinctions as, for example, with respect to the methods and rules of interpretation, application, modification and termination of treaty norms and of customary norms, even when the content of a given treaty norm is or appears to be identical to the content of the corresponding customary norm or vice versa.

I recall the above because the proposed «draft resolution» contains a reference to the reports of the First Commission together with the comments and conclusions attached thereto and I would like to support, without misunderstandings, your conclusion that the Commission cannot «escape the task of advancing some generalized conclusions about the relationship between treaty and custom, without seeking to lay down rigid guidelines as to the scope and content of what is and will continue to be an ever-evolving relationship».

I would add that the *dicta* or general law statements and conclusions of the International Court of Justice are an indispensable tool in order to assess that «ever-evolving relationship» and that the contributions of the Court in this respect subsequent to the 1969 *North Sea Continental Shelf* cases are several and important. They ought to be born in mind in the work of the First Commission.

II. Observations on the proposed conclusions

Conclusions 1 and 2

The provisions contained in these two conclusions could be combined in a *single conclusion with three paragraphs*. «Participation» is a criterion too close to the general definition of «codification convention» as to be presented separately.

The expression «*general* public international law» in Conclusion 1 poses a relationship problem with the definition of «regional codification convention» given in the second sentence of Conclusion 2. Is it intended by the proposed text that a «regional codification convention» means a codification convention concluded at the regional level designed to codify or progressively to develop rules of *general* public international law ? or designed to codify or progressively to develop rules of *regional* public

international law ? or both ? In any case, the present wording would exclude, for example, the Latin American codification conventions on diplomatic asylum and I do not see any justification for that.

As a matter of codification policy, I have some reservations concerning the splitting of «*general* public international law» through the conclusion of «regional codification conventions». However, I recognize that this is sometimes tried within certain regions and that the States concerned are perfectly free to do so. All in all I would, therefore, favour a definition of «regional codification conventions» wide enough as to cover the two hypotheses described above.

In Conclusion 2 «general codification conventions» and «regional codification conventions» are defined by reference to distinct criteria : the openness or scope of potential participants in the first case (universal or wide participation) and the framework of conclusion of the convention in the second (at the regional level). Could or should the said criteria be made uniform or more uniform ? I am inclined to think so. For example, in the definition of a «general codification convention» it could be inserted, after the words «wide participation by States», the following : «independently of the regional group or groups to which they may belong». At the same time the definition of a «regional codification convention» would be reworded to read : «Exceptionally, however, a codification convention concluded at a regional level may reserve participation to the States belonging to the regional group concerned, ...».

Subject to further consideration of the matter within the First Commission, I would suggest deletion, in the definition of a «general codification convention», of the words : «and, where appropriate, international organizations». The same would apply *mutatis mutandis* to the reference to «international organizations» made in Conclusion 10. Intergovernmental organizations are more and more often associated to the elaboration of codification instruments and they may even be allowed to become as such parties to the multilateral treaties concerned. But, the States remain the «primary subjects» of general public international law and that condition of the States has a particular bearing on international law and its codification procedures and instruments. In other words, the masters of general public international law, of its creation and development, continue to be the States. If needed, I think better to deal with the question of intergovernmental organizations or of certain intergovernmental organizations *(e.g.*, the European Union) in a separate conclusion which might adopt the form of a general reservation.

Conclusion 3

I agree.

Conclusion 4

I agree. Perhaps «similar» would be better than «identical».

The Conclusion, as indeed the whole proposed draft, is however silent on the important question of the relationship between successive «general codification» and «regional codification» conventions concerning the same subject-matter. Should this be explored further by the First Commission ?

Conclusion 5

For me this Conclusion and its drafting are satisfactory. But, are the words «in many respects» necessary ? I would prefer its deletion. There is little to gain by retaining them and much to lose because they introduce a certain degree of incertitude in the interpretation of the Conclusion. If it is felt that a certain qualification is needed some other formula could be considered, such as, for example, «a general codification ...».

Conclusion 6

I agree with the principle embodied in this Conclusion as such, but I have difficulties to visualize, in the light of the ways and means followed to codify general public international law, how «a codification convention» could conflict at the time of its conclusion with an existing peremptory norm of general international law.

One cannot presume that it may happen. If it is so, the main *jus cogens* question at issue here would be, with respect to both the later and the earlier codification convention, the *jus cogens superveniens* rule of Article 64 of the Vienna Law of Treaties Convention.

A second point that I would like to underline is that peremptory norms of general international law are not immutable rules. They may evolve. As expressly provided for in Article 53 of the Vienna Convention such kind of norms can be modified «by a subsequent norm of general international law having the same character». It is only with respect to this later eventuality that a caveat on the possible application of Article 53 of the said Vienna Convention would in fact be needed in Conclusion 6.

States may have recourse to the declaratory, crystallising or generating effect of a given codification convention (Conclusion 3) to signify that a *jus cogens* norm has been modified by a subsequent peremptory norm of general international law and this may have a bearing on the application of the provisions stated in the Articles of the Vienna Convention on the Law of Treaties referred to in Conclusion 5.

The caveat concerning Articles 64 and 53 of the Vienna Convention on the Law of Treaties could well, therefore, be the object of two separate paragraphs within Conclusion 6.

In any case, I would get along with the proposed text providing that the words *after* «the Vienna Convention on the Law of Treaties» be deleted.

Conclusion 7

I have no problems concerning the saving for application of the law of State responsibility (second part of the Conclusion).

The saving concerning Article 60 of the Vienna Convention on the Law of Treaties is, however, much less clear to me. Again my problem is that I fail to see the factual situations envisaged by the saving as formulated (because of the insertion of the words «in a case where the provisions of a later codification convention constitute a breach of an obligation in the earlier codification convention prohibiting the conclusion of the later convention»).

How «the provisions of the later codification convention» may as such constitute a breach of «an obligation in the earlier codification convention prohibiting the conclusion of the later convention» ? The breach, if there is a breach, would be the very fact of concluding the later convention rather than «the provisions» therein.

May the fact of having concluded the later convention prohibited by the earlier convention be considered in international relations «*a material breach*» of the earlier convention falling under the definition contained in paragraph 3 of Article 60 of the Vienna Convention on the Law of Treaties ? It will depend of the circumstances of each particular case. But, the injured party to the earlier codification convention could always invoke its termination or suspension of operation rights under the said Article 60. Those rights of the eventual injured party remain protected as provided for in paragraph 5 of Article 30 of the Vienna Convention on the Law of Treaties.

«Prohibiting clauses» as those referred to in Conclusion 7 are normally the object of «final clauses». They were studied by the International Law Commission and the answer is to be found in the provisions on the application of successive treaties relating to the same subject-matter embodied today in Article 30 of the Vienna Convention on the Law of Treaties.

Moreover, our topic concerns a particular kind of multilateral treaties, namely codification conventions (and mainly general codification conventions). Now, it is unusual for States to insert the said «prohibiting clause» in codification conventions. The purpose of the codification

conventions is not the prevention of further codification and progressive development of international law by conventional means in the area or subject-matter concerned. Thus, the question of «prohibiting conclusion clauses» appears to me as rather academic for the purpose of the First Commission's work on successive codification conventions.

In my opinion, and subject to your further learned explanations, the wording of the saving for Article 60 of the Vienna Convention on the Law of Treaties should not go beyond a short and general formula as the one used in paragraph 5 of Article 30 of the said Convention. This should be enough for the protection of the termination or suspension of operation rights of individual parties to the earlier codification convention.

Conclusion 8

I agree.

Conclusion 9

The «treaty relationship provisions priority» of the Conclusion goes, in my opinion, too far. The parties to the two codification conventions concerned may not be the same. It needs also some clarification because both the earlier and the later codification conventions could contain «relationship provisions» drafted differently. I would suggest to reformulate the Conclusion taking duly into account the *res inter alios acta alteri nocere non debet* and the *leges posteriores priores contrarias abrogant* principles.

Conclusion 10

I agree with the underlying principle. However, I would suggest some drafting changes. For example, the deletion of the words «or international organizations» (see above Observations on Conclusions 1 and 2).

Moreover, it seems to me better to circumscribe this Conclusion to the *lex specialis* versus *lex generalis* question, the *lex posterior* principle would have been dealt with as appropriate under Conclusion 9. If this is done, the qualification of the codification conventions as «earlier» or «later» could be omitted, as well as the words «and unless the later convention otherwise provides».

Finally, I would suggest to study the convenience of qualifying somewhat or not the «greater detail» criterion of Conclusion 10 by considerations drawing from the *res accessoria sequitur rem principalem* principle.

Conclusions 11 and 12

I fully agree that treaty and custom are two autonomous sources of international law and that there is no hierarchy among these two differing sources of international law. I favour, therefore, the underlying basic principles of these two Conclusions. For me the only matter requiring further consideration and discussion within the First Commission concerns what should follow the first sentence of each of those two Conclusions.

In so far as Conclusion 11 is concerned, my first suggestion would be to draft the end of the second sentence (after the word «impact») as follows : «... upon the development of the content of norms deriving from the other source as well as upon the respective interpretation of those two kinds of norms».

My second suggestion regarding Conclusion 11 concerns the fact, already mentioned above, that even when they are or appear identical as to its content a treaty rule and a customary rule — which are rules of a different normative nature — retain their autonomous separate existence and, consequently, all its respective potentialities as to its applicability in a given case or situation. The rules of international law governing the interpretation, application, modification or termination of treaty norms are not as such applicable to the interpretation, application, modification or termination of customary norms or vice versa.

All this is, in my opinion, important enough as to deserve to be spelled out in Conclusion 11 through an appropriate formula which should be added. The matter is closely linked to the *non liquet* proposition, namely to the question of the fullness of international law.

The absence in international law of a hierarchy of sources, so rightly stated in Conclusion 12, is confirmed by States' practice, by international judicial and arbitral decisions and by doctrine. It corresponds also to the prevailing interpretation of Article 38 of the Statute of the International Court of Justice. What is the main legal consequence of the absence of hierarchy between the two sources ? That treaty norms and customary norms have the same legal force. Consequently, it follows that treaty norms and customary norms may prevail in a given case or situation against each other.

It explains also why international law has not set up particular rules concerning the application of successive treaty norms and customary norms relating to the same subject matter. In case of conflict, *lex posterior, lex specialis* and other relevant common general principles apply. The fact that in given cases or situations the treaty norms may prevail against customary norms is often the result of the application *in casu* of such common general principles. Treaty norms are frequently *posterior* and/or *specialis* with respect to the corresponding customary norms.

In the light of the above, to make distinctions in general terms between that normative situation and the application of international law «in cases of dispute», as the second sentence of Conclusion 12 tries, is not an easy undertaking. Moreover, the circumstances of fact and law vary considerably from a dispute to another and the means of settlement chosen may have also a bearing on the application of international law to the dispute concerned.

A proposition as the one in the second sentence of Conclusion 12 is too absolute and goes too far even «as a matter of application of international law». One thing is to consider logic, and even reasonable, that those in charge of applying international law to a given case verify firstly whether or not there are relevant treaties in force applicable as between the parties to the dispute and another quite different thing to declare as a general proposition that the relevant treaty norms binding upon the parties to the dispute will prevail over norms deriving from customary law. There is not, in my opinion, a normative basis in international law allowing the formulation of that kind of general proposition. The saving needs to go much further than *jus cogens*.

Conclusion 13

I agree. But, the fact of mentioning the *North Sea Continental Shelf* cases only creates a problem. The Court has also in subsequent cases (*e.g.*, *Fisheries Jurisdiction, Gulf of Maine, Continental Shelf (Lybia/Malta)* and *Nicaragua*) laid down criteria which remain likewise valid. In these later cases, the Court refined important points relating to the generation of customary law by treaty and the application of international law to cases of dispute which cannot and should not be ignored. If the First Commission would not like to enumerate as appropriate all such cases, the alternative would be to delete in Conclusion 13 the reference to the *North Sea Continental Shelf* cases.

Conclusion 14 : I agree.

Conclusion 15 : I agree.

2. *Réponse de M. Shabtai Rosenne*

12 July 1994

Dear Friend and Confrère,

Once again it gives me great pleasure to congratulate you on your magnificent synthesis of divergent views so modestly entitles *Provisional*

Report. I do not think that there is anything provisional about it. It looks to me like a definitive study of a previously untouched topic.

I want first to deal with the comment which you made to our Secretary-General regarding the implementation of Part XI of the Law of the Sea Convention.

I have the impression that this instrument and the method of its negotiation and adoption are an important innovation in the techniques of multilateral treaty-making, and consequently I hesitate to say that it should be overlooked. As I understand it, it is an instrument recording agreement as to the interpretation and application of Part XI, without formally amending the Convention itself. Moreover, it is being adopted in a curious twilight period, never before encountered in such an acute form, during which, although the necessary number of ratifications or accessions have been deposited (and cannot, I suppose be withdrawn), by virtue of article 308, paragraph 1 of the Convention, the Convention itself will not come into force until after 12 months, that is on 16 November 1994. As the Convention has not yet entered into force, I imagine that neither its own amendment provisions nor those of the Vienna Convention on the Law of Treaties are applicable. This is not merely technical matter, since article 314 of the Convention has special provisions for the amendment of part XI.

But on looking over the history of the Law of the Sea Convention since 1982, I find that this is not the only instance of an agreement on its interpretation and application.

There is first of all the bilateral agreement between the United States of America and the former USSR concluded at Jackson Hole (a more land-locked place for the conclusion of an important agreement on the law of the sea is hard to imagine !) on 23 September 1989, about the interpretation and application of the articles on innocent passage. I know that this was a bilateral agreement between two States *only*. But what States ! Coastal States between them possessing the longest stretches of coast in the world. As we wrote in our Commentary on the Convention :

> This formal interpretation by two principal maritime Powers — which are also among the largest coastal States — even though it relates to a treaty which has not yet entered into force at the time it was made, will influence the practice of States and the interpretation of a provision which previously might have been regarded as ambiguous on the essential point of whether or not paragraph 2 [of article 19] was exhaustive[173].

---

173 University of Virginia, Center for Oceans Law and Policy, *United Nations Convention on the Law of the Sea*, 1982 : A Commentary, vol. II at 177 (1993, S.N. Nandan and Sh. Rosenne, eds.).

Then we have General Assembly resolution 46/215 of 20 December 1991 on large scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas. Technically in the form of a resolution of the General Assembly, in its preambles it recalls the «relevant principles elaborated in the United Nations Convention on the Law of the Sea» without specifying what provisions it had in mind, although the resolution as a whole refers to the *high seas* and thus by implication incorporates Part VII, section 2 (articles 116 to 120), of the Convention. This to my mind represents an agreement on the interpretation and application of those relevant principles, or if one does not want to attribute the force of agreement to a resolution of the General Assembly, practice based on it would rank as subsequent practice in the application of the treaty.

Something similar seems to be happening in the current United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, due to complete its work in August next. General Assembly resolution 47/192 of 22 December 1992, by which the Conference was convened, reaffirms that the work of this Conference and its results should be fully consistent with the provisions of the Convention, in particular the rights and obligations of coastal States and States fishing on the high seas, and that States should give full effect to the high seas fisheries provisions of the Convention with regard to fisheries populations whose ranges lie both within and beyond exclusive economic zones (straddling fish stocks) and highly migratory fish stocks. The Revised Negotiating Text prepared by the Chairman of the Conference (A/CONF.164/13/Rev.1, 30 March 1994) contains a sentence in which the parties confirm their commitment to the effective implementation of the principles embodied in Part V (on the exclusive economic zone) and VII (on the high seas) of the Convention. The remainder of this long text, in whatever form it finally takes, reads also as an agreement on the interpretation and the application of the relevant provisions of the Law of the Sea Convention, which itself remains formally untouched.

To the best of my understanding — I have not made any detailed research into this question — given the increasing difficulty of renewing or revising major international conventions even when they are regarded by some as out-dated[174], the idea of an agreement (in whatever form it takes) on the interpretation or application of the Convention seems to

174 I am thinking here of the hesitations felt in some quarters at any idea of revising or updating the Hague Convention N° 1 of 1899/1907 in connection with the centenary of the First Hague Conference of 1899 and the Decade of International Law.

open new possibilities and new techniques for bringing or keeping important treaties up-to-date without touching the treaties themselves. This comes within the scope of article 31, paragraph 3, of the Vienna Convention, whether as a subsequent agreement or, if the basis is a resolution of the General Assembly, as subsequent practice. In any event, this appears as a new form of a succession of conventions on a particular subject.

Therefore, while at this stage I do not have any strong feelings on the matter, I am not convinced that we should completely pass this development over in silence.

I now turn to your draft resolution.

I have considerable difficulty, as a matter of phraseology only, with the use of the expression *codification convention*. As an academic matter, there is no objection to the term, which of course is frequently encountered. But if the resolution is addressed to the «negotiators» of conventions, I think we should avoid academic turns of phrase, which may themselves lead to controversy. You will recall that both the ILC at the time, and the Vienna Conferences on the Law of Treaties, have all refrained from any form of classification of treaties. The word *codification* could easily be dropped from the two places in which it appears in operative paragraph 1. One might even go further and drop the first *codification* in the second preamble : indeed, what I have allowed myself to recite regarding the later «agreements» regarding the interpretation and the application of the Law of the Sea Convention would seem to require the dropping of the first *codification* also. Following from that, I think that *codification* could also be dropped from operative paragraph 2 without changing its sense.

In operative paragraph 1, I suggest to replace *Expresses the wish* by *Recommends*. I base this suggestion on section II of the Nice resolution on the termination of treaties[175]. On the other hand, in operative paragaraph 3, I suggest replacing *Trusts* by *Expresses the wish* following the Cairo resolution on the elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective[176].

175 Institut de Droit international, Tableau des Résolutions adoptées (1957-1991) 63.

176 Ibid. 181.

I realise that my hesitations over using the word *codification* in the resolution itself may require some redrafting of the *Conclusions of the Commission*. This might not be necessary if a full title were to be added to the resolution, and perhaps a footnote to the word *convention* in operative paragraph 1 indicating that what is in mind is the *codification convention* as explained in the Conclusions.

Once again, my warmest congratulations and best personal wishes.

Yours very sincerely,

Shabtai Rosenne

3. *Réponse de M. James Crawford*

14 September 1994

Dear Ian,

I have the following comments on the draft resolution and conclusions circulated with your provisional report on this subject. I agree that the outcome of the work of the Commission should take the form of a resolution and conclusions in the general form you propose.

As to the resolution, in paragraph 1, I would say «expresses the view» rather than «expresses the wish». In the second line I would say «should incorporate». In paragraph 3, I would delete the words «in its entirety» and add the phrase «and in particular its conclusions».

As to the conclusions themselves, I have the following comments. These incorporate a number of suggestions of one of my PhD students, Mr Michael Byers, who is working on the processes of customary international law-making.

1. There is a problem in that the topic of the Commission relates to succession of codification conventions, yet any convention will, as conclusion 3 points out, contain provisions which are regulatory, institutional, machinery, etc. Succession as to such provisions presents no particular problem for our purposes. It might be better — if it does not require too much redrafting — to talk about codification conventions as conventions which contain codification provisions, and then to focus on the succession of such *provisions* in different conventions. This would also avoid the problem that even «regulatory and institutional» provisions in conventions can become a source of rules of general international law, one way or another.

2. Another comment of a general character. We say that «exceptionally» codification conventions may be concluded at the regional level, and this is undoubtedly true : *e.g.* the European Convention on State Immunity, which was, however, barely intended as a codification convention when it was concluded. Nonetheless we do not make it clear whether we are interested in regional codification conventions so far as they relate to regional customary international law or only so far as they relate to general international law. The point is that there are significant differences between regional and general custom. As the *Asylum* case indicates, something close to explicit acceptance is required in relation to a regional custom, whereas a less rigorous requirement may exist in respect of general customary international law. Anyway there is no reason why regional codification conventions should be exceptional so far as regional customary law is concerned. Perhaps we should make it clear that our interest in regional codification conventions is only so far as they contribute to general customary international law, though this could be done in the commentary.

3. It seems odd that conclusion 5 does not mention Article 43 of the Vienna Convention on the Law of Treaties, which is the provision expressly envisaging the concurrence of treaty and general international law obligations. It is clear from Article 43 that is is concerned with the concurrence of obligations arising «independently of» a treaty with obligations arising «as a result of the application of the present convention or of the provisions of the treaty». Where a codification convention gives rise to or contributes to a rule of customary international law, that rule must nonetheless be regarded for the purposes of Article 43 as arising «independently of the treaty». This may require some adjustment to conclusion 5.

4. In conclusion 6, rather than «possible» I would prefer «potential». I do not think we should suggest that the application of Articles 53 or 64 is merely hypothetical or contingent, and «potential» expresses this idea better.

5. In conclusion 11 I do not agree that treaty and custom are «autonomous» sources of international law, though they are distinct. Apart from anything else, the obligation to comply with a treaty cannot derive from a treaty : the norm *pacta sunt servanda* is necessarily a customary norm. I would prefer that conclusion 11 read «Treaty and custom form two distinct sources of international law».

6. Conclusion 12 is incomplete, because it ignores the possibility that a treaty norm will have been modified in subsequent practice by a later rule of customary international law. Admittedly this is not something dealt with by the Vienna Convention : a decision was made — as you will

recall — to exclude that issue from its scope. But this was a decision relating to the scope of the Convention, not to the impossibility of subsequent modification of a treaty by custom. I think this should be referred to in conclusion 12.

7. Conclusion 13 would be easier to read and more useful if we stated in our own words, or by select quotation, what we think *are* the criteria laid down in the *North Sea Continental Shelf* cases.

8. As to conclusion 14, I agree entirely with the first sentence. The second sentence however raises a slight difficulty in that it does not distinguish between the practice of States parties which only affects other States parties and the practice of States parties which is carried out, as it were, *erga omnes*. For example a State party might seek to give effect to the European Convention on State Immunity as against all other States in the world, irrespective of whether they are parties to the Convention. That would be necessarily be an example of State practice occurring outside the framework of the Convention though in accordance with its terms. The illustration shows that there is some equivocation in the words «in the case of States parties to the Treaty». Perhaps this should read : «In the case of conduct of States parties to the Treaties in their relations with other States parties».

9. This then raises the question whether there is a presumption that conduct of a State party to a treaty in its relation to another State party is presumed to be conduct carried out under the treaty or whether it contributes to State practice in the creation of norms of customary international law. As a general matter I would think that States are presumed to be acting in their relations with each other in accordance with applicable treaties rather than general international law, unless there is some indication to the contrary. The question is whether that general conclusion — if it is accepted — would apply equally to codification provisions or to codification conventions, which presumably carry with them in one way or another an indication that they are intended to bear some relationship to general international law. The idea of a codification convention might allow one to presume *opinio juris* in a situation where one would not normally do so. However our definition of codification convention is a rather broad one, and I would myself prefer stating the point in the second paragraph in the reverse way :

> «In the case of States parties to the treaties in their relations with other States parties, the significance of an instance of State practice will be substantially reduced unless there is evidence that the State concerned was acting within the framework of customary international law».

10. Conclusion 15 seems too categorical. Although in principle a decision of a court as to customary law as at day 1 does not exclude a finding by a later court that customary law has changed, nonetheless the decision may slow down the development of customary law, and in strong cases may even tend to «freeze» it. I would prefer that instead of the words «constitutes no bar to the further development of the law «we inserted the words «does not exclude further development of the law».

Yours sincerely,

James Crawford

4. Réponse de M. Dietrich Schindler

September 24, 1994

Dear Colleague and Confrère,

Many thanks for your Provisional Report and your effort to take into consideration the manifold opinions of the members of the First Commission. I agree with almost all your remarks and conclusions.

Your Report confirms my impression that our topic, selected in 1985, was not a particularly happy choice for the work of a commission of the Institute. It became evident that the main problems relating to the succession of treaties on the same subject-matter have been dealt with by the Vienna Convention on the Law of Treaties. The proposed conclusions therefore contain, to the greater part, mere references to the provisions of that Convention and to some other general rules of international law. This, to be sure, does not diminish the value of the Commission's work. Yet, its main value does not lie in the conclusions we can arrive at but in your Preliminary Exposé which gives an excellent synopsis of the problems involved and of the practice of States and which is usefully supplemented by the observations of the members of the Commission and your present Report.

I agree with your suggestion to submit to the Institute a draft resolution which merely takes note of the Commission's Reports and Conclusions, the Conclusions being appended to the Resolution.

As to the Conclusions, I have no observations with respect to those of Part I (General) and of Part II (Treaty Law). As to the Conclusions of Part III (Relationship between treaty and custom) I have some doubts whether Conclusions 13-15 should be retained as the Commission's

conclusions. Although I agree with their content, they are, in my opinion, rather outside the scope of our topic. The rules on the generation of customary law (Conclusions 13 and 14) and on the effect of judicial pronouncements (Conclusion 15) show no particularities with respect to our subject, but have a general character. One could omit them or insert into Conclusion 11 a simple reference to the general rules on the generation of customary law.

As to Conclusion 12 (Hierarchy of sources) which states that «as a matter of the application of international law in cases of dispute, relevant norms deriving from a treaty binding upon the parties of the dispute will prevail over norms deriving from customary law, save where the norm deriving from the treaty contravenes a rule of *jus cogens*» it seems to me that one should also take into consideration the possibility that a norm of a codification convention is modified by a norm of subsequent customary law

I am looking forward to your final report and to the discussions in Lisbon next year.

With best personal regards,

Yours sincerely,

Dietrich Schindler

Final Report

December 1994

I. Introduction

1. The Rapporteur is grateful to those Confrères who commented in writing on the Provisional Report circulated in May of this year. Their observations have made possible the preparation of the present Report which is designed in particular to take into account the comments and proposals made on the content of the Draft Resolution and Conclusions enclosed with the Provisional Report. It is the hope of the Rapporteur that the revised versions of the Draft Resolution and Conclusions enclosed with the present Final Report will be seen to be generally responsive to the points raised in the written comments submitted by members of the Commission on the Provisional Report, and to be acceptable to the Commission as a whole or at least of its preponderant majority. Of course, further modifications can be made to the Draft Resolution and the Conclusions as and when the Commission meets on the eve of the Institute's next session in Lisbon. It is in any event the view of the Rapporteur that the topic is now ripe to be placed on the agenda of the Lisbon session.

II. Scope of the Final Report

2. The Final Report assumes that the conclusions to be drawn from the study undertaken by the First Commission generally remain those set out in the Provisional Report, subject of course to the points of detail raised by those members of the Commission who have submitted written comments.

3. There is however one issue which may require further consideration. In the penultimate paragraph of his Provisional Report of 11 May, 1994, the Rapporteur made reference to the Draft Resolution and Draft Agreement relating to the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea adopted *ad referendum* on 15 April, 1994, within the framework of the informal consultations organized by the Secretary-General of the UN. He expressed the view then, in his

covering letter of 17 May to the Secretary-General of the Institute transmitting the Provisional Report, that he doubted :

> «... if the existence of these new instruments ... affects the Draft Resolution and «Conclusions of the Commission» annexed to the Provisional Report».

The Rapporteur did however particularly invite observations from members of the Commission on this point. He should add at this stage that there have been some very significant developments since the Provisional Report was circulated. The Draft Agreement was in fact adopted by the General Assembly, under cover of Resolution 48/263, on 28 July, 1994, by a vote of 121-0-7. As a result, the Agreement was opened for signature on 29 July, 1994, for one year at UN Headquarters in New York. On the opening day, the Agreement was signed on behalf of 41 States at a ceremony in the General Assembly Hall. In the following days, 8 further signatures were affixed[177]. Among the signatories of this new Agreement are the United States, all 12 member States of the European Union (as well as the European Union itself), Japan, China, India, Indonesia, Jamaica, Brazil, Argentina, Canada, Sweden, Australia, New Zealand, Poland and Algeria. Given this broad spectrum of support for the new Agreement, there is a good prospect that the new Agreement will enter into force, despite the stringent conditions which have been set for entry into force :

> «In order to meet the concerns of developing countries, both ratifiers and non-ratifiers alike, that their concessions might still fail to attract ratifications from major countries which had shown interest in deep seabed mining, a special requirement was included in Article 6 about entry into force. Entry into force of the agreement requires 40 ratifications etc., of which at least seven must be States to which paragraph 1(a) of Resolution II of the Third UN Conference on the Law of the Sea applies (namely, Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Russia, the United Kingdom and the United States, plus India and China : South Korea joined this group in August, 1994). Five of the seven must be developed States. Such States would contribute a significant amount to the cost of the ISA ...»[178].

---

177 These details are given in a note published by D.H. Anderson (one of the negotiators of the Agreement) in the October, 1994 issue of the *International and Comparative Law Quarterly* : see 43 *I.C.L.Q.* (1994), pp. 886-93. The full texts of Resolution 48/263 and of the Agreement (together with its annex) have now been published in 33 *I.L.M.* (1994), pp. 1309-27, where it is noted (footnote to p. 1309) that, as of September, 1994, 51 countries had become signatories to the Agreement. See also notes by Bernard H. Oxman, Louis B. Sohn and Jonathan I. Charney (all of whom are favourable to the new Agreement) in 88 *A.J.I.L.* (1994), pp. 687-714.

178 Anderson, *loc.cit.*, p. 890.

4. Mr *Rosenne*, in his written comments of 12 July, 1994, on the Provisional Report (these comments having been prepared before the opening for signature of the new Agreement) has taken up the invitation to comment on the Resolution and Agreement. He takes the view (with which the Rapporteur is in full agreement) that these two new instruments, and the method of their negotiation and adoption, constitute an important innovation in the techniques of multilateral treaty-making ; and he implies that it should not be overlooked. The Rapporteur shares Mr *Rosenne*'s admiration for the ingenuity of the negotiators in finding a solution for what, at first sight, must have seemed to be an intractable problem : how to ensure that a multilateral convention, in respect of which the required number of instruments of ratification or accession have been deposited with the depositary but which is not yet formally in force, can be «adjusted» so that, upon its entry into force, it will be interpreted and applied in accordance with the prescriptions contained in the new Agreement. Obviously, for those States which had already ratified the Law of the Sea Convention, problems with their legislature would have arisen had the new Agreement purported textually to amend particular provisions of the Convention. Moreover, as Mr *Rosenne* rightly points out, Article 314 of the Convention, incorporating special provisions for the amendment of Part XI, is not applicable during the twilight period immediately preceding the formal entry into force of the Convention. It is clear from the text of the new Agreement that it is not in any event expressed to constitute an amendment of any of the provisions of Part XI (or indeed of any other Part) of the Convention.

5. In this context, Mr *Rosenne* draws attention to other instruments adopted within the framework of the UNCLOS negotiations which he thinks have a bearing on the process of the interpretation and application of the 1982 United Nations Convention on the Law of the Sea. The examples which he cites are, firstly, the bilateral agreement of 23 September, 1989, between the United States and the former USSR, concluded at Jackson Hole, about the interpretation and application of the articles on innocent passage ; and, secondly, General Assembly resolution 46/215 of 20 December, 1991, on large-scale pelagic drift-net fishing and its impact on the living marine resources of the world's oceans and seas.

6. The Rapporteur does not dissent in principle from Mr *Rosenne*'s analysis of the effect of these other instruments, although he is conscious (as indeed is Mr *Rosenne*) that the first of the two instruments to which reference has been made is a bilateral agreement only and cannot therefore formally engage other States parties to the 1982 Convention ; and that the legal effect of the second of the two instruments is limited by the consideration that it takes the form of a normal General Assembly resolution, and nothing more.

7. The Rapporteur is accordingly not entirely convinced that the two other instruments to which Mr *Rosenne* makes reference afford any real parallel to what is sought to be achieved by the new Agreement relating to the Implementation of Part XI of the 1982 Convention. We are all aware of the grave consequences of the failure of the Third United Nations Conference on the Law of the Sea to achieve the consent of several major industrialised States to some of the more far-reaching provisions incorporated in Part XI of the 1982 Convention. The Resolution adopted on 28 July, 1994, and the Agreement opened for signature on 29 July, 1994, constitute a brave and highly ingenious attempt to bring on board those industrialised States which had expressed their objections to certain of the proposals embodied in Part XI of the 1982 Convention prior to the opening of that Convention for signature. The Resolution and Agreement have been drawn up to take into account the far-reaching political and economic changes which have taken place since 1982, represented by what one of the preambular paragraphs to the Resolution refers to as «... a growing reliance on market principles» which, it is said, «... have necessitated the re-evaluation of some aspects of the régime for the Area and its resources».

8. In essence, the new Agreement seeks to adjust the provisions of Part XI to meet the major concerns voiced by industrialised States. Section 1 substantially reduces the costs of the new Authority for the States parties. Section 2 addresses the functions of the Enterprise and the discrimination in its favour contained in Part XI. The Enterprise will merely tick over until deep sea-bed mining begins, probably not before the twenty-first century. Any operations by the Enterprise are to begin by joint ventures in which the capital will be provided by a private sector consortium, thereby reducing risks and costs for the States parties. The Enterprise will work according to commercial principles and there will be no discrimination. Section 3 adjusts the decision-making rules in Part XI so as to ensure that, within the new Authority, a stronger voice is given to mining interests. Section 5 replaces the former provisions about the mandatory transfer of technology by more market-oriented provisions, including effective protection of intellectual property rights. Section 6 replaces the provisions in Part XI on production controls by more generalised provisions calling for the application of sound commercial rules and the relevant GATT rules. The financial terms for mining consortia will be eased by Section 8.

9. This very brief summary shows that the adjustments to Part XI are substantial and significant. The objective of the consultations initiated by M. Perez de Cuellar and completed by the present Secretary-General of the UN was, in the words of the latter's report of 9 June, 1994 (A/48/950, para. 28), « ... to achieve wider participation in the Convention

from the major industrialised States in order to achieve the goal of universality». Whether that goal will be achieved remains to be seen. But, as has already been noted, the prospects are reasonably encouraging.

10. Of particular significance in this context is Article 7 of the new Agreement dealing with provisional application. Article 7(1) provides that if, on 16 November, 1994, this Agreement has not entered into force (which is indeed factually the case) it shall be applied provisionally by four categories of States, of which the first category is :

> «(a) States which have consented to its adoption in the General Assembly of the United Nations, except any such State which before 16 November, 1994, notified the depositary in writing either that it will not so apply this Agreement or that it will consent to such application only upon subsequent signature or notification in writing».

13. Mr *Rosenne* concludes his comments on this new Agreement with the following observation :

> « ... the idea of an agreement (in whatever form it takes) on the interpretation or application of the Convention seems to open new possibilities and new techniques for bringing or keeping important treaties up-to-date without touching the treaties themselves. This comes within the scope of Article 31, paragraph 3, of the Vienna Convention, whether as a subsequent agreement or, if the basis is a resolution of the General Assembly, as subsequent practice. In any event, this appears as a new form of a succession of conventions on a particular subject».

14. The Rapporteur agrees entirely with Mr *Rosenne* that an agreement of the type exemplified by the new Agreement on the Implementation of Part XI of UN Convention on the Law of the Sea of 1982 appears to open up new possibilities and new techniques for securing that a multilateral convention is applied in a manner different from that which may originally have been intended. At this stage, however, and with a view to maintaining the flexibility of approach inherent in these new techniques, he hesitates to characterise an instrument of this type too closely. In particular, he is unconvinced that such an instrument constitutes a new form of succession of conventions on a particular subject. He would rather view it as a striking illustration of the notion of freedom of contract (subject to respect for overriding rules of *jus cogens*) in the process of treaty-making. Whatever view one takes, however, it does not seem to the Rapporteur that any specific new conclusions are required to accommodate such a highly exceptional instance of treaty-making as is provided by this new Agreement on the Implementation of Part XI of the UN Law of the Sea Convention.

III. Form of the work product of the First Commission

15. Mr *Torres Bernardez* retains a reservation concerning the form to be given to the final outcome of the work, believing that this should be decided only when the scope of agreement within the Commission on the proposed «Conclusions» can be assessed. His main preoccupation concerns the formula to be adopted for the set of conclusions on the relationship between treaty and custom. The Rapporteur understands the concem of Mr *Torres Bernardez*. It is indeed the Rapporteur's caution about analysing too closely the «ever-evolving relationship» between treaty and custom which may be in part responsible for the reservation of Mr *Torres Bernardez*. The Rapporteur agrees that treaty and custom are two distinct law-creating processes of positive international law, each in principle constituting a normative world of its own. The Rapporteur has added the phrase «in principle» to Mr *Torres Bernardez'* formulation, since he is conscious of the dangers of over-rigid compartmentalisation in this context, particularly in the case of a codification convention which will contain provisions which are declaratory of existing customary international law as well as provisions which serve to crystallize emerging rules of customary law or which generate new rules of customary law (see draft Conclusion 3). The process of cross-fertilisation between treaty and custom should not, in the view of the Rapporteur, be impeded by an over-rigid classification. The Rapporteur believes in any event that the concern of Mr *Torres Bernardez* can be met if a satisfactory wording can be found for the relevant conclusions.

16. Mr *Schindler*, on the other hand, agrees with the proposal to submit to the Institute as a whole a draft resolution taking note of the Commission's Reports and Conclusions, the Conclusions being appended to the Resolution. Mr *Crawford* likewise agrees that the outcome of the work of the Commission should take the form of a resolution and conclusions in the general form which the Rapporteur has proposed. Mr *Rosenne* seems implicitly to accept this approach, while having specific comments (as do other Confrères) on the wording of the proposed draft Resolution and Conclusions.

IV. Suggested modifications to the Draft Resolution

17. Mr *Rosenne* has considerable difficulty, as a matter of terminology, with the use of the expression «codification convention» ; and suggests the dropping of the word codification from the two places in which it appears in operative paragraph 1 of the draft resolution, from the first place in which it appears in the second preambular paragraph, and indeed also from operative paragraph 2. -

18. The Rapporteur sees some difficulties with these suggestions. He is conscious of the mandate of the First Commission which is to study the problems arising from a succession of codification conventions on a particular subject. To delete the word «codification» twice in operative paragraph 1 would be to overstep the mandate given to the First Commission. As a matter of treaty law in general, the Rapporteur could accept a widening of the recommendation along the lines suggested by Mr *Rosenne* ; but he hesitates to lead the Commission in the direction of exceeding its mandate. The Rapporteur would also draw attention to the consideration that the term «codification convention» is defined in Conclusion 1, at any rate for the purpose of the Conclusions in general. The Rapporteur believes that the term «codification convention» as used in the Resolution would be understood in the sense of the definition in Conclusion 1, and would prefer to leave the draft resolution untouched on this point, and to consider the possible modification of Conclusions 1 and 2 (as proposed by Mr *Torres Bernardez*) at a later stage.

19. Mr *Rosenne* suggests that, in operative paragraph 1, the phrase «Expresses the wish» be replaced by «Recommends». Mr *Crawford*, on the other hand, would prefer to use the phrase «Expresses the view» in operative paragraph 1. Both suggestions would appear designed to strengthen the draft, and the Rapporteur has no objection to either. He has accordingly incorporated Mr *Rosenne*'s proposed wording on this point in the revised draft. He has also accepted Mr *Crawford*'s grammatical point, while not accepting that the original language was ungrammatical.

20. In operative paragraph 3, the Rapporteur has accepted Mr *Rosenne*'s proposal to replace «Trusts» by «Expresses the wish». He has also accepted the second of Mr *Crawford*'s suggestions, namely, to add the phrase «and in particular its conclusions». He is much more hesitant about deleting the phrase «in its entirety», since the written observations which Mr *Torres Bernardez* has submitted on the Provisionsl Report place considerable emphasis on the comments made by members of the Commission on the various reports of the Rapporteur. The phrase «in its entirety» would ensure that these comments were also taken into account.

V. Suggested modifications to the Draft Conclusions

21. On Conclusion 1, Mr *Crawford* rightly points out that the particular problems which the Commission is directed to study are those arising from a succession to codification provisions in a codification convention, the institutional or regulatory provisions in such a convention presenting no special features. The Rapporteur has accordingly inserted the words

«containing provisions» after «multilateral convention» both in Conclusion 1 and, where appropriate, in other Conclusions.

22. Both Mr *Torres Bernardez* and Mr *Crawford* raise the question whether, in the context of regional codification conventions, we are concerned with regional codification conventions so far as they relate to regional customary law, or so far as they relate to general international law, or so far as they relate to both. The intention of the Rapporteur was *not* to exclude codification conventions dealing with regional customary international law. He is therefore persuaded by the arguments advanced on the wording of Conclusion 2, and has sought to accommodate them by an extensive revision of the text. The Rapporteur believes that the real distinction between a general codification convention and a regional codification convention relates essentially to the range of potential participants. In preparing this revised version of Conclusion 2, the Rapporteur has drawn largely on the suggestions made by Mr *Torres Bernardez* ; but he has now incorporated a final sentence which makes it clear that a regional codification convention may contain provisions which codify or progressively develop rules of general public international law or rules of public international law applicable only as between the States within the region.

23. Conclusion 3 has elicited no comments. The Rapporteur, however, believes, on reflection, that it would be desirable to insert the phrase «(hereinafter referred to as «codification provisions»)» at the end of the first sentence. This would be responsive to Mr *Crawford*'s point on Conclusion 1, and would simplify the drafting of later conclusions. As regards Conclusion 4, Mr *Torres Bernardez* raises the question of the relationship between successive «general codification» and «regional codification» conventions. The Rapporteur takes the view that, in the context of the formulation of a general codification convention, the existence of an earlier regional codification convention on the same subject-matter would constitute some evidence of the position taken by States within the region on that subject-matter. In view of the recommendation expressed in operative paragraph 1 of the draft resolution, he does not however think it necessary to formulate any additional conclusion on this particular question. The Rapporteur has however adopted the other suggestion made by Mr *Torres Bernardez* to replace the words «identical with» by the words «similar to». He has also made further modifications to Conclusion 4 consequential to the addition he has made in Conclusion 3.

24. Conclusion 5 has attracted comments from Mr *Torres Bernardez* and Mr *Crawford*, Mr *Torres Bernardez* suggests that the qualification «in many respects» which appears in the fifth line of Conclusion 5 might be deleted. The Rapporteur ventures to recall that, in the *Namibia* advisory opinion of 1971, the International Court of Justice was only prepared to

go so far as to characterise the rules contained in Article 60 of the Vienna Convention on the Law of Treaties (dealing with termination of a treaty relationship on account of material breach) as being «in many respects» a codification of existing customary law on the subject ; and that the Court embodied precisely the same qualification in its characterisation, in the *Fisheries Jurisdiction* case of 1973, of the rule expressed in Article 62 of the Vienna Convention on the Law of Treaties (dealing with fundamental change of circumstances). The Rapporteur would therefore prefer to retain the qualification «in many respects». Mr *Crawford* raises a different point, namely, whether reference should be made to Article 43 of the Vienna Convention in Conclusion 5. The Rapporteur does not fully understand Mr *Crawford*'s comment. In his view, Article 43 has really nothing to do with any problems arising from a succession to the codification provisions of codification conventions relating to the same subject-matter. It simply preserves the duty of any State to fulfil any obligations to which it would be subject under customary international law in the event of the invalidity, termination or denunciation, etc. of a treaty provision embodying any such obligation.

25. In Conclusion 6, the Rapporteur has accepted Mr *Crawford*'s suggestion to replace «possible» by «potential». He has more problems with the comments of Mr *Torres Bernardez*. He would accept of course that rules of *jus cogens* are not immutable rules. On the other hand, he has always had very considerable intellectual difficulty with the concept that a norm of *jus cogens* can be modified by treaty. Such a treaty would, at the time of its conclusion, be in conflict with the very norm of *jus cogens* which it purported to modify. Can a declaratory, crystallising or generating effect stem from the provisions of a convention which international law stigmatises as null and void ? For the time being, he has not modified Conclusion 6 to meet the point raised by Mr *Torres Bernardez* but would be prepared, if the other members of the First Commission agreed, to delete the words following «the Vienna Convention on the Law of Treaties» as Mr *Torres Bernardez* has proposed, since he would regard this as being a purely drafting change.

26. Mr *Torres Bernardez* also queries the saving concerning Article 60 of the Vienna Convention which appears in Conclusion 7. The Rapporteur would wish to explain that the saving concerning Article 60 of the Vienna Convention was included essentially because of the content of Article 311(6) of the UN Convention on the Law of the Sea. Members of the Commission will recall that the Rapporteur drew attention, in paragraph 51 of his Provisional Report, to paragraph 6 of Article 311, which reads :

> «6. States parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof».

The first limb of Conclusion 7 was designed to take into account a treaty provision of this kind, exceptional though it may be. However, the Rapporteur is prepared to concede that the drafting of the first limb of Conclusion 7 could be improved. It is not necessarily the conclusion of a «later *codification* convention» which breaches the obligation in the earlier codification convention ; it is the conclusion of *any* later convention. Moreover, it might be more accurate to speak of «the content» of a later convention rather than «the provisions». He has accordingly made these changes in the revised version of Conclusion 7.

27. Conclusion 8 has not given rise to any criticism. But Mr *Torres Bernardez* thinks that Conclusion 9 may go too far, since :

(a) the parties to the two codification conventions concerned may not be the same ;

(b) both the earlier and later codification conventions could contain relationship provisions drafted differently.

He thinks that Conclusion 9 might be reformulated to take into account the *res inter alios acta* and the *lex posterior* principles.

28. The Rapporteur is not fully persuaded by this criticism of the wording of Conclusion 9. He does not see it as the task of the Commission to present a solution for any potential treaty law problem which may arise in a particular set of circumstances. In any event, the articles in the Vienna Convention to which reference is made in Conclusion 5 (particularly Article 30) embody in large measure residual rules. However, it might largely meet the concern of Mr *Torres Bernardez* if the words «where applicable» were inserted in the text ; this the Rapporteur has done in his revised text (Alternative 1). On the other hand, the Rapporteur is conscious that the wording which he has proposed in Conclusion 9, particularly the phrase «only to the extent that» might carry with it the misleading implication that *none* of the provisions of the Vienna Convention to which reference is made in Conclusion 5 would be applicable if either codification convention contained a clause specifically regulating the relationship between the two conventions. For this reason, the Rapporteur has proposed a completely new version of Conclusion 9 (Alternative 2). The choice between the two versions can be made at the meeting of the Commission which will immediately precede the forthcoming Lisbon session of the Institute.

29. Mr *Torres Bernardez* has also offered comments on Conclusion 10. The Rapporteur has cut out the phrase «or international organizations» as suggested. On the other hand, as he has not specifically dealt in Conclusion 9 with the *lex posterior* principle (that principle being inherent in Article 30 of the Vienna Convention to which reference is made in Conclusion 5), he has not felt it appropriate to take up the other drafting

suggestions made by Mr *Torres Bernardez*. Conclusion 10 was intended to deal *inter alia* with the kind of problem presented by the relationship between the provisions on the diplomatic bag contained in the four existing codification conventions on diplomatic law and any new codification convention which might be adopted on the basis of the ILC draft articles on the status of the diplomatic courier and unaccompanied diplomatic bag. The words «in greater detail» are intended to reflect the notion that the topic may be partially regulated by the earlier convention, the later convention building on the progress already achieved.

30. Conclusions 11 to 15 deal with the relationship between treaty and custom. Mr *Schindler* has some doubts about the retention of Conclusions 13 to 15, believing them to be rather outside the scope of the topic assigned to the Commission, and to display no particularities as regards our topic. On the other hand, Mr *Torres Bernardez* clearly attaches considerable importance to what is said in the Conclusions of the Commission about the relationship between treaty and custom. The Rapporteur therefore proposes to retain the substance of Conclusions 13 to 15 while endeavouring to take into account particular points raised on their wording.

31. On Conclusion 11, Mr *Crawford* takes exception to the characterisation of treaty and custom as «autonomous» sources of international law, though he accepts that they are «distinct» sources. By way of contrast, Mr *Torres Bernardez*, seems to have a preference for the word «autonomous». The Rapporteur accordingly proposes, in his revised version of Conclusion 11, the use of the phrase «distinct but related» instead of «autonomous». Mr *Torres Bernardez* is anxious that Conclusion 11 be amplified to stress that treaty rules and customary rules, even if identical, retain their autonomous separate existence. To meet this point, the Rapporteur has added the following sentence to Conclusion 11 :

> «In principle, however, they retain their separate existence, as norms of treaty law or of customary law respectively».

32. Both Mr *Crawford* and Mr *Torres Bernardez* find some difficulty with the content of Conclusion 12. Mr *Crawford* finds the second sentence too absolute in the sense that it does not take account of the possibility that a treaty norm may be modified in subsequent practice by a later rule of customary law. Mr *Torres Bernardez* finds even greater difficulty with the second sentence of Conclusion 12 and takes the view that «there is not a normative basis in international law allowing the formulation of that kind of general proposition». The Rapporteur ventures to disagree with this last statement, but can go some way towards meeting the concerns voiced by adding a further qualification to the send sentence :

«... or has been subsequently modified by a later norm of customary law».

33. On Conclusion 13, both Mr *Torres Bernardez* and Mr *Crawford* dislike the specific reference to the *North Sea Continental Shelf* cases. Mr *Crawford* thinks it would be preferable to spell out the actual criteria laid down in these cases. Mr *Torres Bernardez* would simply delete the specific reference to the *North Sea Continental Shelf* cases, since he points out that in subsequent cases (*Fisheries Jurisdiction, Gulf of Maine, Libya/Malta Continental Shelf* and *Nicaragua*) the Court, or a chamber of the Court, has indicated refinements in the process of generation of customary law by treaty. In view of the difficulties, the Rapporteur favours the approach of Mr *Torres Bernardez* and has revised the text of Conclusion 13 accordingly.

34. Mr *Crawford* has some difficulty with the formulation of the second sentence of Conclusion 14. He suggests that it read :

«In the case of States parties to the treaties in their relations with other States parties, the significance of an instance of State practice will be substantially reduced unless there is evidence that the State concerned was acting within the framework of customary international law».

The Rapporteur is not happy with this alternative text, given that Conclusion 14 is directly concerned with State practice in relation to the process of generation of customary law by treaty. He has however revised Conclusion 14 in the direction favoured by Mr *Crawford* by adding at the end of the second sentence the phrase «... and not in the conviction that the practice was in any event independently required by a rule of customary international law». He has also accepted Mr *Crawford*'s reformulation of the opening phrase of the second sentence of Conclusion 14.

35. Finally, the Rapporteur accepts the point made by Mr Crawford that the wording of Conclusion 15 may be too absolute, since a judgment of the Court as to the content of a customary law rule may slow down the development of the law in a sense different from that expressed in the judgment. The Rapporteur has therefore accepted Mr *Crawford*'s proposed amendment in his revised version of the Conclusions.

36. The Rapporteur would in conclusion express his gratitude to all the members of the Commission for their contribution to the study undertaken. He looks forward to meeting them the day before the opening of the next session at Lisbon when the text of the Draft Resolution and Conclusions to be presented to the plenary meeting of the Institute will have to be finalised.

Draft Resolution

December 1994

The Institute of International Law,

— *Considering* that the mandate of the First Commission is to study the problems arising from a succession of codification conventions on a particular subject,

— *Considering* that the conclusion of the United Nations Convention on the Law of the Sea of 1982 has focused attention on the particular problems which may arise when a later codification convention deals with the same subject-matter as an earlier codification convention,

— *Considering* that these problems include *inter alia* questions of the law of treaties and questions pertaining to the relationship between treaty and custom,

— *Having examined* the reports of the First Commission together with the comments and conclusions attached thereto,

1. Recommends that the negotiators of any codification convention relating to the same subject-matter as that of an earlier codification convention should incorporate provisions in that convention regulating the relationship between it and the earlier convention.

2. Congratulates the Rapporteur and the Members of the First Commission on having succeeded in identifying and suggesting possible solutions for some of the problems which may arise from a succession of codification conventions relating to the same subject-matter.

3. Expresses the wish that the work of the First Commission in its entirety, and in particular its conclusions, will be the subject of thorough study by all concerned.

Conclusions of the Commission

December 1994

I. General

Conclusion 1 : Definition

For the purpose of these conclusions, the expression «codification convention» is to be taken as meaning any multilateral convention containing provisions designed to codify or progressively to develop rules of general public international law.

Conclusion 2 : General and regional codification conventions

A codification convention in this sense is normally open to universal or at least very wide participation by States irrespective of the regional group or groups to which they may belong, in which case it is referred to as a general codification convention. Exceptionally, however, a codification convention may be concluded at the regional level and may reserve participation to the States belonging to the regional group concerned, in which case it is referred to as a regional codification convention. Such a regional codification convention may contain provisions which codify or progressively develop rules of general public international law or rules of public international law applicable only as between States within the region.

Conclusion 3 : Declaratory, crystallising or generating effect of codification conventions

A codification convention may contain provisions which are declaratory of existing customary law or which serve to crystallise emerging rules of customary law or which generate new rules of customary law (hereinafter referred to as «codification provisions»). It may in addition embody provisions which are essentially regulatory or institutional in their nature.

Conclusion 4 : Scope of conclusions

These conclusions apply to a succession to the codification provisions of general codification conventions relating to the same subject-matter, and may equally apply to a succession to the codification provisions of regional codification conventions relating to the same subject-matter where a succession to the codification provisions of such conventions raises problems similar to those raised by a succession to the codification provisions of general codification conventions.

II. Treaty Law

Conclusion 5 : Treaty law consequences of a succession of codification conventions relating to the same subject-matter.

The consequences, as a matter of the law of treaties, of a succession to the codification provisions of codification conventions relating to the same subject-matter flow from the application of the provisions stated in Article 30 of the Vienna Convention on the Law of Treaties, bearing in mind, where appropriate, the provisions of Articles 40, 41 and 59 of that Convention, these provisions constituting in many respects a codification of existing customary law on the application of successive treaties relating to the same subject-matter, the amendment of multilateral treaties, their modification as between certain of the parties only, and the termination of a treaty or the suspension of its operation implied by the conclusion of a later treaty.

Conclusion 6 : Saving for jus cogens

Conclusion 5 is without prejudice to the potential application of the rules stated in Article 53 or 64 of the Vienna Convention on the Law of Treaties in the case of a later codification convention relating to the same subject-matter as an earlier codification convention.

Conclusion 7 : Saving for application of the law of State responsibility

Conclusion 5 is likewise without prejudice to the application of the rules stated in Article 60 of the Vienna Convention on the Law of Treaties in a case where the content of a later convention constitutes a breach of an obligation in the earlier codification convention prohibiting the conclusion of the later convention, and is equally without prejudice to the other legal consequences of breach of such an obligation deriving, for example, from the application of the rules of the law of state responsibility.

Conclusion 8 : Saving for application of particular rules or practices of international organizations

In the case of successive codification conventions relating to the same subject-matter concluded within the framework of an international organization which has adopted particular rules or practices regulating the relationship between successive conventions of this type, Conclusion 5 is without prejudice to the application of any such rules or practices.

Conclusion 9 : Priority to be given to treaty provisions regulating relationship between successive codification conventions

Alternative 1.

Conclusion 5 applies to a succession to the codification provisions of codification conventions relating to the same subject-matter only to the extent that the earlier or later codification convention does not embody a provision specifically regulating the relationship between the two conventions, in which case that provision will where applicable prevail.

Alternative 2.

Conclusion 5 applies to a succession to the codification provisions of codification conventions relating to the same subject-matter even in cases where the earlier or later codification convention embodies a provision specifically regulating the relationship between the two conventions ; but in such a case that provision will, to the extent that it is applicable in the particular circumstances, prevail.

Conclusion 10 : Special case of a later codification convention regulating in greater detail part of the ground covered by an earlier codification convention

Where the object and purpose of a later codification convention is to regulate in greater detail a matter or matters already regulated by an earlier codification convention and where two States are parties to both conventions, there may, in appropriate cases and unless the later convention otherwise provides, be room in the interpretation of the two conventions for the application of the distinction between the *lex specialis* and *the lex generalis*, so that the *lex specialis* would prevail, in a case of incompatibility between the provisions of the two conventions.

III. Relationship between treaty and custom

Conclusion 11 : As sources of international law

Treaty and custom form two distinct but related sources of international law. Norms deriving from one of these two sources may

have an impact upon the content and interpretation of norms deriving from the other source. In principle, however, they retain their separate existence as norms of treaty law or of customary law respectively.

Conclusion 12 : Hierarchy of sources

There is no *a priori* hierarchy among the differing sources of international law. However, as a matter of the application of international law in cases of dispute, relevant norms deriving from a treaty binding upon the parties to the dispute will prevail over norms deriving from customary law, save where the norm deriving from a treaty contravenes a rule of *jus cogens,* or has been subsequently modified by a later norm of customary law.

Conclusion 13 : Generation of customary law by treaty

The criteria laid down by the International Court of Justice for the generation of customary law by treaty remain valid.

Conclusion 14 : State practice in relation to the process of generation of customary law by treaty

In assessing the element of State practice in the process whereby a rule of customary law may be generated by treaty, the practice of all States, whether or not parties to the treaty, should be taken into account. In the case of conduct of States parties to the treaty in their relations with other States parties, the significance of an instance of State practice in this context will be substantially reduced if there is evidence that the State concerned had been acting only in the application of the treaty, and not in the conviction that the practice was in any event required by a rule of customary international law.

Conclusion 15 : Effect of judicial pronouncements

A judicial pronouncement to the effect that a particular provision of a codification convention is declaratory of customary law, or has crystallised an emerging rule of customary law or has generated a new rule of customary law states the law only as of the date upon which such a pronouncement is made, and consequently does not exclude the further development of the law.

Les conséquences juridiques pour les Etats membres de l'inexécution par des organisations internationales de leurs obligations envers des tiers

The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties

*Cinquième Commission**

Rapporteur : *Mme Rosalyn Higgins*

* La Cinquième Commission comprenait au 15 avril 1994 : Mme Rosalyn Higgins, *Rapporteur*, MM. Amerasinghe, Bowett, Crawford, Lauterpacht, Monaco, Salmon, Schachter, Schermers, Seidl-Hohenveldern, Seyersted, Shihata, Vignes, Vukas, Waelbroeck, Zemanek.

Preliminary Exposé and Draft Questionnaire

June 1989

I. Introductory

II. Direct liability to third parties

Legal consequences for member states and the legal personality of international organizations

a) International bodies possessing no separate personality

b) International organizations possessing their own legal personality

- The case law
- The writings
- State practice

The problem of third parties' vis-à-vis the organization

The question of *vires*

Analogy to the position of member states in respect of treaties concluded by an international organization

Application of principles of state responsibility

III. A duty to put the organization in funds

IV. Concluding thoughts :

- Some questions of principle
- Burden of proof to show a rule exists
- The problem of *non liquet* and private law analogy
- Considerations of equity and policy

Draft Questionnaire

I. Introductory

The purpose of this Report is to provide a preliminary study of the international law issues in determining the legal consequences of member states of the non-fulfilment by international organizations of their obligations towards third parties. When the question of such non-fulfilment of obligations is litigated before domestic courts, various considerations of domestic law will come into play. The personality of the international organization on the domestic plane may be thought to have relevance, for example. This Report does not purport to examine issues of domestic law. Further, the substantive determinations of municipal tribunals on our topic has been severely curtailed through the operation of immunities from jurisdiction on the one hand, and the concept of non-justiciability on the other. While an international organization may be liable for certain acts and omissions on the domestic level, it may often be protected from the consequences of the liability by virtue of having certain immunities from suit and/or execution. That of itself should be irrelevant to the question of whether member states are themselves liable for the obligations of the organization. But insofar as the answer is said to rest upon provisions in the treaty establishing the organization, it may be contended that this is a non-justiciable issue for the local courts (perhaps because the treaty is not part of the local law, or because the matter involves relations between international actors that are felt inappropriate for local determination). Further, a claim that the member states are liable for the obligations of an international organization to which they belong may be met by the assertion by the states concerned of state immunity from local jurisdiction.

I have not in this preliminary report dealt in any detail with substantive domestic law considerations, nor with questions of immunity and non-justiciability, though they are constantly in the background and have, for example, played a very important part in the recent tin litigation. I have assumed that the « legal consequences for member states » with which our Commission is concerned are the legal consequences at international law.

The necessary starting point in determining the legal consequences for member states of the non-fulfilment by international organizations of their obligations towards third parties is the concept of personality. We may simply say that, if an international organization has no distinct legal personality, it cannot itself be legally liable for obligations even if incurred

in its name ; and it is likely that the liability will rather be that of the member states.

While separate personality may be a prerequisite for the liability of the organization, it is not necessarily sufficient to establish whether there is liability on the part of the members, of a concurrent or secondary nature. This requires many further questions to be addressed. Is the organization to be regarded as having acted as the agent of its members ? Is the method by which the organizational decisions were taken that led to the obligation to a third party a relevant factor ? Does a host state retain special liabilities vis-à-vis the conduct of an organization headquartered on its territory - and indeed, are the general principles of state responsibility illuminating in regard to the problem before us ? We will also need to consider whether considerations of *vires* on the part of the international organization can affect the answer to the question of state liability.

This preliminary report endeavours to address all of these closely interrelated issues, by reference to judicial and arbitral decisions, treaties and state practice, learned writings, and what we may term argument of principle.

II. Direct liability to third parties

Legal consequences for member states and the legal personality of organizations

a) International bodies possessing no separate personality

It appears to be widely accepted that an entity without legal personality cannot be the bearer of either rights or duties. This may be deduced from the fact that the issue of whether an entity itself has rights and obligations in international law has invariably been regarded as synonymous with whether it has international legal personality. This has been true both for those early writers who insisted that only states could have international legal personality, and for those who saw, even by 1930, that :[1]

> « the exclusive possession of the field of international law by states ... is being broken down by the invasion of bodies which are neither

1 See also, C.W. Jenks, « The Legal Personality of International Organizations » 22 *BYIL* (1945), pp. 11-72 and the vast international literature gathered in footnote 11 thereof.

> states nor individuals, nor combinations of states or individuals, but right-and duty bearing international creations, to which for the want of a better name the title of 'international body corporate', *'personne juridique internationale'* may perhaps be accorded ».
> (Sir John Fischer Williams, « The Legal Character of the Bank for International Settlements », 24 *A.J.I.L.* (1930) 665 at 666).

Equally, the International Court of Justice found that, to say that the United Nations was an international person means that it is « capable of possessing international rights and duties » (*Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ *Reports* 174 at 179). Indeed, without deviating into an analysis of the arcane question of whether personality is something other than a compendium of capacities, we may safely say that one of the *indicia* of international personality is that the entity concerned can bring claims or have claims brought against it. This necessarily implies liability (though without determining whether it has some liability).

In international associations which have no separate legal personality, it is the states members and not the association which will be liable for unfulfilled obligations entered into in the name of the association. An international association lacking legal personality, and possessing no *volonté distincte* (Alexander Nekam, *The Personality Conception of the Legal Entity*. W.S. Hein, 1978), remains the creature of the states members who are thus liable for its acts.

While there is little debate today on the legal consequence for member states of acts of organizations not having separate legal personality, there is still some controversy on how one ascertains whether organizations do have such separate personality. The view is taken by Seidl-Hohenveldern that an international organization is only a subject of international law insofar as its rights are of a *jure imperii* quality. More precisely, he is of the view that :

> « an international organization will be a subject of international law if it has been established by a meeting of the wills of its member states for activities which, if pursued by a single state, would be *jure imperii* activities and if the member states have enabled the organization to have rights and duties of its own under international and domestic law and to express a will not necessarily identical with the will of each of them, such will to be expressed by an organ not subject to instructions of any single member state ».
> *Corporations In and Under International Law* (1988 at p. 72). See also *Das Recht der Internationaler Organisationen*, p. 4.

Classifying international bodies engaged in activities *jure gestionis* as interstate enterprises rather than as international organizations (see also Valticos, I.D.I. *Annuaire* 57 (1977-I), p. 13), Seidl-Hohenveldern finds that they lack international personality and draws the conclusion that member

states may not escape liability for debts incurred by the interstate enterprise. He finds that :

> « just as a state cannot escape its legal responsibility under international law by entrusting to another person the fulfilment of its international obligations, the partners of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise ». (*Corporations In and Under International Law* at p.121).

In the view of this writer liability for international bodies that have no legal personality and are merely a vehicle for interstate cooperation, remains that of the members. However, the implication of Seidl-Hohenveldern's position is that even if an organization has under its constituent instrument been granted its own rights and duties, and can express a *volonté distincte* through organs not subject to the instructions of a single member state, it still has no personality or liability of its own if its functions are those that would be described as *jure gestionis* if carried out by a state. This is more controversial and will require further study.

The relationship between activities *jure gestionis* of an international body and its separate legal personality has been in issue in one facet of the International Tin Council litigation. In the Court of Appeal Judgment in the *Direct Action* cases the question of separate personality (and the consequences for members' liability) was concerned in significant part with whether any international personality had been carried into English law. (Both the Sixth International Tin Agreement (ITA6) and the Headquarters Agreement (HQA) provided in terms that the ITC should have legal personality). The pertinent statutory instrument (which did not purport to give effect to the ITA6 but was directed to giving effect to relevant provisions of HQA) merely stated that the ITC should « have the legal capacities of a body corporate ». The Court decided that this formula (which was a standard one used in English statutory instruments under the International Organizations Act 1968) :

> « was not merely to enable the members of an international organization, in most cases sovereign states, to function within the framework of English law under a collective name as individual legal entities. The objective must also have been to give recognition to the fact that all the members, including the United Kingdom itself, intended that the international organization shall have legal personality. »
>
> (*Maclaine Watson v. Dept. of Trade* [1988] 3 *A.E.R.* 257 at 296 C.A.).

It has been suggested to the Court of Appeal that the *Reparation for Injuries Case* and other authorities dealing with international legal personality were concerned only with the United Nations and that the same consequences should not be drawn for an organization acting *jure*

gestionis.[2] The Court of Appeal had also studies Seidl-Hohenveldern's approach to common interstate enterprises. In its judgment it said :

> « Of course, the constitutional objectives of the United Nations are wholly different from those of more commonplace international organizations such as the ITC. But the fact that the ITC is largely designed to conduct trading activities in order to achieve its objectives, whereas the United Nations will presumably enter into contracts mainly for administrative and similar purposes only, is no reason for differentiating between them as legal entities ».
> ([1988] 3. *A.E.R.* 257 at 297).

Thus, even though the ITC was engaging in trading, it was held to be an international legal person and not merely a collective name for its members ; and was itself liable for its acts, for contracts entered into[3] and liable on awards and judgments.

There is some diverse practice, at the level of domestic courts, as to whether a distinction *jure gestionis* and *jure imperii* should be made in the case of international organizations, for the purpose of interpreting the immunity to be granted. This is a topic which is beyond the scope

---

2 I do not here need to deal with the question of whether every international organization that is trading is *ipso facto* an organization which functions *jure gestionis* rather than *jure imperii*. The contending parties took different positions on this in the *Direct Action* in the Tin Case ; and the Court of Appeal satisfied itself with saying that the ITC was « 'largely' designed to conduct trading activities in order to achieve objectives ». It undoubtedly also had a few *imperii* type activities too ; and whether the stabilisation of international tin prices is an objective *imperii* or *gestionis* is perhaps open to argument. Seidl-Hohenveldern, in his remarks on OPEC, accepts that an international body which has functions, some of which are *gestioni* but others of which are *imperii*, cannot be considered a common inter-state enterprise but rather an international organization.
Corporations In and Under International Law, p. 111.

3 The claim for contract was summarised thus : « The ITC has no legal personality distinct from its members. The members are an unincorporated association who agreed to trade, and traded in the name of the ITC. The plaintiffs' contracts, although made nominally with the ITC, were accordingly made directly with the members, and the members are accordingly jointly or severally liable as trading partners ».
[1988] 3 *A.E.R.* at 274.

of this paper[4], where we address only the issue of whether an international organization established by treaty to engage in trading activities is necessarily devoid of international personality (and is thus not responsible for debts incurred in its name).

More generally, the Court of Appeal found that, although the ITC was not a body corporate in terms of English law (but had only been given the capacities of a body corporate in English law) it was recognised in English law as a legal entity separate from its members.

b) International organizations possessing their own legal personality

While the possession of separate legal personality is a necessary precondition for an organization to be liable for its own obligations, it does not follow that separate personality is necessarily determinative of whether member states have a concurrent or residual liability. The contention that there existed such liability on the part of members, notwithstanding the personality of the organization, was the second of three[5] arguments on liability advanced by the plaintiffs before the Court of Appeal in the *Direct Action* in tin. This required the Court of Appeal to regard the ITC as :

> « analogous to that of bodies in the nature of quasi-partnerships well-known in the civil law systems, where both the entity and the members

4 See, for example, *Branno v. Ministry of War*, 22 *I.L.R.* 756. In all these cases matters internal to the organization, *i.e.* concerning the relationship of the staff to the organization, have been held to be *jure imperii* and/or immune from local jurisdiction. For a rehearsal of the arguments supporting absolute immunity of international organizations, see Morgenstern, *Legal Problems of International Organizations* (1986) at 6, who includes « the fact that the capacity of international organizations is directly related to their public functions seems to imply that, as a matter of principle, the problems of acts *jure gestionis* should remain unimportant ». She asks, « Would, for instance, the sweeping denial of immunity for contracts for the supply of goods under the United Kingdom State Immunity Act, 1978, be suitable for application to purchases by an organization for technical cooperation projects ? »

5 The first argument was that the ITC had no legal personality distinct from its members ; and that contracts with the ITC were in fact contracts made directly with members, who were accordingly jointly and severally liable as trading partners. The third argument was that, even if the ITC has separate legal personality, in contracting with third parties it acted as agent for its members as undisclosed principals.

> are liable to creditors, or the members are in any event secondarily liable for the debts of the entity. This concept is exemplified in the United Kingdom by a Scottish partnership, in France by a *société en nom collectif* and in Germany by a *Kommanditgesellschaft auf Aktien* ».
> ([1988] 3 *A.E.R.* at 274.

This argument was advanced as one applicable both from the perspective of international law and domestic law. It was claimed that the nature of the ITC in international law was that of such a mixed entity ; and that English law merely conferred capacities on the ITC (through the 1972 Order in Council) but did not purport to change its legal character. And it was further argued that the association of the members for purposes of trade, taken together with the absence of any limitation of their liability meant that the members, as well as the organization, was liable for debts.

The Court of Appeal found that the concept of secondary liability of members in the face of the separate personality of an association had not been developed in English law :

> « The interposition of a legal entity between an unincorporated group of persons on the one hand, and third parties who enter into contracts with the legal entity on the other, has the consequence under the common law that the members of the group have no liability for the contracts made by the entity ».
> ([1988[] 3 *A.E.R.* at 301).

The Court of Appeal therefore turned to deal with the issue of what it termed « secondary liability via the route of international law »[6]. This it did partly by an examination of the particular constituent instrument (finding that ITA6 « nowhere envisages any liability by the members to anyone other than the Council or the members *inter se*. There is nothing which points to the assumption of any obligation to any creditor of the Council. On the contrary, everything points in the opposite direction »,

---

6 To be able to address this question as a matter of substance, the Court of Appeal had first to be able to dispose of the contention that the matter was non-justiciable, because any argument on secondary liability required reliance on ITA6, which had not been incorporated into English law. Kerr and Nourse LJJ (but not Ralph Gibson LJ) found that although unincorporated treaties are not part of English law, and no rights or obligations arising under them can provide a basis for a claim in English law, « there seems no harm in permitting resort to the Sixth International Tin Agreement for the purpose of establishing who, on the plane of international law, is liable for the debts of the ITC ... »
[1988] 3 *A.E.R.* at 303.

ibid. at 304) and partly by reference to the general principles of international law.

In seeking to identify the pertinent rules of general international law, the Court of Appeal heard extensive submissions on the writings of leading jurists and on international case law. Lord Justice Kerr, writing the majority opinion for the Court of Appeal, found on the basis of these sources that there was no :

> « basis for concluding that it has been shown that there is any rule of international law, binding on the member states of the ITC, whereby they can be held liable, let alone jointly and severally, in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name ».
> (*Ibid.*, p. 307).

The Case law

The Court of Appeal judgment in the *Direct Action* in tin is of course itself one of the judicial decisions to which one must now look to identify the international law on this matter[7]. (Article 38 of the Statute of the ICJ, the reference to judicial decisions as a subsidiary source not being limited to international judicial decisions). Accordingly, it should be noted that while a majority of the Court (Kerr LJ and Ralph Gibson LJ) rejected the submission of a concurrent or secondary liability on the part of members, they did so on significantly different grounds, at least so far as international law was concerned[8]. Lord Justice Ralph Gibson bases himself not so much on a conviction that general international law did not contain any rule of separate liability, but rather on arguments of non-justiciability. In his view the transactions of members within the ITC - even directed to buffer stock trading and borrowing - were transactions between foreign sovereign states (and the EEC) and non-reviewable by the English courts :

> « ... the actions of the members in conducting their international purposes through the means of the ITC, on which they conferred international

7 However, appeals on this judgment are now (June 1989) being heard before the House of Lords.

8 As to municipal law, Lord Justice Ralph Gibson agreed with Lord Justice Kerr that « the rules of law of England and Wales including the 1972 Order » did not lead to the secondary liability on the part of the members notwithstanding the separate legal personality of the ITC.

> legal personality, and for which they sought and obtained legal personality under our law for the purposes of its trading activity, show, in my judgment, that the intention of the members was to prevent their actions as members within the organization from being subjected to the jurisdiction of our courts ».
> ([1988] 3 *A.E.R.* at 348).

By contrast, the starting point for Lord Justice Nourse was that « in international law the attribution of legal personality to an international organization does not necessarily free its members from liability for its obligations ». From that point he reasoned that when states engage in extensive participation and control in the affairs of an international organization, the presumption is of liability for its obligations. Nor should the liability be limited to fault on the part of member states « because that would make third parties' rights of recovery against the members precarious and dependent on circumstances outside their knowledge and control ». Members could still limit or exclude their liability by expressly so providing in the relevant treaty. Nor should liability be excluded for *acta jure imperii*, because a third party dealing with an international organization should be in no worse a position than if the organization were acting *jure gestionis* (*ibid.*, pp. 332-3).

The present writer believes that the only real reliance placed by Nourse LJ on substantive international law was the finding that legal personality of an organization does not necessarily free his members from liability. Lord Justice Nourse pointed to policy reasons why, in his view, the protection of third parties made desirable the secondary liability of states. In an uncertain area policy factors are not to be discounted as irrelevant, and we later offer our views as to preferred policy considerations. Lord Justice Nourse also thought (ahthough again he pointed to no specific international law that addressed the matter) that extensive participation and control by members in the affairs of an international organization « points strongly towards their liability for its obligations ». At the level of domestic law we may note that the members of associations often continue to have an important role in the decision-making of the association without being liable for its obligations : their liability depends upon the nature of the association rather than their institutional interest in its affairs.

At the international level this leads one into the area of *dédoublement fonctionnel*, the role of the members not being as individual states, but rather as members of the relevant decision making organ. Nearly all international organizations with separate personality have a secretariat, and one or more organs on which all, or some, of the member states are represented. But if an international organization is really the creature of the states members, it will be an interstate enterprise without a *volonté*

distincte. Where the organization has a *volonté distincte* the continuing role of states members *qua* organs should be regarded as neutral as regards the issue of members' liability for the acts of the international organization. There are other considerations which lead in the same direction. If 'continuing involvement and control' were the test for member states' liability, would it be argued that states would be liable for decisions taken in organs in which they are represented (even if they did not vote for them) but not in organs in which they are not represented ? Is it to be argued that states are liable for, *e.g.*, decisions made in a plenary organ or organ of limited representation, but not, *e.g.* for embezzlement by a secretariat member ? International organizations are of course an integral whole, and not interstate organs on the one hand and 'real' international organizations (*i.e.* secretariats) on the other.

Other case law remains of limited value in determining the problem of members' liability. The question arose in the ICC arbitration, *Westland Helicopters Ltd. v. Arab Organization for Industrialisation,* 5 March 1984, 23 *ILM* (1984) 1071. The claimant, the AOI, had entered into certain contracts. Prior to this the Higher Committee of the AOI (ministers delegated by the four states members) had signed with the United Kingdom a memorandum of understanding guaranteeing performance by the four states of AOI commitments. Difficulties arose within the AOI as a result of Egypt's role in the Camp David Agreements and consequential problems led the claimant to seek arbitration. The issue of personality of AOI and liability of members arose indirectly, in the context of the need of the Tribunal to decide whether an arbitration agreement had been entered into only with AOI, or with the states parties also (notwithstanding that they were not signatories to the arbitration agreement). The Tribunal decided that this question was « exactly the same » as whether the obligations generally of the AOI under the Shareholders Agreement were obligations attributable to the members.

We should treat this finding as specific to the case. So far as separate legal personality of AOI is concerned, the Tribunal noted that it was not subject to any national law and that its legal status was established by treaty. The Tribunal took no further the analysis of whether the AOI really had international legal personality, because it took the view that, in deciding whether the states were bound by obligations undertaken by it, « One must ... disregard any question relating to the personality of the AOI. The possible liability of the 4 states must be determined by directly examining the founding documents of the AOI in relation to this problem ». But the documents were silent on the matter and the Tribunal

was left to make inferences from such silences[9]. It found that the express attribution of legal personality does not allow one « to deduce an exclusion of the liability of the 4 states ». Further :

> « One could perhaps infer that the 4 states' liability is secondary, in that they could not be proceeded against so long as AOI performed its obligations ... but it does not follow that the 4 states would have no liability whatsoever for obligations entered into by AOI ».

The Tribunal continued :

> « In the absence of any provision expressly or impliedly excluding the liability of the 4 states, this liability subsists since, as a general rule, those who engage in transactions of an economic nature are deemed liable for the obligations which flow there from. In default by the 4 states of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability ».

This was said by the Tribunal to be a « rule » which « flows from general principles of law and from good faith ». We can make several brief observations. The « general principles of law » seemed to consist of analogizing « commercial organizations » to partnerships in English or United States law, or *société en nom collectif* under French,

---

9 This interim award is not satisfactorily addressed in the Court of Appeal (*Direct Action*) judgment in tin. That the award had been successfully challenged in part in the Swiss courts should not have affected any inherent value in the analysis it provides (the challenge being on other grounds). But its lack of value as «a satisfactory precedent» (not the test that international law would apply in assessing a case as a relevant source) was what was emphasised. Kerr LJ found that as the award was made in an international arbitration pursuant to an international arbitral agreement «its reasoning cannot simply be transposed to found an acceptance of obligations to the creditors of the ITC at the level of municipal law» [1988] 3 *A.E.R.* at 307. But the exercise being undertaken by the Court of Appeal was not to found an acceptance of obligations under municipal law, but to identify general principles of international law, to see if there was secondary liability « via the route of international law » (p. 301). Ralph Gibson LJ accepted that the tribunal was applying general principles of international law, but said he would not «apply that decision» (which was never in issue ; what was involved was trying to identify general international law on the subject at hand). His reason was that « where the contract has been made by the organization as a separate legal personality, then, in my view, international law would not impose such liability on the members, simply by virtue of their membership, unless on a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability had been assumed by the members » (p. 353). Ralph Gibson LJ does not identify the sources of international law by reference to which he arrives at this view.

Swiss or German law. The present writer believes this approach to be question-begging and inappropriate. International organizations fall ultimately to be understood and analyzed within their own terms. The Tribunal also referred to the states engaging in transactions of an economic nature : again, this begs the question of whether it was they, or the AOI, which so engaged. Nor was there any analysis as to whether contracts for the provision of arms entered into by an international organization established for this very purpose are or are not necessarily to be regarded as *jure gestionis* ; or the legal consequences that might be said to flow from an affirmative conclusion[10]. Above all, the Tribunal seemed to assume that there was an *a priori* liability on the part of members which they had failed to exclude : this reasoning appeared in the specific case to flow from the technique of analogizing to certain private law entities ; for the « limited personality » conferred by the constituent instruments ; and from the fact that « one must admit that in reality, in the circumstances of this case, the AOI is one with the states ».

In the opinion of this writer the analysis lacks a certain rigour, and even on its own terms can be said to rest on a scepticism about the 'real' independent personality of the AOI, which was really to be identified with the states.

In the circumstances (and leaving entirely aside the status of the Interim Award, which has been challenged for other reasons in certain jurisdictions : we are here concerned with the realm of intellectual analysis rather than precedent or authority in any other sense) the *Westland Helicopters* case does not carry the matter forward.

In seeking to identify relevant judicial decisions, reference must properly be made to the *Case of Reparation for Injuries Suffered in the Service of the United Nations*, ICJ *Reports* (1949) 174 ; the *Case of Certain Expenses of the United Nations*, ICJ *Reports* (1962) 151 ; and the *Namibia Case*, ICJ *Reports* (1971), though, as will be seen, they do not really address the issue before us. *The Reparation for Injuries Case* addresses the issue of powers to be implied to international organizations possessing international legal personality, notably the power to bear rights and obligations ; it is not directed to the liability of its members for the obligations of the organization. The Namibia Case does of course make clear that when a decision by the Security Council has been made under Article 24 of the UN Charter, it is binding on the membership as a whole. But the fact that, under a constituent instrument, decisions validly taken by one organ may bind those who did not take part in the decision, and indeed even those who voted against the decision, does not

10 Which we have briefly alluded to above, pp. 254-255.

greatly illuminated our problem. What is the relationship between being « bound by » the decision of an international organization and being « liable for » such a decision ? To be bound by a decision means that one cannot deny its validity or binding force ; or the consequences of it so far as it requires conduct or abstention from conduct on the part of members. Thus in the Namibia Case the decision of the Security Council in resolution 276 required members to desist from trade with South Africa in respect of Namibia. In the case of tin, once tin contracts were made by the ITC, the members were not free to denounce them or to act in a way on the tin markets that would undermine the actions agreed upon by the ITC (even this analogy is not quite correct, because tin trading contracts were not in fact entered into by organs on which the states were represented ; rather, specific contracts were entered into under delegated powers, by the Buffer Stock Manager, an international civil servant. For a real analogy between the Namibia Case and our problem to arise, the following scenario would have had to occur : the UN acting *intra vires*[11] its powers, engaged in action that resulted in loss and damage to third parties, and it was claimed that the members, rather than (or as well as) the UN was liable. It will readily be seen that, by contrast, in the *Namibia Case*, the question was not whether the members were liable to third parties for action taken by the UN, but rather whether they themselves were free to engage in acts (which has no loss to third parties, other than Namibia itself) in the face of UN decisions which bound them.

So far as the general question is concerned - that is to say, whether the members of international organizations are liable for the obligations of the international organization - the Advisory Opinion of the International Court of Justice in the case of *Certain Expenses of the United Nations* is also of limited authority. The Court was asked whether certain expenditures authorised in specific General Assembly resolutions constituted « expenses of the Organization ». The question was not formulated so as to ask the Court in terms whether members were obliged to pay for these expenditures. This was because, in the particular cases of UNEF and ONUC, there was controversy as to whether they had each been established in accordance with the provisions of the Charter. Further, the

11 The extent to which the trading in 1988 was *intra vires* ITA6 has received some passing attention only (in part because of the reluctance of English courts to interpret complicated provisions of an unincorporated treaty : though Kerr LJ has limited this doctrine to two circumstances ; (1) no private rights or obligations can be derived from such treaties and (2) such treaties cannot be enforced by the English courts.
Maclaine Watson v. Dept. of Trade, [1988] 3 *A.E.R.* at 291).

Court was asked whether the expenditures constituted expenses of the Organization «within the meaning of Article 17, paragraph 2 of the Charter of the United Nations » ; and Article 17, paragraph 2 itself provides : « The expenses of the Organization shall be borne by the members as apportioned by the General Assembly ». It might thus seem that the identification of expenditures as an expense of the organization necessarily answered the question as to the obligation of members to bear them, given the particular treaty provisions of the Charter. In the way that the matter was handled by the Court, however, the matter was not quite so clear. The Court stated that three questions arose under paragraph 2 of Article 17, the first being what constituted the expenses of the Organization ; the second concerning apportionment by the General Assembly ; « while a third question might involve the interpretation of the phrase «'shall be borne by the members'. » *(Certain Expenses*, Advisory Opinion, 20 July 1962, p. 158). The Court stated that these second and third questions directly involved the financial obligations of the members, «but it is only the first question which is posed by the request for the advisory opinion». (*Ibid*). This is difficult to follow. If there had been any controversy about questions of apportionment, or about the interpretation of the phrase «borne by the members», the question put to the Court (« Do the expenditures ... constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2 of the Charter of the United Nations ? ») would necessarily have encompassed responses on these other elements in Article 17, paragraph 2. In the event, the United Nations certainly took the view that, once the Court had determined that the expenditures were expenses, it necessarily followed that, by virtue of Article 17(2), they were to be borne by the membership, as apportioned by the Assembly.

The separate opinion of Judge Sir Gerald Fitzmaurice seems equally unclear as to the extent that the Court was, by necessary implication, deciding on financial obligation as well as on the identification of expenses. Having stated (at p. 198) that the Court has taken the view that it is only required to say whether specified expenditures are expenses, and not to declare what are the financial obligations of members, he elsewhere says (p. 207) that « because the Court has proceeded on the basis that once it is established that certain expenditures constitute 'expenses of the Organization', it follows necessarily and automatically that every member state is obliged to pay its apportioned share of these expenses *in all circumstances* ». Sir Gerald does not identify where in its Opinion the Court adopts this position. The view Fitzmaurice stated at p. 198 of his separate Opinion seems the more correct.

Much of the Court's Advisory Opinion is of course directed towards the specific question of financial obligation, in accordance with specific

treaty terms, in the face of possible *ultra vires* commitments entered into by the organization. (We return to the question of *vires* below). Leaving this aspect aside, the *Expenses Case* is very limited authority for our purposes. The states were, in a sense, obliged to put the UN in funds so that the UN could meet its obligations to, *inter alia*, third parties, regarding expenses incurred for peacekeeping. But this is because under the UN system states are obliged to pay their apportioned share of the expenses of the Organization : and obligations incurred *inter alia* to third parties were deemed to be such expenses.

Concurrent or secondary liability of the UN members directly to these third parties was simply not in issue. The matter becomes in issue in an international organization in which only a fixed capital sum is required under the constitutive instrument to be paid by the members (rather than an open-ended commitment to pay legitimate expenses, to the organization itself, without a ceiling being imposed). What is apparent from the Opinion is that the duty of the UN to honour its debts to third parties operates as a presumption too make decisions incurring such debts *intra vires*. But that is not the same as a finding that the importance that other organizations (differently structured from a financing point of view) should honour their debts to third parties, operates as a presumption that states have a direct secondary liability for such debts. Nor is it even the same as a finding that, where a fixed contribution is payable and in the absence of a clause requiring expenses to be apportioned among the members, the members must « make the organization good » for debts that it occurs beyond what can be met by the fixed contributions due.

The writings

The simplest statement of principle is offered by Schermers, *International Institutional Law* (1980) at 780, who says :

> « Under a general principle of law, an organization, as well as a natural person, is responsible for its own legal acts and therefore liable if such acts cause damage to others ...
> ... Under national legal systems, companies can be created with restricted liability. An express provision thus enables natural persons to create, under specific conditions, a new legal person in such a way that they are no longer personally liable for the acts of the new person.
> In international law no such provisions exist. It is therefore impossible to create international legal persons in such a way as to limit the responsibility of the individual members. Even though international organizations, as international persons, may be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the member states themselves. When an international organization is unable to meet its liabilities the members

> are obliged to stand in, according to the amount by which each member is assessed for contributions to the organizations' budget ».

This view naturally has attracted a great deal of attention in the course of the tin litigation. The opinion here stated covers three separate elements : (1) that states are, as a matter of general principle, liable for the debts of international organizations ; (2) that this is true not only in the face of silence of the constituent instrument, but generally, because international organizations cannot be created in such a way as to limit or exclude liability ; (3) that the liability is proportionate to the contributions due for the organization's budget.

While these pronouncements are of the greatest interest, no authority is cited for any of them ; nor does the distinguished author make clear the analytical basis of his views. It would *seem* that his starting point *is* analogy with the national company, with liability resting with those establishing it unless excluded. We may question whether the analogy is apposite, and thus also whether the right starting point *is* the assumption of liability unless specifically excluded. As to the «impossibility» of creating, in specific terms, international organizations that exclude liability, we know (since the time that Professor Schermers wrote his study) that there exist many treaties which expressly disclaim liability on the part of member states : we comment on these below. (We may note at this juncture that Nourse LJ in the Court of Appeal accepted Schermers's view in favour of the liability of members on the basis that « international law would surely presume that states which were willing to join together in such an enterprise would intend that they should bear the burdens no less than the benefits ». However, Nourse LJ rejected Schermers's view that it is impossible for members of international organizations to exclude or limit their liability for its obligations : [1988] 3 *A.E.R.* at 333.

Kerr LJ appears to accept that, as a matter of international law alone, « on the available material the better view may well be that the characteristics of an international organization are those of a mixed entity [entailing the secondary liability of members] rather than of a body corporate, unless, of course, there is an express disclaimer of liability » (*op.cit.*, supra, 307). But he acknowledges that those who have written on this topic are relatively few, and «their views, however learned, are based on their personal opinions ; and in many cases they are expressed with a degree of understandable uncertainty. As yet there is clearly no settled jurisprudence about these aspects of international organizations». (*Ibid.* 306).

Interestingly, however, Kerr LJ finds that Schermers's views are consistent with an application on the plane of international law alone. In other words, he believes that though Schermers might be saying that, if an international organization defaults, then a secondary regime of liability

on the part of its members applies as a matter of international law - but that he is not necessarily to be understood as saying that there is a rule of international law whereby such members can be held liable in any national court for debts assumed by an organization in its own name. Ralph Gibson LJ believes that the Schermers passage, read as a whole, posits a liability of the members to the organization, but not secondary liability to creditors (p. 351). It may well be that either of these interpretations is a correct reading of Schermers, and further elucidation from the author will be helpful for our work.

But what does it mean to say that there is no international law rule whereby a member (if secondarily liable at international law) can be held liable in a domestic court ? Is this not to posit a non-question, to raise an irrelevancy ? Whether such a member would be liable in a domestic court is surely not a matter for which an international law permissive rule would need to be sought. If secondary liability at international law were to be established, then liability in a domestic court, *as a matter of international law*, would rather be a matter of whether international law *precluded*, for reasons of international public policy, such liability being upheld on the domestic plane. If such considerations are to be addressed, they would normally be so by reference to the concepts of non-justiciability or immunity[12].

The matter of state liability for the obligations of international organizations has been commented on by Professor H.-T. Adam, *Les organismes internationaux spécialisés : contribution à la théorie générale des établissements publics internationaux* (1965). Some of his most important comments are directed to the relationship of state liability to the absence of third-party recognition of international personality : we return to this aspect below (pp. 30-32). More generally, he suggests that the control which states exercise over an organization (even one with separate legal personality (« *peut, par application des principes généraux de droit, donner prise à cette responsabilité, dont l'étendue et la portée resteront évidemment imprécises, faite de législation internationale en la matière* »[13].

12 Kerr LJ also seemed influenced by the fact that an action for the liability of members of an association with distinct legal personality (not being a body corporate) is not available under English law, and that for there to be an international law rule that there should be such a liability in the English courts « would be tantamount to legislating on the plane of international law ». This analysis starts, as we have indicated, from the wrong point.

13 Para. 110, *Les organismes internationaux* ... The footnote which Adam cites in this passage seems to indicate that Adam is here speaking of what Seidl-Hohenveldern has described as an interstate enterprise, *i.e.* an association which has no real *volonté distincte*.

Kerr LJ, in the Court of Appeal in the *Tin Direct Action,* found Adam (together with the other writers) important but inconclusive on the point - a view shared by Nourse LJ who said in his judgment that Adam's views were such that they were relied on by both sides, and were :

> « ... on the whole inconclusive ; see in particular para. 110. On the one hand, he instances the control which the member states exercise over the organization as pointing towards liability. On the other hand, he questions whether there can be liability independent of fault ; and, while he is disposed to regard provisions limiting the members' liability to contribute to capital as being equivocal, he reminds us that the obligations of states are to be interpreted restrictively, particularly as regards third parties ».
> [1988] 3 *A.E.R.* at 327.

Professor Seidl-Hohenveldern has recently written at length on *Corporations In and Under International Law* (1987). In a significant passage he makes his starting point the « generally accepted principle[s] of the conflict of laws » that the respective responsibilities of a corporate entity and its members is determined by « the national law of that entity » (pp. 119-120). But this does not lead Seidl-Hohenveldern to analyze international law generally, as « the national law » of an international organization ; rather, he goes straight to the constitutive instrument, saying :

> « If the treaty establishing the enterprise does not contain any such rules, the member state will be jointly and severally responsible for its acts, as general international law does not contain any rules comparable to those which, in domestic law, limit the responsibility of the member of a corporation for the latter's act ».

Seidl-Hohenveldern denies that the member states may « hide behind this veil at all in order to escape liability for debts incurred by their common state enterprise », and continues :

> « Just as a state cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner states of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise » (p. 121).

These comments are made in the context of a discussion on what the author terms « interstate enterprises », viz. those international associations which act *jure gestionis* and are not, in his view, international organizations properly so-called (on which facet, see above, pp. 17-18). This much is clear both from the terminology employed and from the fact that it is treated in the chapter dealing with interstate enterprises and

not in that dealing with international organizations (Chapter 9). This is noted also by Nourse LJ in the Court of Appeal judgment, who draws no conclusion from that fact save to observe that the ITC was a trader in tin even if, in contrast to any ordinary trader, it did not seek a profit. Kerr LJ, who finds no rule of international law indicating state liability that can be sued upon in an English court, nonetheless finds the location of Seidl-Hohenveldern's comments in the section on interstate enterprises as without significance. No doubt our distinguished colleague can elucidate for us whether his remarks were intended to be limited to interstate enterprises in his sense of the term.

Dr. Shihata, touching on both the position vis-à-vis third parties, the factor of control and the relationship of any liability to fault, writes as follows :

> « A question usually raised in this respect is whether the members of an international company can be held liable to third parties for its acts. It has been argued that since the company has an independent personality, the states constituting it will not be answerable to its creditors unless some misconduct or negligence can be imparted to them in the exercise of their supervision over its activities. Influenced by the same logic, some writers suggested that only the state exercising control over the company (*l'Etat-tuteur*) assumes an unlimited liability. Others, having found no rule of limited liability in international law, concluded that all member states are liable beyond the limits of the value of their shares. My point here is that we cannot conclude a rule of unlimited liability merely from the absence of a rule of limited liability in international law. All relevant provisions and circumstances must be studies to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties dealing with the enterprise. Present general rules of international law cannot, in my opinion, be quoted as a basis of the unlimited liability of the parties to an international corporation for its acts or omissions unless of course the corporation is considered, despite its independent personality, an organ of the state establishing it ».
>
> of Law in Economic Development : The Legal Problems of International Public Ventures », 25 *Revue égyptienne de droit international* (1969) 119 at 125.

Dr Shihata's entire study is in terms addressed to « joint enterprises to achieve common economic objectives » (p. 122) : one imagines that his remarks would be *a fortiori* in the case of an international organization properly so-called. Again, no doubt our distinguished colleague can elaborate on this assumption.

The present writer concludes this section by saying that for the moment the writings seem sufficiently diffusely targeted (duties *inter se* ; liability to third parties ; fault ; type of liability) and written in sufficiently

different organizational contexts, and sufficiently expressions of personal opinion, to make any consensus of principle unascertainable. This situation may of course change in the course of the preparation of our study.

State practice : the specific exclusion or limitation of liability in the constitutive instruments of international organizations

Whereas the great majority of international organizations, including the United Nations and its specialized agencies, have no provisions at all in their constitutive instruments about any liability of the members, this is not true of the constitutions of all international organizations. About sixteen such treaty-constitutions (mostly providing for development activities or price stabilization techniques) make specific provision for the exclusion of liability of members. The practice is conveniently gathered and clearly explained in the judgment of Ralph Gibson LJ in the Court of Appeal judgment in the *Direct Action* in tin :

> « ... in a number of instances, states are shown to have set up organizations, in which they are to be members by constituent treaties which provide not only that the organization shall have legal personality but also for exclusion of liability of the members. The clauses appear in two general forms : first, in the provisions dealing with the subscription of capital, 'liability on shares shall be limited to the unpaid portion of the issue price of the shares' ; and, second, and also in the provisions dealing with membership and capital, 'no member shall be liable by reason of its membership for obligations of the organization'. In some instances both forms of clause appear together. In others there is a special provision about responsibility for borrowing ».
> [1988] 3 *A.E.R.* at 354.

Using this classification, we may note that limitation of 'liability on shares' is provided for in the International Bank for Reconstruction and Development 1945 and the African Development Bank. Exclusion of liability by reason of membership is provided for in the International Finance Corporation 1955, International Development Association 1960, African Development Fund 1972, International Institute for Cotton 1966 and Common Fund for Commodities 1981.

Both forms of clause together are provided for in Asian Development Bank 1965, Caribbean Development Bank 1969, East African Development Bank 1967 and Caribbean Food Corporation 1975.

Provisions that there should be no liability on members in respect of borrowing by the organization appear in the International Sugar Organization 1968 (provision inserted in agreement of 1977 when powers

of borrowing were included and dropped in 1984 when the borrowing power was deleted) ; and the International Cocoa Organization 1972 (provision for no responsibility for repayment of buffer stock loans inserted in 1980 and omitted in 1986 when power to borrow was excluded). Provisions providing that there will be no liability with reference to borrowing appear also in the International Seabed Authority 1982 and International Atomic Energy Agency 1956[14].

Finally[15], the International Natural Rubber Agreement of 1987 (concluded after the crash of the International Tin Council) provided in article 48(4) :

> « General obligations and liability of members : The liability of members arising from the operation of this agreement, whether to the organization or to third parties, shall be limited to the extent of their obligations regarding contributions to the administrative budget and to financing of the buffer stock ».
> (See [1988] 3 *A.E.R.* at 306).

The existence of such provisions leads one to enquire whether they indicate an understanding among states that they are liable unless liability is specifically excluded. Neither Kerr LJ or Ralph Gibson LJ (who formed the majority in the Court of Appeal judgment on the *Direct Action* in tin) were prepared to deduce this conclusion. Kerr LJ was less than clear as to whether he thought such treaties showed that members accepted secondary liability as a matter of international law (he rather emphasized that it could not be assumed that there was any such acceptance by members « within the framework of municipal systems of law » (*op.cit.*, supra, p. 307). Ralph Gibson LJ put it in the following clear terms :

> « Such terms [excluding members' liability] are consistent with the acceptance by the states concerned that liability of members would arise if no such terms were included ; but they are also, as I think, consistent with a state of uncertainty as to the rules of public international law and with a desire to declare what the states regarded as the consequences in international law of the existence of separate legal personality and of stated limits on members' contributions to the organization. There was, no doubt, further an intention to warn those dealing with the organization. I am unable to accept that the practice shown in these treaties can fairly be regarded as recognition by the states concerned of a rule of international law that absence of a non-liability clause results in direct liability, whether primary or secondary, to creditors of the organization in contrast to the obligation to provide funds to the

14 And see Szasz, *Legal Practices of the IAEA* (1970), Chapter 29 « Liability ».

15 Going beyond this classification, we may also note the more general disclaimer by members in the ITU Convention, Art. 21.

> organization to meet its liabilities. Nothing is shown of any practice of states as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause. The only decision shown to us is the arbitration award in the *Westland Helicopters* case which ... does not persuade me of the existence of a rule of international law ... »

Nourse LJ, while finding that the members of the ITC may be jointly and severally liable, directly and without limitation, for the debts of the ITC to the extent that they were not discharged by the ITC itself, did not rely on the provisions of these treaties in reaching this conclusion.

It would seem to me that the weight to be given to these treaty provisions cannot be finally resolved without a detailed examination of the *travaux préparatoires* of each and every one of them (a task not yet undertaken) to see what legal purpose it was felt such a clause served. The second task would then be to see the degree of overlap between the membership of these organizations and other organizations, so that any appropriate inference about silence in those constitutions could be drawn. That analysis is for the moment lacking.

Mention may also be made of the fact that certain constitutive instruments (*e.g.* the IAEA) also make clear that the *host state* shall not be liable for any claims brought against the international organization. The same question arises as to whether the absence of such a provision would evidence an understanding that the host state would generally be liable. We have answered this below in the negative, by reference to the general law of state responsibility.

By contrast, there are also various technical assistance treaties whereby the host state specifically accepts responsibility for the acts of the organization on their territory while providing such technical assistance. This takes the form of an acceptance of responsibility for dealing with claims from third parties and a promise to « hold harmless » the organization and its experts (save where it is agreed that the organization or its experts have acted with gross negligence or wilful misconduct). See, *e.g.*, Article 1, para. 6 of the Agreement of 21 May 1968 between Australia and the UN, ILO, FAO, UNESCO, ICAO, UNO, ITU, WMO, IAEA, UPU, IMCO, and UNIDO, for the provision of technical assistance to Papua and New Guinea. In its Report to the General Assembly the International Law Commission correctly observed :

> « ... it is not at all a matter of attributing the conduct of others to the territorial state, but simply of that state assuming, by virtue of a special agreement, the consequences of conduct which is not its own but that of the organization ». *YB ILC* 1975, Vol. II, p. 89[16].

Particular problems related to the position of third parties vis-à-vis the organization

We may posit this related proposition for discussion (without necessarily agreeing with it). While the unique situation of the United Nations, with its near universal membership, may invest it with objective legal personality, this should not be presumed to apply to all international organizations. Treaties establishing such organizations may provide them with legal personality so far as the states parties to the constitutive treaty are concerned ; such personality may be given effect to on the domestic plane by various acts of host state (or directly, if the host state automatically « receives » treaties into its domestic law). But nothing in the *Reparation for Injuries* case provides for objective legal personality for each and every international organization. Therefore, in such other cases, third parties are not obliged to recognise the personality of the organization and can insist that any liability incurred in its name is still that of its members. Put differently, any arrangements states make to confer separate personality (insofar as it is concluded that that operates to exclude state liability) or in terms to exclude or limit states' liability, can only operate *inter se*. It has no effect on third states, being for them *res inter alios acta*.

This argument has been advanced by various of the plaintiffs in the tin action in the Court of Appeal ; and is echoed in some of the

16 An interesting footnote, though strictly irrelevant for our present purposes, is the recent action of the United Nations itself in limiting its own liability. This was done by Resolution 41/210, 1986, concerning limitation of damages in respect of acts occurring within the Headquarters Distric ; and by the adoption of Regulation N° 4. It has been pointed out (Paul Szasz, 81 *AJIL.* (1987) 739-744) that the UN has been able to do this because of specific provisions within the Headquarters Agreement between the United States and the United Nations. It has thus not been necessary to answer whether, as a general principle of international law, the United Nations can limit the assessment of liability. From the perspective of our topic, we may simply note that during the discussions leading to Resolution 41/210 and Regulation N° 4, there is no suggestion that any liability could be that of the member states. The clear implication was that the liability was that of the UN alone, which in the current circumstances of huge insurance premiums would need to seek a way to limit its liability.

literature. See, for example, Schwarzenberger, *International Law*, Vol. I, 3rd ed (1957), pp. 128-30 ; Bindschedler, « Die Anerkennung im Völkerrecht », IX *Archiv des Völkerrechts* (1961-2) 387-8 ; Seidl-Hohenveldern, « Die Völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten », XI *Österreichische Zeitschrift für öffentliches Recht* (1961) 497-506 ; and « Recentsbeziehungen zwischen Internationalen Organisationen un den einselnenstaaten », IV *Archiv des Völkerrechts* (1953-4) 33 ; Mosler, « Réflexions sur la personnalité juridique en droit international public », *Mélanges offerts àHenri Rolin* (1964) ; Wengler, *Actes officiels du Congrès international d'études sur la Communauté européenne du charbon et de l'acier* (1958) Vol. III, pp. 10-13 and 318-9 ; and others cited by Seyersted, *Indian Journal of International Law* (1964), pp. 233-5 ; and elsewhere.

Professor Seyersted, in his study on this matter, in both the *Indian Journal of International Law* (entitled « Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non Members ? ») and in *Objective International Personality of Intergovernmental Organizations* (1963) 62-107, analyses the views taken by these and other writers, noting variations that occur between them. He notes that most writers taking this view share two starting points, namely (1) that an international organization has international personality only if and to the extent that it follows from its constitution and the intention of its drafters, and (2) that the constitution of an international organization cannot bind states that have not acceded to it. Seyersted further notes that Seidl-Hohenveldern, while sharing these positions, in his *Österreichische Zeitschrift* study bases himself primarily « on the general principal of law that a creditor is not obliged to accept a new debtor in lieu of the old one » (*Indian Journal*, p. 241). Seyersted rejects the appropriateness of this principle to the matter at hand. He further finds that :

> « It is not possible, on the basis of the principle that a creditor is not obliged to accept a new debtor in lieu of the old one, to hold the member states responsible for acts of the organization which involve no delegation of powers from these states ».
>
> *Objective Personality...* at p. 70.

Seyersted has here expressed the view that a general delegation of powers occurs only in supranational organizations such as the EEC ; and that some of the writers insisting upon the liability of states members are in fact writing about such organizations.

The critical aspect of Seyersted's analysis is that international organizations exist when there are international organs not subject to the jurisdiction of any one state and which assume obligations otherwise than on behalf of the states members. In his view these factors are the basis

of their objective existence, and thus the fact that the treaty which forms the constitutive instrument is *res inter alios acta* third parties is irrelevant.

The present writer agrees with the view that the objective existence of an organization on the international plane is not simply a matter of widely shared participation in the founding treaty (as in the case of the UN), but of an objective reality. Insofar as third parties deal with the organization in contract, they by implication accept this reality (and the onus would be on them to show that at all times they thought they were, and indeed were, contracting with the member states). The objective existence of the organization, occasioned by its constituent instrument, but not simply a matter of participation in its constituent instrument, leads to the same conclusion so far as non-contractual liability is concerned - that is to say, duties under general international law. There exist throughout the world associations and bodies that a claimant is not called upon to «recognise». Nor, if the shareholders or directors of such bodies are not liable under the applicable governing law for the failures of the association, can a claimant insist upon such liability because it was not a party to the arrangements establishing the association. The fact that international organizations are established by treaty rather than by, *e.g.* articles of association, does not change the position and introduces no relevant element of *res inter alios acta.*

This approach accords with reality. Thus the Court of Appeal noted (albeit while pronouncing upon a different point) that « in a recent decision of the Supreme Court of the State of New York, *International Tin Council v. Amalgamet Inc.* (1988) 524 *N.Y.S.* 2d 971, the court clearly took it for granted that the ITC is a legal entity » (per Kerr LJ 3 *A.E.R.* [1988] at 297. This was so notwithstanding that the United States was not a party to the Sixth International Tin Agreement and that there was no domestic United States legislation recognising the existence and status of the ITC.

The question of *vires*

Although not central to our theme, some reference must be made in our final report to the legal consequences for member states regarding any liability they might have for the acts of international organizations, should those acts be *ultra vires.*

As has been pointed out in an important contribution to this topic (E. Lauterpacht, « The Legal Effect of Illegal Acts of International Organizations » in *Essays in Honour of Lord McNair* (1965) although the International Court in its Advisory Opinion on the IMCO Case, ICJ *Reports*, 1960, p. 150, found that the Maritime Safety Committee was

not constituted in accordance with the constitutive Convention, it has no occasion (because of the form of the question put to it) to pronounce on the legal consequences of this finding. States members took different views (partly obfuscated by the fact that the Assembly was not legally obliged to accept the Opinion of the Court). Eventually the measures taken by the Maritime Safety Committee were « adopted and confirmed » by the Assembly, notwithstanding that the majority of the Assembly also accepted the Court's advice of the illegal constitution of the Committee. The legal basis is thus obscure and the response of the Assembly was no doubt conditioned by a desire to avoid the complications of an insistence on all acts of the Committee as null and void.

In the case of *Certain Expenses,* the pleadings revealed a wide measure of agreement (among states otherwise taking different positions) that there was no authority to apportion expenses arising out of *ultra vires* action (see, *e.g.*, the Soviet, Czech and United Kingdom views, Pleadings, pp. 402, 242 and 336 respectively ; conveniently gathered and analyzed in Lauterpacht, *op.cit. supra*, pp. 106-109). The United States, focusing on the implications for third parties, contended rather that the validity of the action was irrelevant : what was relevant was the fact that the expense had been incurred and that third parties dealing with the organization were entitled to rely on the resolution as valid (*Pleadings*, p. 416). As is well known, the court in its Advisory Opinion, linked the question of *vires* to that of purposes, stating :

> « ... when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization ».
> (ICJ *Reports*, p. 168).

The Court continued to state that if the act was *ultra vires* by reason of it having been taken by the wrong organ, it could still bind the UN to a third party. Although it is not entirely clear, the Court here appears to refer to an act that is *ultra vires* only by reason of being taken by the wrong organ. Presumably (though this can only be deduced from the Opinion as a whole, and is not made explicit), an act that is *ultra vires* by reason of being beyond the competence of the organization as a whole (and here the question of implied powers would need to be addressed) contrary to its purposes, would be without effect and thus not binding vis-à-vis third parties. Nevertheless, as has been correctly observed (Lauterpacht, p. 112), several judges giving separate or dissenting opinions took the view that lawful expenditures could only be incurred by *intra vires* action, in the sense of action validly taken by the appropriate organs. The refinements of these different views must be beyond the scope of our present examination. But see Lauterpacht, *op.cit.* ; and Osieke, « *Ultra*

Vires Acts in International Organizations », *BYIL* (1977) at 259 ; and generally, Jennings, « Nullity and Effectiveness in International Law » in *Essays in Honour of Lord McNair.*

The question of presumption of *intra vires* was affirmed by the Court in the Namibia Case, ICJ *Reports*, 1971 at 22.

We may conclude this briefest of résumés with the following conclusions : the question of *vires* is neutral so far as the question of legal consequences for members is concerned. The concept of *vires* goes to the validity of the act. If an act, by reference to the concept of *vires* as it applies to international organizations, is valid, and causes harm to a third party or entails a failure to meet an obligation made to a third party, it is an act which binds the organization vis-à-vis that third party. But that tells us nothing about the legal consequences for the member states of the organization. And if an act is *ultra vires* in the sense indicated by the Court in the *Expenses Case* (*i.e. ultra vires* on the internal plane, but still in accordance with the purposes of the organization) then the position is the same. And if an act is fundamentally *ultra vires* (either by being beyond the purposes of the organization, or, in the view of certain dissenting and minority judges in the *Expenses Case,* by being invalidly adopted), then it will not bind the organization and no question of liability of members could even arise.

Analogy to the problem raised for member states by the conclusion of treaties by an international organization to which they belong

It has been suggested in various quarters that the legal problem facing us is in essence the same as that concerning the effect of a treaty to which an international organization is party with respect to the member states of the organization. Assuming that the organization possesses full competence to enter into treaties *eo nomine*, the analogy is in my view precise ; and brief reference to the issue is appropriate.

The question was addressed in considerable detail by the International Law Commission in its consideration of the proposals of the Special Rapporteur on the Question of Treaties concluded between States and International Organizations. The original draft of the famous Article 36 bis provided (see *YB ILC* 1977, Vol. I at p. 134) :

> « 1. A treaty concluded by an international organization gives rise directly for member states of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effect to the treaty.

2. When on account of the subject matter of a treaty concluded by an international organization and the assignment of the area of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member state for

(i) rights which the member state is presumed to accept, in the absence of any indication of intention to the contrary ;

(ii) obligations when the member state accepts them, even implicitly ».

This proposal was to go through various forms (conveniently summarised at *YB ILC* 1978, Vol. II, Pt. 2, p. 134 ; *YB ILC* 1981, Vol. I, p. 170 ; *YB ILC* 1982, Vol. II, p. 43) ; and, as the Commentary (1982, Vol. II, p. 43) observes, was the issue «that has aroused most comment, controversy and difficulty, both in and outside the Commission». However, certain brief comments may be made.

In none of the versions was it suggested that a treaty entered into by an international organization *ipso facto* binds members vis-à-vis third parties, whether for reasons of *res inter alios acta* or otherwise. The Special Rapporteur, Professor Reuter, clearly believed that the general rule was otherwise and at all times emphasised a distinction to be drawn between the obligations of members to the organization, and their obligation to third parties in respect of the treaty. With regard to the former, they would be under an obligation not to act in a manner so as to thwart the effectiveness of the treaty. In that sense they were «affected by» the treaty concluded by the organization — but this was a matter between the organization and the members. With regard to the latter, members would not be bound by a treaty made by the organization unless the constituent treaty so provided, or consent was expressly given, or the subject matter so dictated, and the states members impliedly agreed and the other parties negotiated on this basis. In order to meet the concerns of members of the ILC, the element of consent hardened, rather than weakened, in the drafting changes.

The reasons for rejection of the proposed Article 36 bis were clearly *not* that some members of the ILC believed that members incurred obligations under treaties made by international organizations of which they were members. Those members who opposed Article 36 bis simply felt that it had no place in the treaty being drafted ; that is dealt with « representational issues » beyond the scope of the proposed convention ; that it undercut the clear insistence on non-liability already clearly to be found in articles ; and that its major purpose was to deal with the problem of a supranational organization, the EEC. There was a high degree of consensus on the basic principle (that in principle the conclusion of a treaty by an international organization incurs no obligation for the states

members) ; but deep division on the desirability of including the issue and on drafting any qualification to the general principle.

The view of the Special Rapporteur were summarized thus :

> « ... if it is recognized that [an international organization has the right to negotiate], the organization commits itself alone, and its partners deal with it alone. This is indeed one of the more indisputable consequences of legal personality. It in no way prejudges the obligations that member states may incur under the constituent charter of the organization ...
> ... more often than not, the organization lacks the financial and human resources to ensure the effective performance of its own obligations. In the circumstances, it is fairly natural that both the partners of the organization and the member states would want member states to be associated with the obligations of the organization.
> There are technical mechanisms for obtaining this result. The simplest is the mechanism whereby the organization and its member states act side by side as parties to a treaty ... » [*YB ILC* 1977, Vol. II, Part One, p. 126].

Although the final decision in Article 74 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was « not [to] prejudge any question that may arise in regard to the establishment of obligations and rights for states members of an international organization under a treaty to which that organization is a party » ; we may conclude both that this was arrived at for reasons indicated above, and that the general opinion was that member states did not in fact incur such obligations.

These provisional conclusions are not incompatible with the *Rapport définitif* prepared by Professor René-Jean Dupuy for the Institute, on « *L'Application des règles du droit international général des traités aux accords internationaux conclus par les organisations internationales* »[17]. The Report and the responses of Commission members to the questionnaire are certainly pertinent to our present study. Professor Dupuy concluded that states members were not to be considered parties to treaties concluded by the organization[18] ; but that these treaties had legal consequences for them in the sense that, at least within the UN system, they could require members to participate in various activities within the remit of the UN ; and thus may have financial implications for the members. The legal

17 *Annuaire* de l'Institut de Droit international. Volume 55 (1973), p. 358-378.

18 Special considerations could apply when a treaty is entered into jointly by the organization and its members, as is the case concerning certain agreements of the EEC.

personality of an organization does not result in members being «third parties» to such agreements ; agreements entered into by an international organization are opposable to states members. They may not act in a manner to thwart the execution of such treaties. Because Dupuy's report this study was not directed to the problem of non-fulfilment of obligations of international organizations, the proposed recommendations did not make a linkage between these findings and any legal consequences for members of non-fulfilment of obligations to third parties.

Application of principles of state responsibility

There appears in the law of state responsibility to be no general concept whereby states retain a responsibility under international law for the acts of international organizations to which they belong, when those organizations have separate legal personality. There is no evidence that states continue in any general sense to retain legal responsibility for the bodies they have created ; nor that state responsibility arises through international organizations properly being perceived as the agents of the members.

Indeed, it is rather striking that from the earliest moment that the International Law Commission decided to include an article on international organizations[19], the question has been addressed in quite different terms. Draft Article 12(1) has remained essentially unchanged and uncontested over the years :

> « The conduct of an organ or another state of an international organization acting in that capacity in the territory of a state shall be considered as an act of that state under international law ».

This draft article is directed at the question of the responsibility of the host state for the conduct of an international organization on its territory. No special consideration has been given to the fact that the host state is also likely to be a member of the organization concerned. The problem was seen as potentially arising from a state's responsibility for certain acts occurring on its territory, not from its membership of an organization.

The discussion did however range rather more widely than the text suggests. Generally, members of the ILC made a connection between responsibility and international personality : if an organization had

19 Special Rapporteur Garcia Amador initially thought that the question of responsibility for the acts of international organizations was not yet ripe for development. See *YB ILC*, Vol, I, 1956, p. 232.

personality, conduct would be attributable to the organization itself, rather than to its member states. (See, *e.g.*, Reuter, *YB ILC* 1975, Vol. I, p. 45, para. 29 ; El Erian, *ibid.*, p. 46, para. 35 : «An international organization which had the capacity to enter into a contract or a treaty with a state in which its organ was to operate, would clearly be responsible for the acts of that organ»). Some, however, thought that the answer might not always be clear when the injurious act was that of an armed force of the organization composed of contingents of states (Ushakov, *ibid.*, p. 47, paras. 5-6). Members clearly wished to avoid getting deeply embroiled in definitions of either insurrectional movements (responsibility for which is also dealt with in draft Article 12) or international organizations (see *e.g.*, Vallat, *ibid.*, p. 51, para. 7) ; and the comment of Tammes, *ibid.*, p. 53 at para. 20, that «the conduct of an insurrectional movement was inherently foreign to the territorial state since, like an international organization, such a movement existed independently of the State»).

The Special Rapporteur, Mr Ago, indicated that Article 12 was not meant to settle the question of «when the responsibility of an international organization or its member states could be engaged or what cases might possibly involve joint liability» (*ibid.*, 1315th meeting, p. 59, para. 347).

The Commentary made in the ILC's Report to the General Assembly went beyond the issue of host-state responsibility in this comment :

> « ... it is not always sure that the action of an organ of an international organization acting in that capacity will be purely and simply attributable to the international organization as such rather than, in appropriate circumstances, to the states members of the Organization ... »
>
> (*YB ILC* 1975, Vol. II, at p. 87).

However, the Commentary continues by drawing attention to the fact that, in relation to a variety of claims for compensation arising out of UN peacekeeping activities, it was the UN which accepted international responsibility, both in internal law and under international law. The Commentary concludes that there is no liability upon the host state (but does not return to the question, *obiter* to its consideration, of member states' liability).

We may conclude that the work to date on state responsibility deals only with the distribution of responsibility between international organizations and host states (who will not be responsible unless they failed to exercise due diligence) ; but that there was no inclination to suggest that a host state might still be responsible for the acts of an international organization through another route, viz. through membership thereof. One could either say that that possibility did not occur to those

considering the issue or was regarded as irrelevant to the issue before them.

It seems clear, notwithstanding the caveat of Article 74 of the 1986 Vienna Convention (itself not widely ratified) that under international law the acts of an international organization with separate personality would not be attributable to the member states. This is so even if the acts are those of organs comprised of representatives of member states ; and *a fortiori* if the acts are those of international civil servants acting, within the authority of the constitutive treaty, in the name of the organization.

The concept of attributability in international law is to an extent matched by notions of what we may term «factual agency» in domestic legal systems (so far as contractual matters are concerned) or « directing, procuring or authorizing » certain acts to be done (so far as tortious liability is concerned). In the tin litigation these aspects (*i.e.* « factual agency » and « tortious liability ») have been dealt with separately from the so-called *Direct Action*, in litigation before Evans J.[20]. Just as questions of state responsibility have not been at all addressed to the *Direct Action* (though to an international lawyer they would seem a relevant consideration), so attributability in international law receives small consideration in the judgment of Evans J. The plaintiffs (creditors) contended that each trading contract, though made by the Buffer Stock Manager, entailed a representation that the ITC's debts would be met as they became due ; and that, having authorized the representations, the member states were liable as tort feasors insofar as the representations were false or reckless. The judgment addresses this by analogy between a limited company and its directors, and not by reference to international law. Because the trading contracts were made under English law, much of the argument revolved around English law concepts of fraud and recklessness. It was also claimed by the plaintiffs that « by their participation in the affairs of the Council » the states directed or procured the representations. The defendants denied that the individual member states could be said to have authorized any representations, merely by reason of membership of the ITC generally, or the Buffer Stock Committee specifically.

Evans J. held that the member states *did* authorise the implied representations made by or on behalf of the ITC to the plaintiffs « but their liability, apart from sovereign immunity, depends upon proof that through their representatives they acted fraudulently, whether knowingly or recklessly, in that regard » (Judgment transcript).

---

20 Still awaiting publication in the Law Reports. No date has yet been set for appeal of this judgment.

All questions of representation and fraud and duty of care to third parties were pursued as a matter of English law. Evans J. concludes :

> « If the member states authorised the ITC to make the contracts which gave rise to the implied representations, and if the representations were false, then I can see no reason of policy or otherwise why the defendants should not be liable for the misrepresentation ... »

From the perspective of international law, however, it was not «the member states» which authorised the making of the contracts, but rather the appropriate organ of the ITC (which happened to be composed of member states). And this authorization is provided for in the structure of the treaty itself, and should be appreciated as a matter of international, rather than English, law — even though the substance of the contracts is governed by English law.

III. A duty to put the organization in funds

Our brief survey of the international law relating to the conclusion of treaties by international organizations suggests that, while states are not parties to such treaties, neither are they « third parties », in the sense that they may not engage in acts that run counter to the effective implementation of such treaties. If the obligation of an international organization is engaged through contract, or a duty of care, the legal consequences for a member state entail a requirement to put the organization in funds to meet such obligations.

The Receivership Actions in the Tin Case have been centred on this issue : see *Maclaine Watson & Co. Ltd. v. ITC* [1987] 3 *AER* 789 (Millett J.) and [1988] 3 *AER* 364 (Court of Appeal). There it was claimed that the High Court should appoint a Receiver to collect sums owing to the ITC, including sums allegedly due from member states under a duty to « make good » the ITC to meet its obligations. This necessarily entailed determining whether the ITC had such a cause of action against its members[21]. The judge of first instance (Millett J.) found that there was no arguable cause of action which the ITC might have against its members other than under the Sixth Tin Agreement (ITA6) which, being unincorporated, could not of itself found a cause of action in English law. In the Court of Appeal the points of claim were amended so as to suggest a claim running from the ITC to its members, which was not

21 The ITC itself had never claimed such a cause of action. The claim on behalf of the ITC was formulated by the creditors.

based solely on ITA6. This was based on the right to contribution/indemnity in English law.

The Court of Appeal accepted the argument of the ITC that all the claims were non-justiciable — either because they emanated from ITA6 or because they involved transactions that were acts of state[22] or because « the object of appointing a receiver, and his task, would be the enforcement by him, in the name of the ITC, of any extant rights which the ITC may have against its members ... [but these are] contractual or similar rights derived from agreements made on the plane of international law[23].

The Court of Appeal has thus clearly not purported to make any determination on the substantive international law question facing us.

The view of the present writer is that, where a constitutive instrument requires members to pay their assessed share of « expenses » allocated for *intra vires* purposes, the members have a legal obligation to pay their share of expenses if a failure to pay such « extra » sums would entail a failure of an obligation to a third party (*Case of Certain Expenses*). But there is no principle of general international law beyond this. In respect of constitutive instruments not based on assessed share of expenses, it is necessary to look at the precise terms to see if such obligation is incumbent upon members, as a matter of treaty obligation rather than general international law.

IV. Concluding thoughts : some questions of principle

Our provisional conclusion is that, by reference to the accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties for the non-fulfilment by international organizations of their obligations to third parties. The treaty practice which specifically excludes liability does not create a presumption to this effect in respect of treaties which are silent. The matter has not been addressed in international judicial decisions ; and the limitations of the analysis in the *Westland Helicopters* arbitration have been commented on. The writers dealing with this matter hold different opinions — and

22 This was the ground offered by Ralph Gibson LJ, who applied the English act of state doctrine under *Battes Gas and Oil Co. v. Hammer* [1982] A.C. 931.

23 Kerr LJ and Nourse LJ doubted the application of the act of state doctrine to the facts of the tin case, preferring to base their finding on non-justiciability on different grounds.

the opinions they hold must be understood in context : sometimes the issue of liability is raised in reference to inter-state enterprises rather than international organizations properly so-called. The domestic case law in the Tin litigation is consistent with this provisional conclusion.

This conclusion raises a series of further questions.

l) Is the position that the absence of a specific norm (which some would term a positive rule) determining state liability means that there is no liability ? Or is the correct position that, unless states can be shown to have excluded or limited their liability, the liability must be presumed to exist ? The latter view can only be correct if international law will presume obligations to be incumbent upon states unless the contrary is proved. But this seems to run counter to well established principles : « The rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law » (*Lotus Case*, PCIJ Judgment N° 9, 1927, Series A, N° 10). Put differently, obligations resulting from norms of law (rather than from treaty or other agreement) must be shown to exist by reference to the normal sources of international law. The absence of a norm stipulating liability is, on this basis, determinative of the matter, in the sense that obligations will not be attributed to states in the absence of a clear requirement of international law.

2) But should we look at the situation differently, and say rather than international law fails to address the issue, with the result that there is simply a *non liquet* which must be filled by reference to general principles ? This is closely related to the question of whether it is appropriate to rely on private law analogies to seek an answer to whether states are liable for the non-fulfilment by international organizations of their obligations. The tin litigation has been replete with efforts to rely on private law analogies (not so much as a permitted technique of international law, but rather because most counsel and judges in the case have been more familiar with institutions of domestic law rather than of international law[24]).

---

24 The international lawyers in this litigation have sat through very many days of argument whereby the International Tin Council was analogised variously to a company under English law, a *société en nom collectif*, a Scottish partnership, an English trade union, etc. Regardless of their varying professional interests in this case, international lawyers are in this context likely to welcome the comment of Kerr LJ [1988] 3 *AER* at 269 that : « It would be inappropriate to consider [the legal issues] ... solely by reference to English law in isolation.. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and the domestic law of this country ».

It is by now accepted that it is permissible to fill the jurisprudential gaps in regard to new situations by applying general principles of law. In turn, these general principles of law have frequently been general principles of private law. Such invoked general principles often have concerned what we may term ethical considerations : good faith, the requirement of clean hands, the provision that no-one shall be judge in his own cause, the duty to make reparation (see *e.g.*, the *Chorzow Factory Case*, PCIJ, Series A, N° 17, p. 29). A second grouping of general principles drawn from domestic law concerns essentially procedural issues : admission, waiver, estoppel, prescription (see *e.g.*, the *Barcelona Traction Case*, ICJ *Reports* 1970 ; the *Russian Indemnity Case*, Scott, *Hague Reports* 297). Reliance on private law analogies have also been relevant, at a certain period, for the formulation of international law criteria on the measure of damages. But there have been occasional cases in which more substantive matters have been resolved by reliance on private law analogies (*e.g.* the *Fabiani Case*, La Fontaine, *Pasicrisie*, at 344-69, responsibility of the state for the acts of its agents ; *Venezuelan Preferential Claim Case*, issues of bankruptcy). For a general survey, see H. Lauterpacht, *Sources of Law in the International Community* at 115-9 ; and « Private Law Sources and Analogies » in E. Lauterpacht, *International Law, Collected Papers of Hersch Lauterpacht*, Vol. 2, Pt. I, esp. at 208-212).

My present feeling is that our problem cannot properly be resolved by reference to private law analogy, for two reasons. First, in a case such as the *Barcelona Traction Case*, where answers were required under international law in relation to a domestic phenomenon (a municipal law company), it might be thought appropriate to seek to discover general principles of municipal law. But in our study we have no domestic phenomenon : international organizations of the type under study are definitionally the creation of international law. Thus, second, we would need to find a private law analogy to the relevant legal phenomenon (international organization) and then seek to identify general private law principles in relation thereto. This not only seems too remote as a source of law, but also leads inexorably to the reality that there is no clear « correct » private law analogy to an international organization. Further, the evidence is that, in the nearest analogies known under the various legal systems (partnerships, companies, *sociétés en nom collectif*), different consequences flow under the various municipal systems for the liability of the members of such bodies. No 'general principle' could be found.

3) Can considerations of equity or policy resolve the matter ?

Without here analysing the usefulness or otherwise of equity as a principle of customary law (but see, *e.g.*, Brownlie's critical view in *Recueil des Cours* 1979-I at 288), we may note that, especially in the matter of delimitation, the notion has been used of a result-oriented

principle which emphasises the interest of the international community in finding a peaceful solution. It also serves to ensure that the full complexity and variety of circumstances are taken into account, rather than the strict application of a single rule : and flexibility is thereby introduced. Insofar as it is a concept directed at ensuring that the peculiarity of each case be acknowledged, in all its relevant circumstances, it is unlikely to point the way to general answers to our problem.

What then of the policy considerations ? The relevant policy factors are, on the one hand, the efficient and independent functioning of international organizations, and second, the protection of third parties from undue exposure to loss and damage, not of their own cause, in relationships with such organizations. It has been suggested from time to time in the tin litigation that the functional approach provides no contra-indication to secondary liability on the part of member states. This seems to me to be doubtful : if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership. So far as the protection of third parties is concerned, the lesson of recent events indicate that a variety of protective measures should properly be taken - whether insurance, or the demand of specific *ad hoc* guarantees from members, or other measures. These are obviously extremely complicated matters. While I would regard it as entirely appropriate to look at policy considerations, it is not clear to me that they necessarily lead in one direction rather than another.

Cases

1. *Rayner v. DTI and ITC, Butterworths Co. Law Cases [BCLC]* [1987] 667 (« Direct Action » against the states and ITC).
2. *The ITC* [1987] 2 *W.L.R.* 1229 ; [1987] 1 *A.E.R.* 890 ; [1987] Ch. 419 (« winding up action »).
3. *Maclaine Watson v. ITC* [1987] 1 *W.L.R.* 1711, [1987] *BLC* 707 (« Receivership action »)
4. *Rayner DTI, Maclaine Watson v. ITC, RE IT,* [1988] 3 *W.L.R.* 1033, [1988] 3 *A.E.R.* 257. Court of Appeal judgments on appeals in each of 1-3 above.
5. *AMT v. DTI*, Financial Times Law Reports, February 28, 1989, (« Factual agency and claims in tort »).

Draft Questionnaire

1. Does the distinction between activities *jure imperii* and *jure gestionis* have relevance for the existence of international legal personality in an international organization ?

2. Are any relevant rules relating to liability of general international law, or provisions contained in the constitutive treaty, opposable to third parties to whom an obligation may be owed ?

3. So far as the legal consequences for member states are concerned, what is the significance of their participation in the decisions of the organization *qua* constituent elements of relevant organs ?

4. What is the relevance of fault to the attribution of any liability to members ?

5. If there were liability attributable to members, would this be liability proportionate to the contributions due to the budget, or joint and several ?

6. What are the legal implications, in terms of sources of law and burden of proof, if there exists no ascertainable positive provision of international law on the direct liability of member states for obligations owed by an international organization to third parties ?

7. What is the relevance, if any, of the question of *vires* ?

8. What significance is to be attached to the practice in certain constitutive instruments or excluding or limiting the liability of member states / host states ?

9. How relevant is the analogy to the legal consequences for states of treaties concluded by international organizations ?

10. How relevant and appropriate are private law analogies in seeking answers to the problem before us ?

June 1989

Réponses et observations des membres de la Commission

1. Réponse de M. Ibrahim Shihata

5 September 1989

1. In case member States confer international legal personality on the organization, the latter will have such a personality vis-à-vis its members (and other parties who recognize it as such) even if the activities of the organization are *jure gestionis*. This has been the case for many economic joint ventures.

2. There is no established rule of customary international law which states *in the abstract* whether and to what extent member States are directly liable for the acts or omissions of an international organization. In the absence of established practice, there is no reason to pretend that such a general rule exists. Provisions of the constitutive treaty may provide guidance in the light of their drafting history and subsequent practice. In the absence of explicit provisions made known to other parties acting in good faith, the burden of proof should fall on the party claiming liability.

3. Generally speaking, a member State may be held separately liable for its behaviour related to an international organization to the extent that such behaviour is in violation of an established international law obligation. This follows from general rules of State responsibility, not simply from the obligations of members to behave in good faith. This answer is limited, however, to situations where the member State's behaviour is based on the actions or omissions of its officials acting unequivocally as the representatives of the State, not as officials of the organization. The responsibility of the State may not be based on the action of an official of the organization, even when he/she is appointed by such a State and participates in decision making organs of the organization. The individual has to be acting as the representative of the State or States involved for such separate State responsibility to be established.

4. As indicated in my answer to question (3), fault can be relevant in establishing the separate liability of a member State, quite apart from whether the organization as a whole is at fault.

5. Liability of members *qua* members cannot be established in the abstract. When it is based on the provisions of the constitutive and other relevant instruments, it would be subject to such applicable provisions. In the absence of such provisions in a case where liability has been established in principle, the principles of proportionality and several liability seem to be defensible in the absence of indications to the contrary in the applicable texts and relevant practice.

6. In the light of my above answers and to the extent they are accepted as reflective of international law at this stage of its development, parties to agreements establishing international organizations, especially those involved in financial or commercial activities should include explicit provisions on this matter both in the constitutive agreement and in their contracts. It is important to leave no doubt on this matter even though, given their nature and sophistication, parties which normally deal with such financial/commercial organizations should be presumed to know what clarifications they should seek and receive in this respect. Their claim of direct State liability is further weakened by the absence of any provision establishing such liability in their contractual arrangements or otherwise.

7. An international organization may be held liable when it acts *ultra vires* on the basis of gross negligence or bad faith. This assumes that its action cause damage to a third party which has standing before a competent tribunal. Direct liability of member States may be established only within the parameters stated above, *i.e.*, when their own acts, apart from the acts of the organization, create a basis for such liability.

8. Consistently with previous answers, provisions in constitutive instruments which exclude or limit liability of member States are of great relevance ; all the more so when they are publicised and made known in advance to other contracting parties.

9. The analogy to the legal consequences for States of treaties concluded by international organizations is not irrelevant, subject to the peculiarities of each case.

10. Private law analogies can be of some relevance only as supplementary element of the analysis. They cannot form the exclusive basis of a decision unless the contract so provides, consistently with the organization's rules and practice.

2. *Réponse de M. Daniel Vignes*

5 janvier 1990

Madame et Chère Collègue,

Voulez-vous me permettre de vous féliciter de votre rapport préliminaire. Il me paraît en présentant les problèmes, susciter des réflexions et devoir nous guider dans les travaux à venir. Après notre séance à Saint-Jacques et les interventions de nos collègues, j'ai beaucoup réfléchi et pense pouvoir ainsi prendre position provisoirement sur le sujet et spécialement sur votre questionnaire.

J'ajouterai que dans le cours de mon raisonnement, j'ai tantôt procédé sur la base d'un examen des effets possibles d'un traité par lequel des Etats ont créé une organisation internationale opérationnelle en organisant avec précisions ses pouvoirs et en examinant alors s'il pouvait licitement en résulter une responsabilité limitée de ses créateurs (et j'aboutissais au questionnaire en annexe I), tantôt procédé sur la base d'une transposition dans le droit international public des principes généraux du droit des affaires qui, eux, prévoient couramment la limitation de la responsabilité (et j'aboutissais au début de raisonnement en annexe II).

Dans l'un et l'autre cas, j'aboutis, comme vous le verrez, au même résultat.

A mon avis, toute la question est dominée par l'interrogation suivante : découle-t-il de la théorie des organisations internationales et notamment de leur personnalité morale, que leurs Etats membres sont exempts de la charge des obligations financières pesant sur elles ? Ou, au contraire, malgré cette personnalité morale, les Etats membres d'une organisation internationale ne sont-ils pas responsables pour le passif de celle-ci et dans quelles conditions ?

J'aurai tendance à considérer que, pour toutes les personnes morales, l'obligation de leurs participants à supporter leurs dettes, au-delà même des apports de ses participants, existe sans exception clairement établie *(cfr infra)* ; je ne vois pas que parce qu'elle sont une organisation intergouvernementale, même dotée d'immunités de juridiction et d'exécution, leurs participants ne soient pas tenus de leur passif ; ceci me paraît être une des conséquences de la limite de la théorie de la personnalité morale, un des effets de la transparence de celle-ci, transparence bien connue dans le droit international des séquelles de guerre et des nationalisations. Exception évidemment si l'acte constitutif en dispose autrement.

En droit interne privé, ces exceptions au droit de poursuite des créanciers à l'égard des associés d'une société de commerce sont courantes, depuis la fin du Moyen-Age et ont envahi le droit des sociétés commerciales depuis lors, mais elles doivent toujours être exprimées clairement, voire être publiées.

En droit public interne où nous vivons sous un régime de plus en plus généralisé de responsabilité de l'Etat pour ses activités comme puissance publique, on peut rejeter l'idée que l'Etat puisse s'abstraire de cette responsabilité en créant des personnes morales subsidiaires.

Des règles différentes doivent-elles s'appliquer aux organisations internationales ? Comme vous, je rencontre la question *jure imperii/jure gestionis*. Encore que je crois que les organisations internationales sont instituées essentiellement pour faire du *jus imperii* et que ce n'est qu'accessoirement qu'elles ont des activités *jure gestionis*. Ainsi, pour le Conseil de l'étain, surveiller et régulariser le marché de ce produit. Peut-être le fait-il en effectuant des actes de commerce, notamment en achetant, stockant et vendant de l'étain, mais tout cela est aux fins de régulariser le marché, ce qui est un acte de puissance publique. La distinction entre les actes *jure imperii* et *jure gestionis* devient dès lors difficile.

Si de l'exercice par une organisation internationale de ces actes de puissance publique naît une obligation financière au profit d'autrui, pourquoi les commettants d'une telle organisation internationale n'auraient-ils pas à en supporter les conséquences ? Si c'était l'Etat qui avait agi, il aurait dû les supporter. La transparence permet d'assurer le relais de réparation au-delà de la capacité de l'organisation internationale elle-même.

* * *

A partir de cette construction de principe, quelques problèmes peuvent être examinés.

Le problème de la responsabilité «*joint and several*» (conjointe et solidaire ?) des participants ou de la responsabilité en proportion des contributions au budget.

Outre le fait que toutes les organisations n'ont pas de budgets financés par des contributions des Etats membres (exemple la CEE), je pense que seule la responsabilité conjointe et solidaire peut se concevoir, quitte à ce qu'après coup, l'Etat membre qui a payé se fasse rembourser par les autres selon toutes règles internes adéquates de l'organisation. Mon idée en rejetant la règle de la proportionnalité aux contributions est que je ne vois pas en quoi une telle règle interne à l'organisation peut être opposable aux tiers.

Quid d'une responsabilité pour faute ou d'une responsabilité restreinte à certains participants, je traiterai les deux problèmes en liaison l'un avec l'autre, vous comprendrez pourquoi. Il est certain que l'organisation peut faire une « faute professionnelle » en faisant des opérations légales mais imprudentes ou inversement des opérations irrégulières à l'égard de ses statuts et s'être dans l'un ou l'autre cas rendue insolvable. Remarquons qu'ici nous sommes sortis d'une dette née d'obligations contractuelles pour nous trouver devant une situation délictuelle (ou quasi-délictuelle). La prise en charge par une organisation internationale des résultats d'une telle situation semble ne pas détonner en droit international (sous réserve bien évidemment des problèmes d'immunités de juridiction voire d'exécution).

Mais *quid* du second problème c'est-à-dire du problème de rechercher la responsabilité non pas de tous les Etats membres ou de n'importe lequel — problème déjà examiné — mais de certains Etats membres plus spécialement responsables et lesquels parmi ceux-ci ? Sans nier que l'imagination des avocats pourrait trouver toutes sortes de cas où ils entendraient poursuivre spécialement quelqu'un comme responsable de tout, je redoute de grandes difficultés dans le choix au sein d'un groupe d'Etats souverains de celui à incriminer. Sans doute la Thaïlande avait rompu ses relations diplomatiques avec la Pologne, responsable selon elle du fâcheux arrêt du Temple de Preah Vihear ... car la Cour internationale de Justice était présidée par le polonais Winiarski. Sans doute la CEE est-elle représentée dans ses relations extérieures par l'Etat qui assure semestriellement la présidence de son Conseil des ministres. Mais nous serions là plutôt dans des cas d'imputation politique que de responsabilité financière. Faudrait-il, au titre de cette dernière, poursuivre les quinze Etats membres du Conseil de sécurité (et pas les 141 autres membres de l'Organisation) ? Faut-il poursuivre les seuls Etats qui ont voté en faveur de l'acte incriminé ? Curieux aboutissement du vote majoritaire ! Peut-on encore poursuivre un groupe restreint d'Etats qui, en raison du nombre de voix qu'ils détiennent dans l'organisation, y possèdent une influence prépondérante ? De toute façon, dans mon idée, la possibilité d'une poursuite conjointe et solidaire de *tous* les membres au travers d'*un seul* existant, le problème est résolu pour le bénéfice des tiers. A moins que l'on invente une responsabilité pour faute grave spécialement attribuable à un Etat, « détachable » de sa qualité de membre de l'organisation, je ne suis pas sûr qu'une telle responsabilité pour faute d'un groupe prédominant ou d'un Etat donné soit concevable sans que d'abord ait été établie la faute de l'organisation elle-même, quitte à ce que dans un second temps de logique, on recherche celle propre au groupe plus directement responsable qui aurait agi non dans les intérêts de l'organisation, mais dans les siens propres. Je me demande jusqu'où, dans une société internationale d'Etats souverains, peut aller une telle recherche ?

Resterait évidemment le cas d'une faute personnelle d'un individu préposé de l'organisation qui aurait, à tort — voire avec la complicité de la victime — initié l'opération malheureuse. Elle me paraît poser moins de problèmes, encore que la responsabilité de cet individu serait plutôt à l'égard de l'organisation.

Un autre problème, connexe à celui d'une faute de l'organisation, est celui d'une clause limitative de responsabilité contenue dans l'acte constitutif de l'organisation, celle-ci voyant sa responsabilité limitée aux apports de ses membres. Par apports de ses membres constituant une limitation de leur responsabilité, je pense à la « dotation » décidée par l'acte créateur de l'organisation et par la suite déterminée par les organes de l'organisation, par exemple à la création d'un Fonds et à la décision budgétaire attribuant à celui-ci des crédits budgétaires limités ; je pense que par le biais de cette technique financière d'un Fonds aux ressources limitées, les participants à l'organisation entendent limiter leur responsabilité. Resterait que les tiers contractant avec l'organisation et le Fonds soient informés de cette situation, ce qui est une question de fait, mais pour la solution de laquelle j'attacherais beaucoup d'importance au fait que la plupart du temps nous nous trouverons pour contracter avec l'organisation et son Fonds devant des «professionnels avertis» qui sont très au courant du fonctionnement et de la capacité de l'organisation.

* * *

Dans tout cela, en réalité, nous sommes dans un *no man's land* juridique car il y a peu ou pas de droit international public applicable, ou certaines règles du droit des affaires peuvent peut-être s'appliquer (à quel titre d'ailleurs, comme principe général du droit ?).

Je ne suis pas, par principe, favorable à une transposition du droit privé commercial dans le droit international. J'en vois les difficultés de principe vu l'hétérogénéité du droit international privé et des droits internes. Mais, après tout ... !

* * *

A reprendre votre questionnaire, je vois que j'ai ignoré les problèmes des questions 8 et 9 ; je veux par ailleurs revenir sur la question 10 parce que c'est la question essentielle.

Responsabilité de l'Etat-hôte ? Je la vois mal, à moins qu'il y ait quelque chose dans l'accord de siège ; mais on devra résoudre tous les problèmes sus-indiqués avant ou après avoir condamné l'Etat-hôte (question 8).

Comme vous, je ne vois pas de lien avec le problème des effets à l'égard des tiers des conventions conclues par des organisations internationales (Convention de Vienne de 1986) (question 9).

Je voudrais revenir encore à la difficulté d'introduire, à titre de principe général du droit, les principes généraux du droit commercial dans une structure qui est purement du droit international public et je touche là à votre question 10 ; je pense aux arguments que vous développez page 56[25] de votre mémoire, que je partage. Mais, me faisant l'avocat du diable, ne pourrait-on pas dire, en s'appuyant sur les pouvoirs statutaires du Conseil de l'étain, que son instrument constitutif lui allouait expressément le pouvoir d'agir sur le marché de l'étain en y faisant des actes de commerce, notamment gérer un stock régulateur. Dans cette description de ses tâches, qui ne sont pas les mêmes que celles d'une organisation n'ayant pas d'activités opérationnelles, ne peut-on trouver la facilité de procéder à «l'analogie» qui vous importe ?

Je serai très content de connaître la suite de vos réflexions et notamment de lire votre rapport provisoire.

Dans cette attente, je vous prie de croire, à l'assurance de mes respectueux hommages.

Daniel Vignes

25 Voir *supra* p. 287.

Annexe I.

Est-il concevable que des Etats établissent par un traité, dans le cadre d'une organisation internationale chargée de remplir des tâches *jure imperii*, un mécanisme agissant selon des procédés de droit privé et organisé selon des règles *jure gestionis* ?

La technique juridique d'un Fonds peut-elle, au regard du droit financier interne des organisations internationales, être considérée comme une technique de limitation par les Etats membres d'une organisation internationale de leurs engagements ?

Si les organes responsables de la gestion de ce Fonds ont agi *ultra vires*, en résulte-t-il que les droits des opérateurs ayant contracté avec le Fonds sont limités à l'égard des membres de l'organisation internationale au versement de la contribution de ceux-ci au Fonds, sans préjudice éventuellement d'un recours contre les représentants du Fonds ayant agi fautivement *ultra vires* ?

Annexe II.

Est-il concevable, si pour régir un mécanisme commercial d'économie de marché, utile pour assurer la surveillance et l'équilibre de celui-ci, des Etats créent une organisation internationale dotée d'un mécanisme opérationnel d'action sur ce marché, avec par exemple institution et fonctionnement d'un stock régulateur, que ce stock régulateur ayant mal fonctionné et, l'organisation internationale se trouvant en état d'insolvabilité, on ait à appliquer à cette organisation internationale, au besoin à titre de principe général du droit, des règles du droit des affaires, voire du droit commercial et que cela ait pour conséquence que les créateurs de l'organisation internationale vont devoir payer les dettes non couvertes de celle-ci et, d'une manière plus générale, assurer la liquidation de celle-ci, alors que rien dans le traité constitutif ne prévoit (ni n'interdit) une telle prise en charge.

Certes, à l'égard d'une telle question, on doit être nuancé car, d'une manière générale, la transposition dans le droit international public (et dans la société internationale) de règles et pratiques venues des droits nationaux, et spécialement du droit privé — même à titre de principe général du droit — ne doit se faire qu'avec prudence. Sans doute le principe général du droit, ou plutôt les principes généraux du droit,

n'existent-ils que parce qu'ils sont communs (à tous les) (aux principaux) systèmes juridiques. Aussi bien d'ailleurs, cette source de droit n'est énoncée par le Statut de la Cour internationale de justice qu'en troisième position, après les traités et après la coutume qui, eux, sont déjà du droit international (alors que l'utilisation des principes résulte d'un transfert des droits nationaux) (les principes généraux ne sont toutefois pas une source auxiliaire). Au surplus, s'agissant de faire appel à des règles générales non obligatoirement adéquates à la situation considérée, on doit avoir épuisé l'interprétation de toutes les règles spécifiques propres à cette situation, par exemple savoir si les règles ayant prévu la création et le fonctionnement de l'organisation internationale ne peuvent être interprétées comme impliquant une limitation de la responsabilité des créateurs, ainsi le fait que les créateurs aient prévu une dotation ou un fonds pour les opérations *jure gestionis* n'est-il pas le signe d'un désir de limiter au montant de cette dotation leurs engagements ?

Questionnaire

September 1990

1. Is the question of liability of states members a question of private law or of public international law ?

   What is the relationship, so far as the question to be determined is concerned, of international law and of municipal law ? How relevant and appropriate are private law analogies in seeking answers to the problem before us ?

2. Is there a difference between the concept of legal personality in international law and legal personality in municipal law ?

3. Are any relevant rules relating to liability of general international law, or provisions contained in the constitutive treaty, opposable to third parties to whom an obligation may be owed ?

4. Does the distinction between activities *jure imperii* and *jure gestionis* have relevance for the existence of international legal personality in an international organization ? Or for the liability of member states, even if international personality exists ?

5. So far as the legal consequences for member states are concerned, what is the significance of their participation in the decisions of the organization *qua* constituent elements of relevant organs ?

6. Does an international organization act as the agent of its members ? And if so, in what circumstances ?

7. What is the relevance of fault on the part of member states to the question of their liability to third parties for the acts of international organizations ?

8. What is the practice relating to establishment of international organizations, so far as the exclusion of liability of member states (or host states) is concerned ? Are there special categories, particularly with regard to international financial institutions, in which liability is assumed, unless excluded ? If so, what general conclusions are to be drawn from this ?

9. Is the answer regarding the liability of member states the same in respect of contractual liability as in respect of tortious liability ?

10. What lessons, if any, are to be learned from the dissolution of international organizations (especially the League of Nations), so far as the liability of members is concerned ?

11. If there is liability attributable to members, would this be joint or several ; or joint and several ; or proportionate to the contributions made to the budget ?

12. What are the legal implications, in terms of sources of law and burden of proof if there exists no ascertainable positive provision of international law on the direct liability of member states for obligations owed by an international organization to third parties ?

13. What is the relevance, if any, of the question of *vires* ?

14. How relevant for our problem is the analogy to the legal consequences for states of treaties concluded by international organizations.

The following questions are asked *de lege ferenda*

15. Is it desirable, and if so on what grounds, that members should be liable for the obligations of international organizations ?

16. If there should be liability, *de lege ferenda*, should it be a liability to put the organization in funds or a liability vis-à-vis the creditors/injured third parties ?

17. If the liability were towards the organization, should arrangements be made in constituent instruments, or otherwise, for recovery to be justiciable ? Would justiciability under either public international law or municipal law be envisaged ?

18. What would be the basis for any liability ? Would it depend upon the structure of the organization, and the extent to which it is similar to, *e.g.*, a limited company or to an unincorporated association in private law ; or upon other factors ?

19. If the liability were to exist, should states members be allowed, in all or some categories or types of international organizations, to exempt or limit their liability by the inclusion of special clauses ?

20. If there were general liability *de lege ferenda*, what would the answer be to question 11 above ?

September 1990.

Réponses et observations des membres de la Commission

1. Réponse de M. Daniel Vignes

10 décembre 1990

Madame et Chère Collègue,

Je vous prie de trouver ci-joint la réponse que j'ai donnée à votre questionnaire.

A titre de déclaration finale, puis-je vous dire que si je partage l'idée que les Etats membres d'une organisation internationale doivent être responsables financièrement des mauvais résultats de celle-ci et que cette responsabilité financière doit être développée *de lege ferenda*, il ne s'agit toutefois pas d'un droit direct de ces tiers contre ces Etats membres et encore moins d'un droit de poursuite directe. Je crois que l'affirmation *de lege ferenda* d'une telle responsabilité est nécessaire pour le crédit des organisations internationales qui risquent sinon de paraître des partenaires insolvables.

Je ne conclurai pas : ceci n'est pas de mise dans la réponse à un questionnaire.

N'auriez-vous pas pu nous poser une 21e question ? *De lege ferenda* et pour asseoir le crédit des organisations internationales dont le principal objectif est d'avoir des activités opérationnelles, par exemple, dans le domaine économique, commercial ou financier, ne serait-il pas concevable que l'Institut adopte des statuts-types pour de telles organisations, empruntant au maximum, notamment quant au financement de ces activités et à la responsabilité des Etats membres parties à ces statuts, des dispositions s'inspirant, d'une manière adéquate et éventuellement modulée, du droit des affaires, de celui des sociétés de commerce et des pratiques modernes du financement des entreprises ?

Croyez, je vous prie en même temps, qu'à mes meilleurs voeux pour 1991, à mes respectueux hommages.

Daniel Vignes

1. Je pense que le problème de la responsabilité des Etats membres d'une organisation internationale pour les obligations de celle-ci à l'égard de tiers doit être examiné d'abord comme une question de droit international public : il ne me semble pas *a priori* que s'établissent des liens directs de droit privé entre ces Etats membres et ces tiers.

Je n'arrive pas à considérer la situation en cause comme relevant du droit interne (*municipal law*) ; de quel Etat ? Evidemment de celui où il y a eu des activités opérationnelles de l'organisation internationale, mais est-ce suffisant pour créer une *lex fori* ?

Il est certain que le droit privé interne de la responsabilité a fourni les schémas de base de la responsabilité utilisée aussi bien en droit public interne qu'en droit international public, par exemple en fournissant le concept de faute comme source de la responsabilité ; mais même compte tenu de cette analogie, la responsabilité a pris dans chacun des trois droits une certaine autonomie de règles.

2. Oui, il y a des différences, mais la seule de ces différences qui me paraît importante sinon conceptuelle est qu'en droit international public, la personnalité n'est pas octroyée par une autorité unique, un Etat (comme c'est le cas dans le cadre du droit interne), mais résulte d'un ordre complexe, pluriétatique, où les Etats, notamment en créant des organisations internationales, jouent conjointement un rôle important.

Par ailleurs, la personnalité juridique de droit international public se répercute dans le système interne des Etats en obligeant ceux-ci à reconnaître une personnalité juridique de droit interne aux personnes juridiques de droit international (mais ce n'est évidemment pas l'Etat du siège qui octroie cette personnalité juridique interne, il reconnaît celle octroyée par l'accord constitutif).

3. Je ne vois pas de disposition de droit international général sur la responsabilité qui pourrait être invoquée par des tiers à l'égard des Etats membres d'une organisation internationale pour des obligations nées entre celle-ci (l'organisation internationale) et ceux-là (les tiers).

La situation serait toute autre s'il y avait des dispositions statutaires de l'organisation internationale créant la possibilité de droits des Etats membres envers les tiers, mais cela n'évoque pour moi aucun précédent et je ne suis pas sûr qu'il y ait un besoin *de lege ferenda.*

4. La distinction *jure imperii/jure gestionis* est fondamentale pour notre sujet.

En droit public interne (français) on opposera les actes de puissance publique de l'administration et ses actes dits de gestion. Pendant longtemps cette différence n'était pas tellement marquée et le régime de ces actes était le même, toujours un régime de droit public. L'Etat, les départements

et communes (*local authorities*) ne connaissaient pour les actes qu'un régime de droit public. Mais avec le développement des établissements publics et des entreprises publiques, avec la participation croissante (attention, ce courant est peut-être en train de se renverser) de l'Etat et de ses organes à des activités économiques, le régime de droit public a éclaté. Les établissements publics et surtout les entreprises publiques sont pour leurs actes de gestion soumis à autre chose que du *jus imperii*, ils font des actes de *jure gestionis*.

Quid maintenant des activités des organisations internationales ? Elles ont, d'une part, la personnalité juridique de droit international et exercent une activité de droit public en ayant des rapports organiques et financiers avec leurs Etats membres et avec d'autres Etats, d'autre part, il existe un grand spectre de différences dans leurs activités : si beaucoup se confinent en des activités *jure imperii*, d'autres en revanche exercent des activités opérationnelles et pour cela passent notamment des contrats avec des tiers qui seront soit des Etats, soit d'autres organisations internationales, soit des particuliers. Ces actes relèveront-ils du *jure gestionis* ou du *jure imperii*. Cela dépend des circonstances et des règles prévues. Normalement, la règle devrait être *jus imperii* et le *jus gestionis* l'exception, mais, bien souvent, l'exception devient plus courante que la règle

Ceci dit, quand bien même une organisation internationale aurait travaillé avec des tiers selon des modes *jure gestionis*, je ne crois pas que pour autant ces tiers puissent prétendre avoir établi avec les Etats membres de l'organisation internationale des rapports *jure gestionis*. Si ces tiers prétendaient invoquer une responsabilité des Etats membres pour les activités de l'organisation internationale, ces Etats membres pourraient répliquer que leurs propres rapports avec l'organisation internationale sont *jure imperii*, non *jure gestionis*.

5. Je ne considère pas que leur participation aux organes de décision d'une organisation internationale aura normalement pour les Etats membres des conséquences juridiques à l'égard de quiconque autre qu'eux-mêmes et l'organisation internationale. Je veux bien réserver le cas où ils auraient commis une faute dolosive (*cfr infra* § 7).

6. Je suis perplexe pour vous répondre : *oui*, une organisation internationale agit comme mandataire de ses Etats membres en ce que ceux-ci la chargent, la «mandatent» pour faire quelque chose qui, jusqu'ici, leur incombait à chacun en propre ; *mais*, ce n'est pas véritablement un mandat, c'est la création d'une personne morale distincte d'eux-mêmes pour faire quelque chose de différent. Il y a substitution de compétences qui ne sont plus compétences des Etats, mais de l'organisation internationale *donc*, ce n'est *pas* juridiquement parlant un mandat.

J'ajoute toutefois que les Etats membres d'une organisation internationale pourraient en sus de ce que celle-ci est chargée de faire sur la base de son statut, la charger à titre de mandataire, de faire quelque chose de plus *ad hoc* pour leur compte.

Nous connaissons cela dans le droit des relations extérieures de la Communauté européenne où, en plus de négociations par la Communauté sur des matières de sa compétence, les Etats membres peuvent charger la Communauté de négocier des questions restées de leur compétence. Dans ce dernier cas, la Communauté est mandataire des Etats membres.

Ainsi, dans la Convention de Lomé, plus de 90 % de la négociation a porté sur des matières de la compétence de la Communauté, 5 % sur des questions pour lesquelles les Etats membres avaient donné mandat à la Communauté de négocier en leur nom sur des matières de leur compétence.

7. Si la faute commise par l'Etat membre est une faute légère, par exemple une erreur d'appréciation dans la détermination de l'activité de l'organisation internationale, je ne conçois pas que cet Etat puisse voir sa responsabilité mise en cause pour cette erreur (pas plus d'ailleurs que la responsabilité de l'organisation internationale ne me semblerait engagée).

Mais, si l'Etat membre a commis une faute lourde, une faute dolosive, par exemple a organisé l'insolvabilité de l'organisation internationale à l'égard de tiers, je comprendrais que ces tiers recherchent sa responsabilité. Dans un cas comme celui-là, il y aura un phénomène de transparence ; la faute particulière de l'Etat membre limite la personnalité juridique de l'organisation internationale et permet un rapport direct.

Il me semble d'ailleurs que le refus non motivé d'un Etat ou d'une majorité d'Etats de voter le budget d'une organisation internationale serait constitutif d'une telle faute lourde, de même que le refus systématique d'inscrire au budget les sommes nécessaires àla couverture des dépenses régulières de l'organisation internationale.

8. Je n'ai pas rencontré de situation où on était confronté à une absence de responsabilité des Etats membres du fait notamment d'une disposition statutaire.

Je voudrais toutefois signaler des dispositions intéressantes dans les statuts de la Banque européenne d'investissement, notamment l'article 4 § 1 (voir aussi les articles 18 §3 et 26 § 2 mais ces deux dispositions ne sont qu'à moitié relevantes car il s'agit de responsabilité des Etats membres vis-à-vis de l'organisation internationale).

A titre de conclusion générale aux question 5 à 8, je persiste à ne pas prendre en considération *a priori* (sauf ce que je dis sous 7) de

responsabilité directe des Etats membres d'une organisation internationale à l'égard des tiers à celle-ci. Il y a une obligation de réparer pour l'Etat membre pris individuellement en contribuant au budget de l'organisation. Il n'y a pas de droit de poursuite du tiers.

9. Oui

Les Etats membres ne contractent pas avec les tiers, c'est l'organisation internationale qui le fait. Pour la faute délictuelle, se reporter à ma réponse sous 7.

10. Je n'ai pas beaucoup d'expérience de dissolution/liquidation d'une organisation internationale, mais je m'imaginerais volontiers qu'à la cessation des activités de celle-ci et dans le cas où il y aurait un passif, les Etats membres feraient en sorte soit d'assurer son financement (en somme une sorte de liquidation amiable), soit de charger une autre organisation internationale (phénomène de succession) ou l'Etat du siège de faire le nécessaire.

11. Normalement, je ne devrais pas répondre à cette question car l'Etat membre d'une organisation internationale n'est, selon moi, pas responsable directement du passif de celle-ci. Selon moi, ce qu'il doit, c'est combler les déficits dans la proportion de la clef de sa contribution.

J'ai toutefois réservé le cas où l'Etat membre d'une organisation internationale avait commis une faute lourde à l'égard de tiers. Si la faute avait été collective à tous les Etats membres de l'organisation internationale, je comprendrais que les tiers puissent prétendre àune responsabilité *in solidum* (*joint and several*, je pense). Sand doute à un stade ultérieur, il pourrait y avoir une répartition de la charge en proportion des contributions, mais cela ne concernerait pas les tiers.

12. J'aurais tendance à considérer que s'il n'y a pas de disposition claire et précise sur une responsabilité directe des Etats membres d'une organisation internationale à l'égard de tiers pour les activités entre cette organisation internationale et ces tiers, c'est qu'on a voulu exclure tout lien direct. Pour moi, cette présomption résulte clairement de la création de l'organisation internationale et du fait qu'on lui a conféré la personnalité juridique.

La conséquence sera peut-être que l'organisation internationale ne paraîtra pas un partenaire suffisant aux yeux des tiers, puisque personne n'est responsable pour elle.

Qu'importe ? On pourra remédier à cela en demandant aux Etats membres de cautionner, de se porter garant ... de l'organisation internationale, mais *a priori*, sans cet engagement spécial, les Etats membres ne sauraient être responsables directement.

Je dois toutefois ajouter que tous les statuts d'organisations internationales mettent à la charge des Etats membres le fardeau de contribuer aux dépenses de celles-ci, ce qui aura pour conséquence de rendre l'organisation internationale solvable. Il importera donc de voir s'il existe dans les statuts une telle disposition. A cet égard, je rappellerai les termes de l'avis consultatif de la Cour internationale de justice, du 20 juillet 1962, relatif à « Certaines dépenses des Nations Unies (article 17 § 2 de la Charte) », notamment pp. 174-178.

Ceci ne clôturerait pas le débat, car on pourrait concevoir la situation où une organisation internationale ne peut faire des opérations que dans la limite de certains crédits que son autorité budgétaire lui a alloués (dans le cadre d'une dotation par exemple). Dans un tel cas, je ne considère pas que l'autorité budgétaire ait une obligation de voter des crédits au-delà de cette limite, ce sera alors les tiers qui auront été imprudents en négligeant cette limitation. Quant aux Etats membres, ils ne se mettent pas en faute en refusant des crédits supplémentaires.

En revanche, s'il n'y a pas de limitation des opérations, les Etats membres devraient payer les déficits imprévus de l'organisation internationale. Cela ne créera toutefois pas un droit direct du tiers à leur égard (*cfr. supra* § 7).

13. Je pense que par *vires* vous visez les pouvoirs des dirigeants de l'organisation internationale et que votre question concerne l'éventualité où ces dirigeants ont agi *ultra vires*.

Il est difficile d'y répondre d'une manière simple tant il y aurait de questions.

- L'organisation internationale a-t-elle été valablement engagée à l'égard des tiers, dans le cas où ses dirigeants ont agi *ultra vires* ? Le doute ne doit-il pas profiter aux tiers ?

- Les tiers connaissaient-ils la situation et ont-ils été imprudents, voire complices ?

- Les Etats membres de l'organisation internationale ont-ils une obligation de financer ? Je ne suis pas sûr que je dirais obligatoirement non.

14. Je comprends l'analogie que vous suggérez avec la Convention de Vienne du 20 mars 1986 sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales et, particulièrement, celle avec son « article 36 bis ». Je ne pense pas toutefois que si les situations sont comparables, les raisonnements le soient.

De lege ferenda

15. Réponse positive, en effet, pour assurer le crédit des organisations internationales, il me semble qu'on doive organiser leur solvabilité. Je voudrais ajouter que cela me paraît particulièrement nécessaire pour des organisations internationales à activités opérationnelles économiques/financières ou commerciales et que le problème se posera évidemment avec beaucoup moins d'acuité pour les organisations internationales purement administratives.

16. Je pense essentiellement à une obligation à voter les crédits nécessaires plus qu'à indemniser les tierces victimes. Je n'aime pas beaucoup votre expression *liability to put the organization in funds,* mais je ne suis pas sûr de la signification profonde du mot *liability.*

Je rappelle toutefois que je concevrais très bien qu'une organisation internationale voie sa responsabilité être limitée au montant que ses Etats membres ont décidé de lui accorder (exemple de l'article 4 de la Banque européenne d'investissement, *supra* § 8), ou encore que dans le cas où ses statuts lui permettent de fixer un plafond à ses opérations, les Etats membres n'aient pas à contribuer au-delà de ce plafond (*cfr. supra* § 12).

17. Je serai très hésitant à prévoir dans le statut de l'organisation internationale, qu'il puisse y avoir à la disposition des tiers une voie de droit leur permettant de contraindre les Etats membres d'une organisation internationale soit de verser au budget de celle-ci les contributions adéquates, soit de les payer directement à ces tiers.

Ceci me paraît contraire à toute immunité des Etats.

18. Je ne pense pas pouvoir répondre à cette question vu ma position sur la question 17. A moins que par *basis* vous entendiez une disposition du genre de l'article 17 § 2 de la Charte ; on pourrait par exemple prévoir que : « les Etats membres de l'organisation internationale supportent toutes les dépenses entraînées par les activités de celle-ci. Leurs contributions sont réparties selon telle clef ... En cas de charges imprévues ou exceptionnelles, le Conseil approuvera tout budget supplémentaire nécessaire (procédera àtout appel de fonds) ».

19. Oui. Pour continuer la rédaction évoquée au paragraphe précédent, on dirait : « L'obligation des Etats membres est limitée au versement (ou encore au double) de la dotation pour activités opérationnelles ».

20. L'Etat membre n'aurait d'obligation qu'à l'égard de l'organisation internationale : il doit en effet contribuer aux dépenses de celle-ci en proportion de sa part de la clef budgétaire. Mais *quid* si les autres Etats membres sont insolvables ou refusent de payer, qui sera finalement responsable du trou ? Le tiers ou l'Etat membre solvable (celui du siège ?) ? Je comprendrais qu'on arrête là la fiction et que ce soit le

tiers et non l'Etat membre solvable qui supporte la charge de cette situation, mais je comprendrais aussi que dans l'intérêt du crédit de l'organisation internationale, on adopte une solution plus contraignante.

2. *Réponse de M. Ibrahim Shihata*

December 17, 1990

Dear Professor Higgins,

Attached are my answers to your questionnaire. I have tried to provide concise and, to the extent possible, unqualified answers to assist you in formulating your conclusions. My answers may be complemented by my earlier «preliminary answers» submitted on September 5, 1989.

I wish you every success in your difficult task which will no doubt influence future thinking on this difficult subject.

With warm regards and the Seasons Greetings.

Sincerely yours,

Ibrahim Shihata

1. The relationship between an international organization and a member state is normally governed by international law as both parties are subjects of international law. However, these parties may choose to make a certain relationship between them subject to the municipal law of the state involved or of any other state (*e.g.* under a lease, supply or investment agreement). Also, a municipal law person may have claims against a state with respect to an international organization's action (*e.g.* under the contention that the organization has been acting as the agent of the state or was merely an artificial veil for a genuine state action). In such special cases, the question of state liability may be raised as a question of municipal law without contradicting the general rule stated above.

Private law analogies may be relevant as a subsidiary device in ascertaining applicable rules of international law in this area as in other areas of international law. However, such analogies cannot prevail over the text of the constituent instrument of the organization or its agreement with the claimant.

2. There does not seem to be a difference in the basic concept. In both situations, a personality is created by law whereby the legally created person has a legal capacity and hence may acquire property, sue before a court of law and enter into contractual arrangements. Many differences

exist in the details, however. An international law person enjoys privileges and immunities either under customary international law or by virtue of treaty provisions. Its legal existence vis-à-vis third parties may depend on its recognition by them (as in the case of international organizations of a limited membership). And the scope of the legal capacity of an international organization is limited by the provisions of the agreement establishing it, especially those related to its purpose.

Municipal law often extends the concept of legal personality to forms which are not yet known in international law (such as the single member corporation) and may have other details irrelevant to an international personality.

3. Rules of general international law apply to the international law persons addressed by them, whether or not they are « third parties » to a given transaction. Provisions of the constitutive treaty of an international organization apply to the organization involved and its member states. The organization cannot invoke such provisions against a party with which it enters into a contract which deviates from the charter's limitations as grounds for failure to perform its obligations under such contract except when the contract provides for the supremacy of the charter's provisions. Apart from this, a provision of the constitutive treaty (*e.g.* a clause limiting or excluding liability of member states for the organization's acts) may normally be invoked vis-à-vis third parties unless the latter proves in good faith that such a provision was not disclosed to them and could not otherwise have been known to them. Normally, transactions with international organizations are entered into with sophisticated parties which are expected to ascertain the extent of the liability of the organization and its members before they conclude the transaction.

A fuller answer of the question would depend on the circumstances of each case and the forum under which the issue may be litigated.

4. The distinction between activities *jure imperii* and *jure gestionis* normally arises in the context of the issue of immunity, rather than personality or liability.

The assertion that legal personality can be endowed to an international organization under international law only if the organization is established to perform *jure imperii* activities finds no support in international practice. Many international enterprises have been endowed by their member states with international legal personality which exists in law vis-à-vis the member states. This personality may also exist vis-à-vis other international law subjects to the extent they recognize it, explicitly or tacitly.

5. « Participation » of states in the decisions of international organizations takes different forms. Where members of the governing bodies

of the organization are considered « officials of the organization » (as in the case of the IBRD and most other international financial institutions), the actions of such officials (in the decision-making process) will be attributed to the organization, not to their states. In the different situation where each state acts in the organization through an official representative (*e.g.* at the UN), the state may conceivably be liable for its behavior, if inconsistent with international law. However, the state cannot normally be liable for the acts of the organization merely as a result of voting in favor of such acts in the appropriate forum as long as such voting is a legally valid act under the organizations's charter. A state may be liable, however, if it causes or supports an action which is in violation of general international law or the organization's charter. The basis of such liability would be the state's fault, rather than the organization's own action.

6. The relationship between a state and an international organization of which it is a member cannot be characterized as a principal-agent relationship in the absence of a strong evidence to this effect or an explicit agreement by virtue of which the member requests the organization to act as its agent for a certain purpose (*e.g.*, under the IBRD loan agreements, for the purpose of purchasing and converting currencies on behalf of a borrower state, and under agreements with the IBRD authorizing it to administer funds provided by a member state for a special purpose).

7. Fault is relevant in ascertaining the liability of states for their own acts, not for the acts of international organizations. As explained in the answer to Question 5, a state may be liable for causing or supporting an illegal or unauthorized act under general international law and the organizations's charter.

8. The unlimited liability of member states for the acts of the organization cannot be assumed as a general principle of international law : it has to be established on the basis of the charter and the practice of the organization involved.

The charters of international financial institutions typically provide that the liability of each member is limited to the unpaid portion of the shares subscribed by it and require that this be disclosed on the text of the securities issued by them. Such repetitive provisions are consistent with the limited liability of a separately incorporated personality, but should not be seen as a conclusive evidence for a general customary law rule to this effect. Nor is it acceptable to conclude that the absence of such provisions is in itself a conclusive evidence that member states have unlimited liability for the acts of the organization.

9. There is a preliminary presumption that international organizations, being separate legal persons, are solely liable for their acts. In the absence of a clear evidence to the contrary, a member state is not liable for the

acts of the organization regardless of whether the alleged liability is based on contract or tort. A state remains answerable for its own contractual obligations and for damage caused by its own fault or negligence including acts taken by the state in its capacity as a member of the organization, which are in violation of international law.

A practical difference may thus arise ; tortious liability of the state may be based on its acts in the context of the organization's activities.

Another practical difference relates to the presumption that third parties should know of the charter's limits of members' liability in that such presumption may be strong in the case of a person dealing in contract (unless the contract provisions include conflicting rules, as explained in my answer to Question 3) rather than in the case of a tort claimant.

10. The dissolution of international organizations is normally regulated by explicit provisions in their charters. Annexes A and B, prepared by World Bank lawyers, describe, respectively, the experiences of the League of Nations and of the East African Community's joint enterprises.

The Charters of international financial institutions typically provide for the details to be followed in their liquidation. Such provisions assume that claims of the organization's creditors will be satisfied through the assets of the organization, with no residual responsibility on the part of the members.

There have been cases, however, where member states voluntarily cooperate to salvage a financially troubled joint enterprise by participation in meeting claims of the enterprise's creditors (*e.g.*, Eurochemic) or through sharing the assets and liabilities of such enterprises (*e.g.*, the East African joint enterprises).

11. Since liability is not to be presumed and has to be established by the text of the organization's charger, by separate acts of the states involved or by unequivocal practice, the characteristics of such liability will vary according to the case at hand. If state liability is established only in principle, it would be reasonable to conclude that it should be (a) secondary to the liability of the organization and (b) proportionate to the share of each member in the organization's capital or budget, as the case may be.

This answer may be qualified in case it is proven that the international organization was really a sham and that member states were in fact partners in a joint venture which has no real separate personality. In such a case, joint and several liability would be appropriate. *Cf.* Question 16.

12. In the absence of a general rule of state liability for the acts of the organization, the burden of proof that such liability exists falls on the claimant. Such a proof will be ordinarily based on international law sources except where the tribunal agrees that the relationship is governed by municipal law under the circumstances referred to in the answer to Question 1.

13. The liability of an international organization for its acts does not seem to depend on whether the act is *intra* or *ultra vires* as much as on whether it is a violation of a contractual obligation, or a binding rule of applicable law.

An international organization may not invoke its charter as justification for its failure to perform a conflicting contractual legal duty unless it has reserved the right to do so in the contractual arrangement.

The question of the liability of member states for *ultra vires* acts of the organization may arise in respect of the acts of the states themselves in this context. A state which causes an international organization to act beyond its authorized purposes may be answerable for the consequences, if it is proven that the organization was unable otherwise to exercise an independent will — a rather unlikely event (see also answer to Question 14).

14. An organization should not enter into a treaty which creates obligations for its member states beyond what they have explicitly accepted by virtue of the organization's charter. If an organization, acting *ultra vires*, enters into such a treaty, there will be no legal consequences for the member states unless it is proved that the organization's action is in fact the action of members. In the latter case, only those members which have caused the action to take place will be liable.

15. The main argument in favor of liability of member states for the acts of an international organization is to protect third parties and prevent states from avoiding their obligations by the creation of a body corporate to perform the intended activities in its name.

However, the advantages of having a legal form whereby states cooperate in the creation of an autonomous legal person to achieve common objectives seem to outweigh such an argument. In the international domain, parties which deal with international organizations should be able to ascertain the creditworthiness of the organization before dealing with it and to carefully appraise the business risk of having no recourse to members.

Third parties may be protected through the denial of immunity to international legal persons which perform commercial acts (with respect to such acts). Also, the piercing of the veil doctrine, known in some

domestic legal systems, may be applied to protect « innocent » third parties, if the facts of the case justify it.

16. As mentioned in my answer to Question 11, it is preferable, if state liability is established, that it be secondary to that of the organization. Liability to put the organization in funds follows the principle that the organization is the primary obligor and treats member states merely as guarantors of the organization's performance. In such a case, the obligation of each member should be proportionate to its share or its financial stake in the organization. The answer may differ if the international organization is not in reality a separate person but merely a sham.

17. The relationship between the organization and its members should preferably be detailed in the organization's charter or regulations as a matter of international law. Such details should cover the mechanism of recovery if amounts paid by the organization are recoverable from members. In the case of the IBRD, a formal interpretation of the Articles of Agreement considered the callable capital (*i.e.*, the unpaid portion of shares which may be called only to meet the IBRD obligations towards its creditors, including the creditors of loans guaranteed by it) an asset of the Bank which it is obliged to realize.

18. The basis of state liability for acts of the organization should be the explicit agreement of member states as reflected in the constitutive treaty.

If such liability is to be established as a general principle of international law, it should be based on the assumed intention of the parties, the practice of the organization and its members and the good faith of third parties which should have reasons to rely on the credit of member states in spite of the separate personality of the organization.

19. Yes. Member states should be allowed to limit or exclude their liability for the obligations of the organization. In this case, the constitutive treaty should obligate the organization to disclose this fact to the third parties with which it deals. For example, the IBRD charter requires that securities issued by it state they are not obligations of any government.

20. Liability should in such a case be proportionate and should preferably be established in the form of guaranteeing the organization's obligations to third parties.

* * *

Annexe A

The dissolution of the League of Nations

These notes are based on such information as was immediately available, and may not deal with every aspect of the dissolution of the League of Nations which may be of relevance to the issue of the liability of members for the obligations of the organization.

A Common Plan was worked out jointly by the League of Nations Supervisory Commission and the Preparatory Commission of the United Nations for the transfer of the assets of the League. The Assembly of the League approved the Plan in 1946. In implementation of the Common Plan, a number of protocols were entered into between the League and the United Nations in 1946 and 1947, under which the buildings, furnishings and equipment owned by the League (including the library and its endowment fund) were transferred to the United Nations, together with the related liabilities (for goods and work ordered, etc.).

According to Hungdah Chiu (*Succession in International Organizations*, Harvard University Seminar Paper Submitted to Professor Louis B. Sohn, 1963), «the Plan provided that shares in the LN assets belonging to LN members now members of the UN were to be credited to them on the books of the UN. The shares of members were to be calculated in proportion to the total amount of their contributions since the LN's inception. Those shares of members of the LN, which were not members of the UN on December 31, 1946, were to be disposed of by agreement with the states concerned [...]. However, the LN's practice in disposing of its assets appears to assume that the property of the LN was owned in common by its members rather than by the LN itself as a separate and independent international person» (pages 66-67).

According to F.P. Walters (*A History of the League of Nations*, Oxford, 1952), it was the League's reserve funds that were distributed to the members which had supplied them, after the League's obligations had been satisfied (vol. 2, page 815). In a memorandum to Professor Sohn attached to his dissertation, Chiu adds the following information, which is consistent with this view :

> The participation in the distribution of the LN assets was limited to those states which were members at the time of the dissolution of the

> LN. [...] Since Paraguay ceased to be a member of the LN on February 24, 1937, it could not participate in the distribution of LN assets. However, in the case of the Working Capital Fund, a different rule was followed, the former member's share in the Fund was counted and was to be deducted from the amount of debt, in any, it owed to the LN. Thus, in the case of Paraguay, after deducting its share in the Fund, it still owed the LN a sum of 500.128,47 (it also owed the ILO a sum of 99.236,08) which she did not settle at the time of the completion of the liquidation of the LN [...]. In the final report of the Board of Liquidation, it [is] stated :
>
> > The Fund remains the property of the Member States which contributed to it, but as at the time of its transfer certain of these States either owed more to the League in respect of arrear contributions than the amount of their credits in part payment of their arrears, only the shares of seventeen States formed a liability on the League [references omitted].

It would thus seem that the assets of the League which were considered as belonging to its members were the surplus funds remaining once the League had discharged its obligations. While one may question the statement that the funds belonged to the members, nevertheless it was not unreasonable for the Board of Liquidation to decide that they should revert to the members upon the dissolution of the League once the obligations of the League had been met.

Annex B

The dissolution of the East African community. The role played by the World Bank[26]

Background

The East African Community (the Community) was created by the Treaty for East African Cooperation signed in 1967 by the Governments of Kenya, Uganda and Tanzania. Its aim was to provide for the continuation of the common services organizations (East Africa Railways, East African Airways, East African Posts and Telecommunications, East African Harbours, East African Development Bank, etc.) established under British rule and to formalize the *de facto* customs union which had existed among the three countries before they became independent.

Political and economic problems — Disintegration of the Community

Whilst the 1967 Treaty for East African Cooperation was one of the most far-reaching and comprehensive economic cooperation agreements among sovereign states, in practice the degree of economic integration and cooperation was a great deal less than that intended by the Treaty. Both political and economic problems hampered further cooperation. The 1971 military coup in Uganda created severe political problems, especially between Tanzania and Uganda. There were also political tensions between Tanzania and Kenya which were then following different systems (Kenya was pursuing free market policies while Tanzania was following a socialist egalitarian system). In addition, the three countries faced severe economic problems in 1976 (budgetary and balance of payments problems). Therefore the lack of political unity and economic problems facing the three countries made the operation of the common institutions more difficult. In this atmosphere, governments began to intervene in day-to-day operations,

26 These notes are based on information obtained from the Consolidated Report of the Mediator of the East African Community dated October 1981 and from a course «*Principles of International Mediation — The Case of the East African Community*» by V. Umbricht, published in *Recueil des Cours*, Vol. IV, 1984.

investment planning and personnel. Difficulties in transferring funds from one country to another led to a *de facto* division of many services. The various operations were therefore decentralized in 1977. In February 1977, Tanzania closed its border with Kenya, thus bringing the Common Market to an end. The East African Community finally collapsed in June 1977 when the three governments failed to approve budgetary appropriations. By this time the regional headquarters of the various corporations were already acting as *de facto* national corporations and adminstering the former common services, and by the end of 1977 legislation had been introduced in all three countries giving them *de jure* status.

World Bank loans

By 1976, the World Bank had made ten loans amounting to $ 245 million to the Corporations of the East African Community (East African Railways, East African Harbours, East African Telecommunications, and East African Development Bank). In addition to these loans, the Bank provided considerable technical assistance to the corporations. The loans were made directly to the Corporations with the Guarantees of the three countries.

Mediation

The 1967 Treaty for East African Cooperation contained no termination clauses and offered no guidance for winding up of the affairs of the Community. Since there was deep mistrust among the member countries and their vital national interests were at stake, the countries agreed to seek external mediation. The first step was taken in August 1977 when the Government of Kenya asked the President of the World Bank «in making arrangements to ensure that the liabilities of the East African Corporations are discharged and on allocation of the guarantee obligations to the three market states». In October 1977, during the Joint IMF / World Bank meetings, representatives of the three member states met under the auspices of the World Bank to discuss the distribution of assets and liabilities of the Community. These discussions resulted in a Memorandum of Understanding signed on December 7, 1977. Article 2 of the Memorandum of Understanding states :

> « The [World] Bank indicated its willingness to help constructively. It was agreed that the Bank would assist the Partner States in identifying a mutually acceptable mediator to help the Partner States reach a settlement. In this connection the Bank representatives indicated the Bank's willingness to aid in drafting the Terms of Reference for the mediator to assist him in making a detailed assessment of the assets and liabilities of the East African Community Corporations and the General Fund Service. The mediator's services will include the making of recommendations as to future structure and operations of the East

> African Development Bank. It was also agreed that the [World] Bank would assist Partner States in securing adequate financing for these services. Should financing for the services not be forthcoming it was agreed that the Bank would finance these services from the proceeds of the remaining loan balances to East African Community corporations ».

Dr. Victor H. Umbricht, a former head of the Swiss Treasury and a diplomat was appointed as a mediator by the three countries. Terms of Reference for Dr. Umbricht were agreed in November 1977 and he started work in January 1978. The Terms of Reference were jointly drafted by the three member countries and the World Bank in consultation with Dr. Umbricht. The Terms of Reference provided, *inter alia*, that :

> « The mediator will recommend to the Partner States proposals for the permanent and equitable division of the assets and liabilities of the Eastern African Community Corporations and the General Fund Services. Thereafter, the mediator would assist the Partner States in reaching a definitive settlement on the basis of these recommendations ».

Assets and liabilities

The Terms of Reference provided that « the mediator shall determine the assets and the liabilities and examine various alternative methods of assessing them (including the date or dates as of which they are to be assessed) and of assigning them ». The mediator was therefore required to «determine» (identify and list) and then « assess » (putting a value on) all the Community's assets and liabilities. After almost three years of work, the mediator established that the total net assets of the Community amounted to the equivalent of $ 1432.6 million and total long term liabilities amounted to the equivalent of $ 344.4 million. The mediator also established that Kenya held in its possession 52 % of the total assets, Tanzania 35 % and Uganda 13 % ; but this was merely a physical distribution of assets on a particular date, and was not an equitable distribution. The mediator therefore had to come up with a formula, acceptable to the member states, for the distribution of assets and liabilities. The mediator found no convincing evidence fo the view that economic or political or legal consideration justified equal sharing of the assets and liabilities among the member states. The mediator found that while joint ownership of the assets was not in doubt, it was not equal ownership. The mediator could not therefore propose the division of assets in equal shares. After examining different proposals, the mediator concluded that there was no one clear, undisputed and satisfactory criteria for the division of assets. The mediator's final proposal for the distribution of assets and liabilities was guided by principles of reasonableness, simplicity and fairness. The Presidents of the three countries acccepted the mediator's

proposals and decided in November 1983, to distribute assets and liabilities as follows :

42 % to Kenya ; 32 % to Tanzania ; and 26 % to Uganda.

Mediation Agreement

This 42 : 32 : 26 formula was enshrined in the «Agreement for the Division of Assets and Liabilities of the Former East African Community» signed by the Heads of State of Kenya, Tanzania and Uganda on May 14, 1984. Among other things, the Agreement provided for the distribution of assets and liabilities on the basis of this formula (the Agreement calls this the Mediation Formula). This meant that Kenya would assume responsibility for 42 % of the Community's liabilities, Tanzania 32 % and Uganda 25 %. Article 8.01 of the Agreement provided that :

> « The creditors of the long term liabilities and the States having agreed to the division of the liabilities (pursuant to Article 7 above) and where applicable to the elimination of joint and several guarantees in respect of such liabilities, each State shall solely be responsible for such balance of liabilities allocated to it and as reflected in the separate Agreements between each State and each Creditor ».

Article 9.01 provided that :

> « (a) Claims for amounts due in the currency of one of the States are assigned to, and shall be dealt with by such State in accordance with its existing procedures ;
> (b) Claims for amounts due in foreign currency, not covered by Article 8 may be dealt with by *ad hoc* agreement between the States or, feeling such agreement, by the Arbitration Tribunal referred to in Article 12 of this Agreement ».

World Bank loans under the Mediation Agreement

Annex A to the Agreement contains a list of all outstanding long term loans and their distribution to the three countries. There were eight World Bank loans outstanding as of that date and these were distributed to the three countries in accordance with the Mediation Formula. On June 28, 1984 the World Bank entered into Loan Apportionment Agreements with each of the three countries in which each country assumed responsibility for its portion of the World Bank Loans made to the former East African Community Corporations.

Conclusion

Since the 1967 Treaty establishing the East African Community did not provide for the dissolution or winding up of the affairs of the Community, the member States therefore had to resort to mediation to settle all outstanding issues, including the distribution of assets and liabilities. Mediation effort succeeded due largely to the wisdom and statesmanship displayed by the leaders of the three East African countries.

3. *Réponse de M. Michel Waelbroeck*

January 9, 1991

Dear Professor Higgins,

Not having been able to come to Santiago de Compostela, I would first of all like to congratulate you for your wonderful preliminary report on liability of States Members of international organizations. It is remarquably complete and gives an extremely clear view of what is a very complex problem as is apparent from the wide range of different opinions that have been expressed concerning it and which you refer to in your report. I confess that I had not previously realized the dimension of the problem and your paper has been most useful in helping me to formalize my thoughts somewhat better.

The conclusions to which I arrive are somewhat different from yours. It seems to me that the starting point is to consider that an international organization (whether set up to exercise tasks *jure imperii* or *jure gestionis*) is an instrument by which certain States seek to accomplish together certain tasks more effectively than they could if they were acting individually. Membership in the international organization therefore confers certain advantages to them. Otherwise they would presumably not become a member.

Therefore, it would be wrong, both from a policy and from an equity point of view, to allow Member States to evade all responsibility towards third parties for the activities of the international organizations to which they belong. No difficulty arises of the constitutive instrument provides that members must pay their share of the organization's expenses on an open-ended basis. However, I do not see why unsuspecting third parties should be worse off because the constitutive instrument allocates expenses on a different basis.

By using the words « unsuspecting third parties », I mean to exclude third parties who have contracted with the international organization in the awareness of the fact that the Member States would not stand in if the organization defaulted. I believe, however, that if the constitutive instrument does not clearly exclude the secondary liability of the Member States or if the liability arises as a result of tortious conduct rather than under contract, there are compelling policy reasons to allow injured parties to recover against the Member States if the organization defaults. I do not think that this will necessarily lead the States to increase their intervention in the decision-making process of the organization (your report,

p. 57)[27] ; it may be that they will simply set up appropriate built-in safeguards to prevent potential liability.

As to the basis for my view, I believe it rests on a combination of policy considerations and equitable notions and is perhaps influenced by analogies with private law principles such as those on unjust enrichment, *responsabilité pour risques*, and piercing of the corporate veil. I recognize however that these analogies are not wholly adequate.

Having said this, I would like to answer your questions.

1. The question of liability of States members is, first of all, a question of public international law. However, private law analogies may be helpful in elucidating the content of rules of public international law to the extent the policy considerations in issue are similar.

2. To the extent the existence of a separate legal personality under municipal law does not necessarily exclude the secondary liability of the Members (as in the case with a *société en nom collectif*), I see no reason why the result should be different under public international law.

3. To the extent third parties are put on notice of the fact that the liability of an international organization is limited at the time they have dealings with that organization, the limitation of liability should be opposable to them.

4. I do not see how the distinction between activities *jure imperii* and *jure gestionis* can have any relevance whether for the existence of international legal personality or for the liability of Member States.

5. The fact that Member States may participate in some organs of the international organization does not have any effect, whether positive or negative, as regards their potential liability. The phenomenon of *dédoublement fonctionnel* applies here, as you correctly point out.

6. An international organization does not normally act as the « agent », in strictly legal terms, of its members, although in a broad sense an international organization is, as I said above, an instrument by which its members seek to accomplish certain purposes and may therefore be regarded as their «agent» (or « agency ») in a loose sense.

7. I do not believe that it is necessary to establish that Member States have committed a «tort» as a condition for their liability to third parties. In my view, that liability results from the fact that the Member States have set up the organization in their mutual interest and that they allow

27 Voir *supra*, p. 288.

it to take some measures that may potentially cause injury to third parties (analogy with the *responsabilité pour risques* concept under private law).

8. —

9. Contractual liability may be limited — but it must be done clearly — whereas tortious liability may not be limited.

10. —

11. —

12. I believe there is such a positive provision.

13. The question of *vires* has no relevance, for the reasons you indicate.

14. I have not thought this through.

15. It is desirable that members should be liable for the obligations of international organizations within the limits and for the reasons that I have stated above.

16. The answer depends on the method provided for allocating expenses under the organization's constitutive instrument.

17. Justiciability under public international law and under municipal law is essential if unjust solutions are to be avoided.

18. I believe I have already answered this question.

19. Same.

20. Proportionate to the contributions made to the budget, since this is the best instrument to measure the «interest» of a Member State in an international organization.

I look forward very much to seeing you again in Bâle.

With best wishes and kind regards,

Yours sincerely,

Michel Waelbroeck

* * *

4. *Réponse de M. Karl Zemanek*

January 10, 1991

Dear Professor Higgins,

I regret to reply to your questionnaire a few days late, but other work prevented me from doing it before Christmas and then I found that replying required more time than I had anticipated. So please accept my apology.

I have a basic problem with the questionnaire. When it speaks of «third parties» it uses the term indiscriminately for « third States » and for « private parties ». There would, however, be merit in a distinction. Relations between member States and non-member States are governed by public international law and there are proper procedures to settle a problem of State responsibility or liability. Private parties may only act through domestic courts and the action becomes then burdened with the additional problems of the immunity of the organization and its member States, the relations between international law and domestic law as perceived in the forum State and, probably, with conflict-of-laws questions. I have tried in my answers to differentiate but am not sure whether I always succeeded. So, please, keep these remarks in mind when reading my replies.

1.(a) The relations between an international organization and its members are governed by the constituent instrument of the international organization which is necessarily in international treaty or else the international organization would not be an intergovernmental organization. Some (*e.g.* Seyersted but also myself after the Vienna Convention of 1986 [see my contribution in the *Festschrift* for Seidl-Hohenveldern]) hold that the international legal personality of an international organization derives from general customary international law, the constituent instrument only determining its limitations, while others see the constituent instrument as source of that personality. In any case, it is established by public international law. Legal personality of an international organization in municipal law flows simply from the recognition of the legal personality under international law for the purpose of the application of municipal law. But unless the constituent instrument provides that the international organization is to be *incorporated* as a body corporate into the domestic law of the seat (or any other) State, the internal structure of the international organization continues to be governed by international law alone. The question of liability of member States is therefore a question of international law.

(b) Whether private law analogies are appropriate and relevant depends on what one understands by « analogy ». If «analogy» means direct

applicability in the sense of Article 38(1)(c) of the Statute of the ICJ, I doubt that principles with a claim to generality do exist. If however, «analogy» means that *models* for development *de lege ferenda* should be sought in private law, I agree.

2. What they all have in common is the purpose : to establish a *subject* of law which, in the sphere of its activities, is legally different from its creators. Besides that the concept of legal personality in any system of law — and thus in each municipal system — is subject to different political, economic, social and systemic considerations proper to that legal order. It may be a slight exaggeration but I suspect that there are nearly as many concepts as there are legal systems.

I doubt, however, that in international law a « concept » of legal personality exists, apart from constructions of writers. Founding States intend to establish a *subject* of international law and express this through conferring appropriate functions on the international organizations in its constituent instrument. But in this they are completely free and a comparative study of the «constitutions» of international organizations does not lend support to the idea that the founders had a specific « concept » in mind. It was rather *post festum* that the ICJ in some of its Advisory Opinions had to develop elements of a theory to construe constituent instruments, but I still hesitate to believe that a generally accepted «concept» of legal personality exists in international law.

3. (a) I am not aware of any rules of general international law relating to liability. I think I am supported in this view by the codification exercise in the ILC and by the discussions concerning environmental protection in general.

(b) The constituent instrument of an international organization is, in principle, opposable to third parties to whom an obligation may be owned. If the third party is a State, the law of State responsibility places limitations on that possibility (States cannot do through an international organization what they are not allowed to do by themselves under international law, see answer to Question 5).

In a conflict-of-laws perspective the situation is different, because a municipal court may not judge questions of State responsibility. There is simply a *renovi* to the constituent instrument of the international organization as its « home » or « domestic » law. See however answer to Question 9.

4. If one assumes that the private law capacity of international organizations is the consequence of their personality in international law, and if one further assumes that personality of international organizations in international law is the consequence of their having been assigned functions in that sphere which must consequently be *jure imperii,* it may

indeed be doubtful whether an international organization whose activities are limited to acts *jure gestionis* could be established as an international legal person. Apart from that I see no relevance of the distinction for the existence of international legal personality. The distinction may, however, be relevant in terms of the immunity of the international organization, granted to it in its constituent instrument or in applicable treaties.

For the liability of member States the distinction is irrelevant because such liability, where it existed, would be based on the terms of the constituent instrument.

5.7. A State participating in the decision-making of an international organization may become internationally responsible for a decision if the latter is made by using the powers of the organ in question contrary to the provisions of the constituent instrument and if the decision can be attributed to the State concerned under the rules of State responsibility. To the extent that fault is relevant in that context (see however ILC Draft), it would have to be taken into account.

As for the seat State, Article 13 of the First Part of the ILC Draft on State responsibility exonerates it from responsibility if the claim is based only on the fact that the relevant act took place in the seat State's territory.

But all that is relevant only in relations between member States or between members and non-member States. *Private* third parties do not seem to have a forum where to invoke State responsibility. The immunity of a member State against which an action is brought would cover its participation in the decision-making process of the international organization, which is governed by international law and therefore *jure imperii*, even if the subject of the decision were an act *jure gestionis*.

6. It depends on what is meant by « agent ». An international organization is carrying out the functions which the member States have created in the constituent instrument on its *proper account*. Thus, in the sense which the term «agent» has, at least, in Austrian law, an international organization does not act as an agent of its member States, unless a provision in its constituent instrument prescribes it (see f.i. Article 24 (1) of the Charter).

8. It would, indeed, seem appropriate to distinguish categories of international organizations especially in the present context. It sounds absurd that the same rules of responsibility and/or liability should govern organizations dealing primarely with international policy and others that are mainly concerned with quasi-commercial or financial operations, like Eurochemic for example. Several writers have, in fact, submitted such proposals ; that last I am aware of was Yozo Yokota, « How useful is

the notion of «International Public Corporation today ? » in *Essays in international law in honour of Judge Manfred Lachs,* 1984, 557.

But State practice does not yet follow them. Since international law does not prescribe one or more particular forms for international organizations, States feel free to write into constituent instruments whatever they want. As long as thereby they do not violate an existing international obligation of their own or design the organization for the purpose of violating international law, their freedom is not legally limited.

9. As far as « private » third parties are concerned, I do not see any difference in present international law, but *de lege ferenda* there should be a difference. In contractual relations good faith requires that a private party which intends to engage in transactions of an economic nature with an international organization scrutinizes the latter's constituent instrument, the standard of its management and the scope of its transactions. It should then be aware of the potential risk that it is taking and if it finds it too high it may refrain from the transaction. If this were to become a general attitude of potential partners, the members of the international organization will have to revise the constituent instrument accordingly or the international organization will have to cease its operations.

The situation is totally different in torts where the relation is involuntary and the injured private third party should be afforded total protection. But that has yet to be established in international law.

10. The concurrent resolutions of the UN General Assembly and the Assembly of the League of Nations which were the instruments for transferring the assets and liquidating the League are, in my view, expressions of what member States may do, but not necessarily of what they feel legally obliged to do.

11. Article XXII paragraph 3 of the Outer Space Liability Convention which establishes subsidiary joint and several liability for members of an international organization that causes damage under the Convention, was intended to induce member States of the international organization concerned to settle claims through the organization. It was assumed that threatened with the joint and several liability, they would rather prefer to put the organization in funds. However, the negotiators did not think that they were implementing a mandatory principle of international law but rather that they had to create something new, meeting the circumstances — I know it, because I was one of them.

In the absence of a special treaty provision to the contrary, liability could only be joint or proportionate to the contributions made to the budget, depending on the functions of the organizations and the nature of decision-making in it with respect to the activity in question.

12. I do not fully understand the question. As far as I understand it, it seems that the answer is covered by the replies to other questions.

13. This question is difficult to answer because the concept of *vires* is different in major municipal legal systems. In German and Austrian law f.i. the legal capacity of legal persons is *not* limited by the object and purpose of its statute. It may therefore be difficult to develop a consensus on *vires* on the basis of general principles of law.

However, as far as the *practical* consequences of activities *ultra vires* are concerned, I refer to my answer to Question 5 and 7.

14. I do not think that a direct analogy is possible. The history of what are now Articles 36 to 38 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations of 1986, and of the defunct Article 36 *bis* proposed by the ILC, shows that they are a compromise by omission, made necessary by conflicting propositions of the general law of treaties, the practice of international organizations in concluding treaties and the «rules of the organizations». This is clearly expressed in the saving clause inserted in paragraph 3 of Article 74 of the Convention (see my paper in the *Festschrift* for Seidl-Hohenveldern).

One may, nevertheless, conclude from the negotiations in the Conference that the latter gave precedence to the «rules of the organization» over rules of general international law and that a vast majority of participating States felt that obligations of member States towards third States should not be presumed in the absence of the formers express consent unless the «rules of the organization» provided otherwise.

15. It is desirable. I share the opinion of many writers that States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually. This consideration is particularly valid in cases where international organizations are established for the purpose of quasi-commercial or -financial transactions.

16. The model used in the Space Liability Convention (see answer to Question 11) is the best I can think of.

17. Yes to the first question.

Whether the justiciability is established under public international law or under municipal law depends on whom one envisages as «third party» and, thus, to a certain extent on the functions and the «category» of the international organization (see introductory remarks and answer to Question 8). For organizations dealing primarely with inter-State policy responsibility and liability under public international law will suffice (see

f.i. the settlement between the UN and Belgium concerning damage to Belgian nationals by ONUC operations, *Revue belge de droit international,* 1965, 559 and J. Salmon in *AFDI*, 468). For organizations with a quasi-commercial or -financial activity, on the other hand, making liability justiciable under municipal law (and, consequently, limiting their immunity) will be necessary if «private third parties» are to be adequately protected.

18. I am not sure whether I understand the question correctly.

If it asks whether all international organizations or only some «categories» should be subjected to a regime of liability of their members for acts of the international organizations, I refer to my introductory remarks and to my answers to Questions 8 and 17.

If it asks for the way in which liability should be prescribed, I see two possibilities : either in a revision of constituent instruments or in a new general convention (a possible job for the ILC). Hoping for the development of customary law does not seem promising. First, because (hopefully) there may not occur a sufficient number of instances of State practice to confirm a new *opinio juris* (the ICJ in the *Nicaragua Case*, *Reports* 1986, paragraph 184). Secondly, private law analogies will be too confusing to lead to the formation of an *opinio juris* : not only vary the types of legal persons with the municipal laws establishing them but also the liability assigned to them (see answer to Question 13).

19. If liability is established by a general convention, the possibility of exemptions or limitations can therein be regulated or excluded, depending on the formulation of the primary obligation in the convention.

If liability is established through revising constituent instruments of existing international organizations, member States will shape the revision according to their wish and need (as they perceive it) and I do see no way for preventing them from doing that.

20. See answer to Question 16.

With best regards,

Karl Zemanek

* * *

5. *Réponse de M. Finn Seyersted*

23 January 1991

Dear Professor Higgins,

These are my replies to your questionnaire :

1. Public international law — or, more precisely, the internal law of the organization concerned interpreted in the light of general principles of public international law. In the latter context, assistance may be found in analogies from the national law of those states which do not — like non-Scandinavian continental European countries — make legal personality depend upon positive legislation.

2. National law must accept international legal persons as subjects of national law.

3. Yes.

4. No.

5. None.

6. Only when they have authorized it to do so.

7. None (I do not see the relevance of their fault to the acts of the organization).

8. I am not aware of any organization where liability could be assumed unless provided for.

9. Yes.

10. Non-liability.

11. *De lege ferenda* : the latter.

12. Burden of proof vests in claimant.

13. States do not become liable for their acts as members of organs — only if they openly act outside the organization.

14. Directly relevant.

15. Only in some cases — where special provisions have to be made.

16. The former.

17. Yes.

18. Explicit provisions would be required.

19. Yes — but preferably by general provisions applicable to all members.

20. Question 11 is already answered on that assumption.

In view of my delay — for which I apologize, these replies have been dictated quickly, without taking the time to comparing them with your preliminary report or any other documents. I may therefore reconsider some of my replies after having seen the other replies.

With kind regards,

Yours sincerely,

Finn Seyersted

* * *

6. Réponse de M. James Crawford

26 January 1991

1. (a) It is necessary to distinguish between the liability of a State party to keep an organization solvent (that is the liability vis-à-vis the organization and other States parties) and the liability of a State party towards a non-State third party. The first question is one of international law, assuming that the organization is an international organization properly so-called. The second question is one of mixed international law and national law. The proposition that certain international organizations have a legal personality which is distinct from that of its members is a proposition of international law. International law is also relevant to the question of the extent of the immunity of a foreign State from the courts of a particular country. In addition to these two obvious points, I suppose international law might have a rule that the member States of an international organization are always secondarily liable for the debts of the organization, but I do not think that there is in fact such a rule. The existence of associations with limited liability (*i.e.* whose members are not, or not generally, liable for its acts) is a common feature of most, perhaps all, national legal systems. I see no reason why States should not be able to establish an international organization with similar characteristics. Thus in the absence of any mandatory rule of international law, and especially in the case of a contract or other transaction with a private party under national law, I think it is primarily a matter for the relevant national law to determine the liability of member States participating in one respect or another in that transaction. International law may be relevant to that question, but it is not exclusively relevant.

(b) The relationship between international law and national law varies between different national legal systems and there is no one relationship mandated by international law. International law is primarily concerned

with the substantive outcomes reached by national law rather than the theories on which national courts proceed in reaching those outcomes. Given the complexity of the particular relations between international law and national law that are likely to obtain, private law analogies are only of limited value in this field.

2. I cannot speak of the concept of legal personality in all systems of national law. But the basic conception of legal personality is simply the recognition of a given entity as a person capable of holding rights, performing legal acts (including suing and being sued) and otherwise acting as a juridical entity within that system. At that basic level, the concept of legal personality is no doubt common. Beyond that, international law is likely to have its own particular rules and institutions.

3. Assuming that the liability is one arising under a national system of law (*i.e.* that a particular national system of law is the proper law of the contract, the debt, etc.), the question of the opposability of liability rules under international law would depend on the relationship between international law and the national legal system concerned. So far as the opposability of provisions in the constituent instrument of the international organization, in principle these would not be opposable unless appropriate steps were taken to bring them to the attention of the third party, or unless national law so provided.

4. (a) In general, no. States are almost as likely to wish to establish a separate legal person to engage in acts *jure gestionis* as *jure imperii*. In any event, organizations set up primarily to perform «public» or «governmental» acts will usually engage in a variety of commercial transactions as well, and incidentally. I would add that these classifications are inherently difficult and relative ones. An organization might act in respect of a commercial transaction such that its conduct should be classified as *jure gestionis* ; but the conduct of the member States whose officials are involved in the supervision of the organization's acts might have to be classified as *jure imperii*.

(b) For the reason stated in question 1 above, the liability of a member State to a third party with respect to a private law transaction is in the first instance a matter for the relevant national law. On the other hand, an organization might perform an act which was not submitted or subjected to any particular national system of law, in which case issues of liability would be primarily or even exclusively governed by international law. No doubt the distinction between acts *jure imperii* and acts *jure gestionis* may have relevance in the context of the immunity of a member State from being sued in the courts of a foreign State.

5. In normal circumstances, a member State acting in its capacity as a member of a governing body of an international organization with

separate personality would be acting to commit the organization rather than itself.

6. Plainly an international organization *can* act as the agent of one or more members. However the presumption must be that an international organization with separate personality is acting on its own behalf and not as an agent of its members.

7. This is a matter primarily determined by the proper law of the relevant liability, *e.g.* by the proper law of the contract in the case of a claim brought under a contract. I do not think that international law would prohibit a national law from providing that a person (including a foreign State) acting in relation to the transactions of a separate legal entity in defined blameworthy ways (*e.g.* as an accomplice to a fraudulent transaction) is liable to injured third parties. For example, if persons responsible for the affairs of corporate entities are prohibited from behaving fraudulently in relation to third parties dealing with the entity, I see no reason why that rule should not apply to a foreign State acting in the same way. There is of course a separate issue of State immunity.

8. There has been an extensive practice of specifying or limiting liability in the constituent instruments of various organizations, especially financial organizations. But I do not think that this has given rise to any specific or special category of organization with different liability rules.

9. In principle, yes. The only difference is that any express rule of an organization relating to members' liabilities is more likely to be incorporated into a contract between a third party and the organization, or at least to be a basis on which the contract was entered into.

10. I do not think that there are any particular lessons with respect to the liability of member States, vis-à-vis third parties, other than the obvious lessons that there is a responsibility on States parties to ensure that the debts of the organization are paid. But the crucial question is : what is the status of that responsibility ? That issue did not have to be confronted in the context of the dissolution of the League of Nations.

11. Whether the liability is joint and several, proportionate etc., would depend in the first instance on what the basis of liability is. In general, in respect of their international law liabilities, States are jointly and severally responsible. But is may be doubtful whether this general rule applies to the actions of States operating through an international organization where there are defined levels of financial contribution. As between themselves, States might well be taken to have agreed to bear any liabilities in respect of the organization in those proportions. The position with respect to third parties would be different, as that apportionment would (usually, at least) not be opposable to them. On the other hand, most third party liabilities will arise in the first instance under

some national system of law, and in relation to a particular factual situation ; the general system of liability and contribution under that legal system, and the particular facts of the case, will be the major determinants.

12. I do not think that there is a useful distinction between «positive international law» (apart from specific treaty provisions) and «international law». All sources of law have to be brought to bear in determining what international law is on a particular point. No doubt there is some tactical onus upon the party relying on a particular rule to demonstrate that it *is* a rule, though whether this is a formal onus of proof may be a question. Beyond that I do not think there is any specific implication in terms of sources of law or burden of proof.

13. The principal relevance of *vires* would be in a situation where an organization was acting wholly and manifestly outside the scope of any of its constitutional functions. In that case the argument that the individual member States were merely using the organ as a forum or venue for their own acts would be much stronger. But the principal function of the doctrine of *vires* in relation to an international organization is that of ensuring as between member States that the organization acts in the way agreed. That doctrine is not a primary vehicle for the attribution of loss as between the organization and third parties.

14. The issue of the legal consequences for States of the treaties of international organizations is a pure issue of international law, and has little bearing on the question of the liability of private parties for the private law transactions of international organizations.

15. In the case at least of the larger international organizations, the influence of any one member State in most cases will be limited, and I do not think that it is necessarily the case that each member State should be liable, whether jointly and severally or *pro rata*, for the obligations of the organization. What is obviously desirable is that third parties dealing with the organization should know what the position is. If this knowledge exists, the market will presumably find its own remedies for the potential insolvency of international organizations, through demanding guarantees in one form or another or through other forms of dealing.

16. Except in cases where there has been something equivalent to fraudulent dealing or carrying on the business of an organization with third parties knowing that the organization will not be able to meet its obligations as they fall due, the obligation of individual member States should be limited to the obligation to put the organization itself in funds. That obligation should be owed to the organization itself, and to each individual member State.

17. This would depend on the nature and governing law of the international organization. In principle I think that the obligation would

be an obligation under public international law. I see no reason why it would not be justiciable in an appropriate forum, but that would not necessarily be a national court.

18. I do not see why whatever international liability may be desirable should depend upon the analogy between an international organization and any particular kind of private law association.

19. As between themselves I see no reason why the member States should not be able to limit their liability as they see fit. As against third parties, I think they should only be able to do so (on the assumption that some general principle of liability exists or is introduced) by clear and express provision.

20. I think it is unrealistic to expect that one member with a very minor percentage contribution to an international organization should be technically liable for all its debts. If *de lege ferenda* such liability were to exist, in my view it should be in the proportions in which at the relevant time the member States were liable to contribute to the organization.

James Crawford

* * *

7. *Réponse de M. Jean Salmon*

6 février 1991

Chère Consoeur,

Vous voudrez bien excuser mon retard à répondre à votre questionnaire et d'avoir dépassé de quelques semaines le 1er janvier 1991. Laissez-moi ensuite vous féliciter de votre rapport stimulant qui aborde de nombreux aspects d'une question passionnante mais néanmoins complexe.

Je souhaiterais structurer mes commentaires en deux parties. Dans la première je crois utile de vous donner une vue générale de la manière dont j'envisage le problème dans sa globalité. Dans la seconde j'essayerai de répondre à votre questionnaire.

Première partie — vue générale sur le problème dans sa globalité

1. J'estime comme vous que la question centrale est le point de savoir si l'organisation internationale possède ou non une personnalité distincte de celle de ses membres.

Il est évident que si l'organisation n'a pas de personnalité distincte, seuls les membres sont liés. Il n'y a pas, dans ce cas, de personne juridique autre que celle des membres.

Si, au contraire, l'organisation possède une personnalité juridique distincte, ses comportements ne peuvent engager que sa responsabilité propre. L'idée même de l'indépendance d'une organisation internationale interdit de penser que ses actes puissent engager les Etats membres.

2. Sous réserve des cas particuliers envisagés ci-dessous (N°6), en principe, l'organisation internationale est seule responsable de ses actes ou omissions. La responsabilité des membres se limite aux obligations prévues par l'acte constitutif. Ce sera normalement l'obligation de contribuer au budget ou de répondre aux exigences de souscription au capital, etc. ...).

Les membres ont de manière générale les obligations que les organes peuvent licitement leur imposer.

3. Reste à savoir si la personnalité internationale d'une organisation internationale s'impose aux Etats. Elle s'impose évidemment aux Etats membres. Elle s'impose aussi aux Etats non-membres qui accueillent ses activités (Etats d'accueil) ou qui passent avec elle des conventions ou qui acceptent de traiter avec elle. En d'autres mots tous les Etats qui *reconnaissent* l'organisation en tant que telle. Pour les autres, je ne vois pas pourquoi on se départirait du principe général *res inter alios acta*.

Je ne crois pas personnellement qu'il y ait plus de réalité objective d'une organisation internationale que de toute autre entité, tel un Etat. Rien ne peut forcer un Etat de reconnaître une organisation internationale tierce s'il n'entend pas traiter avec elle. Les démêlés Etats socialistes - CEE ont amplement démontré cela.

La reconnaissance d'une organisation internationale peut être un acte aussi politique que la reconnaissance d'un Etat nouveau.

Bien sûr la reconnaissance sera implicite si l'on contracte avec l'organisation ou si on la traite de quelque manière comme un être juridique individualisé (par exemple si on l'assigne ou si on lui adresse une réclamation).

4. Lorsqu'il existe une personne juridique internationale, celle-ci n'engage qu'elle même.

Je récuse donc complètement les analogies tirées du droit interne qui tendent à impliquer les Etats. Voir par exemple le raisonnement alambiqué et artificiel des arbitres —privatistes de formation — dans l'affaire *Wesland Helicopters* (1984) qui invoque sans que l'on comprenne ni le pourquoi ni le comment des concepts tels que «la société en commandite par action» ou «la société en nom collectif» qu'ignore absolument le droit international public.

5. La question de savoir si l'acte de l'organisation est un acte *intra* ou *ultra vires* n'est pas sans pertinence.

Il faut distinguer pourtant la question de savoir si l'acte *ultra vires* engage la responsabilité de l'organisation au point de savoir s'il engage la responsabilité des Etats membres.

Si on envisage la question en termes de responsabilité pour actes illicites on voit mal comment une organisation internationale pourrait échapper à sa propre responsabilité pour un tel acte parce qu'il serait accompli *ultra vires.*

Tout comme un Etat peut être tenu par ses actes *ultra vires,* l'organisation est également tenue dans les mêmes termes (application *mutadis mutandis* aux organisations internationales de l'article 10 du projet de la CDI sur la responsabilité internationale des Etats).

Les Etats tiers sont évidemment fondés à se plaindre des actes *ultra vires* de l'organisation qui lèsent leurs droits.

Comme l'a dit la CIJ dans son avis consultatif relatif à *Certaines dépenses des Nations Unies* «le droit national comme le droit international envisagent des cas où une personne morale, ou un corps politique, peut être *lié envers les tiers* par l'acte *ultra vires* d'un agent» (*Recueil,* 1962, 168, c'est nous qui soulignons).

Le problème soulevé par les actes *ultra vires* est donc moins de savoir s'ils peuvent engager la responsabilité internationale de l'organisation, que de savoir si de tels actes lient les Etats membres.

A ce propos il convient de distinguer les obligations des Etats membres de contribuer à cet égard aux dépenses de l'organisation de celles qui pourraient exister à leur égard en dehors de cette hypothèse.

La première question, on s'en souviendra, fut examinée incidemment par la Cour internationale de justice dans son avis sur *Certaines dépenses des Nations Unies.* La Cour a traité la question par le biais suivant : elle a recherché si une dépense *ultra vires* pouvait être considérée comme celle de l'organisation. Et elle a déclaré notamment que :

> «si une dépense a été faite dans un but qui n'était pas l'un des buts des Nations Unies elle ne saurait être considérée comme une dépense de l'Organisation». (*Recueil,* 1962, p. 167).

En revanche si l'action d'un organe violait simplement les règles de compétence d'un organe par rapport à un autre organe, ce serait tout de même une dépense de l'organisation.

La Cour a donc considéré que les Etats membres pourraient être tenus de payer leurs contributions au budget de l'organisation, même s'ils avaient voté contre une résolution de l'organisation constituant l'acte *ultra*

vires, dans l'hypothèse ou la dépense est une dépense de l'organisation au sens donné à cette expression par la Cour.

Ceci semble impliquer *a contrario* qu'un Etat membre pourrait refuser de payer sa contribution si la dépense n'est pas une dépense de l'organisation. Dans l'hypothèse envisagée par la Cour la *cause* du paiement par l'Etat se trouve dans ses obligations résultant de l'acte constitutif de l'organisation. La Cour n'a nullement envisagé le cas où l'Etat pourrait être tenu pour d'autres causes.

6. Il convient maintenant d'envisager s'il existe des cas où les Etats membres pourraient être tenus de certaines obligations pour d'autres causes et notamment parce que leur responsabilité *propre* serait engagée, *à côté* de celle de l'organisation.

Plusieurs hypothèses de droit commun peuvent être envisagées :

(a) Il peut tout d'abord arriver que les Etats membres prévoient expressément que les actes de l'organisation engageront aussi les Etats membres (ainsi l'art. V § 1 et XXII § 3 de la Convention du 29 mars 1972 sur la responsabilité internationale pour les dommages causés par des objets spatiaux ; art. 139 § 2 et art. 6 de l'annexe IX de la Convention de Montego Bay).

De tels cas de solidarité conventionnelle doivent être exprès. Une telle responsabilité ne peut exister que si elle est prévue.

(b) Il est aussi possible que l'Etat membre engage sa propre responsabilité, à côté de celle de l'organisation par des obligations unilatérales de garantie ou de caution.

(c) Enfin, les règles habituelles d'imputation n'excluent pas que l'Etat membre soit rendu responsable d'un acte accompli par l'organisation dont il est membre.

Certes, l'article 13 du projet de la CDI exclut toute présomption résultant de la territorialité :

> «N'est pas considéré comme un fait de l'Etat d'après le droit international le comportement d'un organe d'une organisation internationale agissant en cette qualité du seul fait que ledit comportement a été adopté sur le territoire de cet Etat ou sur tout autre territoire soumis à sa juridiction».

Ainsi les actes illicites de l'ONUC ne furent pas imputés au Congo (Léopoldville) mais à l'ONU.

On pourrait cependant envisager d'imputer à l'Etat l'acte de l'organisation s'il apparaissait que l'acte est moins celui de l'organisation que celui de l'Etat (application des articles 8 (a) et 9 du projet de la CDI).

S'il est ainsi constant que la volonté collective de l'organisation n'est qu'une apparence et que l'organisation est en fait, l'instrument d'un ou de plusieurs Etats membres singulièrement lorsque par une manière de dédoublement fonctionnel un Etat est censé agir comme agent de l'organisation alors qu'il poursuit à vrai dire ses objectifs nationaux propres, il semble que les principes généraux d'imputabilité qui sont dominés par le principe d'effectivité suffisent à débusquer la responsabilité de cet Etat. Je partage en d'autres termes votre analyse selon laquelle la volonté distincte de l'organisation internationale est le critère fondamental.

Des problèmes de cette nature se sont posés à propos de l'imputabilité des actes des troupes américaines dans la guerre de Corée.

Tout dépend du point de savoir qui dirige *effectivement* l'opération, l'organisation ou un ou plusieurs Etats membres.

Il faut aussi envisager avec soin les diverses hypothèhses où il y a complicité de l'Etat dans l'accomplissement de l'acte illicite de l'organisation. On peut appliquer ici *mutatis mutandis* l'article 27 du projet de la CDI.

A cet égard, cette complicité peut résulter d'une volonté propre à l'Etat membre qui est identifiable dans le processus décisionnel des organes de l'organisation, qu'il s'agisse d'une action ou d'une omission (vote favorable à un acte illicite ou simplement dommageable pour un tiers ; veto protégeant un Etat coupable d'un acte illicite).

7. On peut en outre estimer que d'une manière générale il y a une obligation des Etats membres d'exercer une *due diligence*, une vigilance, pour que l'organisation n'accomplisse pas des actes illicites s'il y a la possibilité de les prévenir. Cette obligation est particulièrement précise pour l'Etat hôte des activités de l'organisation, mais peut s'étendre à tout membre de l'organisation.

8. Toute l'analyse qui précède repose sur l'idée qu'il existe une personnalité juridique propre et que tant que cette personnalité existe — sauf à se trouver dans une situation où cette personnalité se résoudrait en une apparence (*supra* N° 6) — c'est elle et elle seule qui répond de ses propres actes.

Que va-t-il se passer si cette personnalité disparaît, c'est-à-dire dans l'*hypothèse de la dissolution*, pour quelle que cause que ce soit, de sa personnalité juridique ? C'est là une hypothèse rarement prévue, tant est grande l'illusion de la forme juridique de faire oeuvre éternelle et tant est normale la propension de toute organisation à se perpétuer.

Lorsque cette personnalité juridique disparaît, il faut cependant décider du sort de l'actif (bâtiments, objets immobiliers, créances, etc.) et du passif (dettes de l'organisation). Il incombe sans doute aux Etats

membres de décider alors, si cela n'a pas été prévu dans l'acte constitutif, des modalités de la dissolution. A défaut de décision ou en cas de décision contraire aux droits des créanciers d'obligations, il me semble que l'on devrait considérer les Etats membres comme responsables en lieu et place de l'organisation. Voir quelques exemples donnés par Seidl-Hohenveldern dans son article dans *Le droit international à l'heure de sa codification : études en l'honneur de Roberto Ago,* vol. III, p. 425 et suivantes.

On peut considérer que les arbitres dans l'affaire *Westland Helicopters Ltd* v. *AOI* auraient été mieux inspirés de se reposer sur ce fondement plutôt que de se lancer dans de hasardeuses constructions fondées sur des analogies douteuses.

Si une présomption doit être établie, c'est que, sauf si les Etats ont averti au préalable les tiers par des dispositions contraires expresses, les organisations ne sont pas des sociétés à responsabilité limitée et, si la personnalité juridique morale s'efface, celle des membres réapparaît.

Deuxième partie — Réponse au questionnaire

9. Question 1.

(a) Responsabilité : question de droit privé ou de droit international public ? La responsabilité peut être de droit international public comme elle peut être de droit interne.

La responsabilité relève du droit international public lorsque des obligations internationales de l'organisation sont violées notamment à l'égard d'autres organisations internationales ou d'Etats.

Elle relève du droit interne lorsqu'il s'agit de comportements de l'organisation régis par le droit interne.

Exemples : responsabilité civile pour accident de voiture de l'organisation, ruine des bâtiments, incendie, etc., toutes situations habituellement couvertes par des assurances.

Certaines conventions internationales prévoyant des régimes de responsabilité de droit civil peuvent etre applicables à des organisations internationales (accidents nucléaires, environnement, etc.).

La responsabilité peut aussi relever du droit interne de l'organisation: par exemple dans ses rapports avec ses fonctionnaires ou relever d'un droit interne communautaire (art. 215 traité CEE) ; voyez aussi le règlement N° 4 de l'ONU du 11 décembre 1986.

10. (b) Relations entre les ordres.

Pourriez-vous préciser cette question très vaste et abstraite ?

11. (a) Analogies tirées du droit interne.

Ainsi que je m'en suis expliqué dans *Le droit des peuples à disposer d'eux-mêmes ... : mélanges offerts à Charles Chaumont,* les conditions d'application de ce procédé sont onéreuses et on peut nourrir un certain scepticisme sur sa légitimité.

En l'occurence, je souscris aux objections que vous émettez à ce propos dans votre rapport. Les extravagances du raisonnement des arbitres dans l'affaire *Westland* (v. *supra* N° 3) sont une parfaite illustration des difficultés du recours au procédé en l'espèce, au demeurant inutile puisque le droit international public semble apporter ses réponses propres.

12. Question 2 : Différence entre les deux concepts de personnalité.

Je ne pense pas qu'il y ait de différence entre les *concepts.* La personnalité juridique c'est l'aptitude à être titulaire de droits et à être tenu d'obligations dans un ordre juridique considéré. Mais il y a évidemment une différence de *contenu.* Comme l'a dit la CIJ dans l'affaire des *Réparations* «les sujets de droit, dans un système juridique ne sont pas nécessairement identique quant à leur nature ou à l'étendue de leurs droits». (*Recueil* 1949, p. 178). *A fortiori* en est-il ainsi dans des ordres juridiques distincts.

Pour ne s'attacher qu'à la responsabilité de l'organisation celle-ci aura un fondement et un contenu différent en droit international et dans les droits internes.

13. Question 3 : Question du droit international général opposable aux Etats tiers.

En dépit de la complexité de cette matière, Paul Reuter («Sur quelques limites du droit des organisations internationales» *Festschrift für Rudolf Bindschedler,* spécialement p. 503 et ss) justifiait, avec raison je pense, la possibilité de certaines règles générales appropriées dans le domaine de la responsabilité internationale. Ce droit coutumier international est sans doute opposable aux Etats qui ne se sont pas opposés à sa création ou son application à leur égard.

Pour ce qui est de l'effet des traités constitutifs à l'égard des tiers, je ne vois aucune raison de se départir des principes généraux sur l'effet relatif des traités. Je ne suis pas convaincu par la théorie de la personnalité objective qui n'est que pure apparence (voir *supra* N° 8).

La personnalité juridique d'une organisation internationale n'est opposable qu'aux sujets de droit international qui acceptent de la reconnaître explicitement ou implicitement.

(Il convient à ce propos de nuancer les observations de la CIJ sur la personnalité juridique objective de l'ONU (V. Ritter, *AFDI* 1962, 435).

En cas de non-reconnaissance de la personnalité, l'activité de l'organisation est une activité des Etats intéressés (Ritter, *AFDI*, 1962, 436).

14. Question 4 : Thèse de Seidl Hohenveldern de la distinction *jure imperii* et *jure gestionis*.

Je n'aperçois pas en quoi le critère susvisé pourrait être un critère de la personnalité internationale d'une organisation. Cette idée nouvelle ne trouve aucun appui dans l'avis de la CIJ sur les *réparations*. La seule limite qui est reconnue généralement est le principe de spécialité.

Il y a de très nombreuses organisations internationales publiques qui ont des activités *jure gestionis* et dont la personnalité juridique internationale n'a jamais été contestée (BIRD, FMI, BAD, BERD, OPEP, etc.).

De nombreuses organisations ont aussi des activités mixtes : ainsi divers organes subsidiaires de l'ONU doués d'une autorité administrative et financière autonome : UNRWA, UNICEF, HCNUR, ce qui démontre le caractère impraticable du critère. J'aperçois mal, au surplus, ce qui justifierait que l'on traite différemment une dette de l'organisation résultant d'un acte *jure imperii* (par exemple le paiement des pensions ou des indemnités de licenciement des fonctionnaires) d'une dette de l'organisation résultant d'un acte *jure gestionis* (par exemple une indemnité résultant de la rupture d'un contrat avec un fournisseur privé). Une telle discrimination me semblerait hautement inéquitable.

Ce qui me paraîtrait plus fécond comme critère, c'est la création d'une entreprise commune *dans le seul ordre interne* (en gros les entreprises internationales publiques chères à H.T. Adam). Dans un tel cas, même si l'entreprise est créée par un traité, si elle est insérée comme une entreprise de type commercial dans les seuls droits internes, sans obligations internationales, elle ne bénéficie que d'une personnalité de droit interne et non d'une personnalité internationale. Tous les recours de droit commercial interne sont alors possibles contre elle et, si cela est possible dans le droit interne applicable, contre les Etats «sociétaires».

15. Question 5 : La participation des Etats membres aux organes.

Cette question me semble très pertinente.

Sans doute on pourrait soutenir que lorsqu'un Etat membre participe à une délibération d'un organe international, il n'est qu'un élément de la volonté collective qui va se dégager et que cet acte relève des fonctions de l'organisation. Les privilèges et immunités fonctionnels qui sont octroyés aux représentants des Etats membres à cette occasion confirment ce point de vue.

Ce point de vue occulte cependant le fait que chaque Etat participant à la décision par son vote positif ou négatif, voire par son abstention s'engage personnellement devant son opinion publique nationale comme devant l'opinion publique mondiale qui peuvent lui demander de rendre compte de son vote.

La pratique actuelle de non-participation au vote est dès lors la méthode utilisée par certaines délégations pour tenter d'échapper à toute responsabilité de cet ordre.

Comme nous l'avons exprimé plus haut (paragraphe 6) la position prise par un Etat dans une organisation internationale est susceptible d'engager sa responsabilité (accord pour passer un contrat, pour souscrire un emprunt, veto pour condamner un acte illicite, utilisation d'un moyen illégal par l'organisation etc.).

Ceci peut s'expliquer soit par le fait que certains Etats dominent effectivement la volonté de l'organisation qui n'exprime dès lors plus sa volonté propre, soit par le concept de complicité.

16. Question 6 : Organisation agent de ses membres ?

Cfr. la précédente question. En principe non. En théorie la volonté collective des membres qui devient la volonté exprimée par les organes de l'organisation est une volonté distincte.

Cette façon de voir est évidemment largement fictive, c'est une question de fait, d'effectivité du pouvoir.

Si certains Etats dirigent en fait l'organisation ou en bloquent l'activité, j'ai déjà exprimé ci-dessus l'avis que si cette action étatique fait apparaître la domination d'un Etat — la levée du voile sera réalisée.

17. Question 7 : pertinence de la «faute».

Je suis de ceux qui estiment que la «faute» n'est pas une condition de la responsabilité internationale, que cette dernière est fondée sur les seuls éléments d'illicite et d'imputation ou d'attribution. J'admets néanmoins que l'élément dit «de faute» peut être inclus dans la structure de l'obligation qui doit être respectée. Voir à ce propos ma contribution dans *Le droit international au service de la paix ... : mélanges Michel Virally.*

Je traduis donc votre expression «faute» par «négligence» — ce qui nous ramène aux obligations de vigilance.

Je confirme à cet égard (v. *supra* paragrapahe 7) que j'estime que les Etats membres doivent exercer une vigilance raisonnable pour que l'organisation ne commette pas des actes illicites voire des comportements simplement dommageables à l'égard de tiers de bonne foi.

Cette obligation n'a pas — dans mon esprit — de caractère directement applicable : c'est-à-dire qu'elle n'est invocable que par les autres Etats membres et pas par les particuliers intéressés.

Il faut, bien entendu, réserver le rôle de la faute qui peut être retenue pour une responsabilité de *droit interne*, ce que je ne conteste alors nullement.

18. Question 8 : Clause d'exclusion de responsabilité des Etats membres

J'avoue ne pas avoir le loisir pour le moment de faire une recherche de ce genre qui, au demeurant dans la tradition des travaux de l'Institut, relève, s'il échoit d'y procéder, de la responsabilité du rapporteur. Je me réserve de commenter ultérieurement le résultat de vos investigations. Il est toujours utile de regarder quel est l'état de la pratique. Ceci étant, son interprétation est aussi souvent difficile car il reste à déterminer si ce qui a été prévu expressément doit être considéré comme des illustrations de la règle ou comme des exemples d'exceptions !

Il me semble en tout état de cause difficile de conclure, comme l'on fait les arbitres dans l'affaire *Westland Helicopters* qu'en l'absence de disposition contraire dans l'acte constitutif, la responsabilité conjointe des Etats membres serait de droit. Comme vous le relevez à juste titre, c'est là faire peser sur les Etats des obligations auxquelles il n'est nullement évident qu'ils se sont engagés à souscrire. A l'instar des juges Kerr et Gibson dans l'affaire du *CIE* il me semble qu'il convient de consacrer, en l'absence d'un texte qui le prévoit expressément, le principe de l'absence de responsabilité concurrente des Etats membres d'une organisation, tant que sa personnalité subsiste.

19. Question 9 : Différence entre responsabilité contractuelle et responsabilité civile.

Les termes employés dans la question semblent se référer à une responsabilité de droit interne : responsabilité contractuelle ou responsabilité civile. A première vue je ne vois pas la différence que ces responsabilités, qui ne varient que dans leur objet et non dans leur principe, pourraient apporter pour les Etats membres.

Elles restent celles indiquées plus haut ; tant que l'organisation subsiste : payer sa contribution et inciter les organes à respecter leurs obligations. En cas de dissolution, voyez la question immédiatement ci-dessous.

20. Question 10 : Responsabilité des Etats membres à la dissolution de l'organisation

Il est difficile de se prononcer sur cette question sans faire une recherche de pratique qui, comme pour la question 8, me semble relever des compétences du rapporteur. Je puis vous signaler incidemment quelques

pages à ce sujet dans mon ouvrage *Le rôle des organisaitons internationales en matière de prêts et d'emprunts*, London, Stevens, 1958, p. 321 à 325, mais je n'ai pas eu depuis l'occasion d'approfondir cette très belle question. Le cas de la SdN est sans doute très pertinent (répartition de l'actif entre les membres), mais rendu complexe par l'élément succession d'organisations SdN - ONU.

Comme je l'ai indiqué plus haut (*supra* N° 8) la question de la dissolution de l'organisation me paraît tout à fait pertinente. Lors de cette dissolution, la personnalité des Etats membres est forcée de réapparaître pour le bien (s'il y a des éléments d'actifs àpartager ou dont il faut disposer : les immeubles notamment) et on voit mal alors pourquoi elle pourrait échapper au pire (les dettes).

Lorsque l'organisation disparaît ou a disparu, la personnalité du sujet de droit international dérivé que les Etats avaient créé n'existant plus, c'est contre les Etats membres que les débiteurs vont à juste titre se retourner.

21. Question 11 : Mode de distribution en cas de dissolution.

Il est difficile de trancher cette question.

Sans doute, à première vue, on peut penser qu'il serait équitable de procéder à la répartition de l'actif et des dettes selon la proportion du barème des contributions de chaque membre au budget de l'organisation, ou mieux encore au prorata des contributions réellement payées par chacun au cours de l'histoire de l'organisation.

Des facteurs de complications peuvent cependant exister, notamment lorsque les immeubles ou d'autres actifs sont situés sur certains territoires en particulier ainsi que dans le cas de retraits de membres.

Les solutions qui précèdent sont applicables lorsque le débiteur de l'organisation réclame une somme d'argent (remboursement d'un emprunt, paiement d'une pension, etc.) ou lorsque l'obligation peut se résoudre en une obligation de somme (indemnité par exemple).

La question est plus complexe s'agissant d'obligations contractuelles ou de traités souscrits. La terminaison des obligations par disparition de la personnalité juridique du débiteur peut s'imposer à propos de certaines obligations ayant un caractère *intuitu personae*.

Il faudrait cependant y réfléchir car les situations concrètes peuvent inciter à un large éventail de solutions.

En tout état de cause, les arrangements entre Etats membres en cas de dissolution sont *res inter alios acta* pour les Etats tiers qui peuvent tenir ces Etats membres solidairement responsables.

22. Question 12

Dans la mesure où, selon les explications données dans la première partie, j'estime qu'il est un certain nombre de principes de droit international applicables en la matière, la question me semble sans objet.

23. Question 13 : La question des actes *ultra vires*.

Voir paragraphe 5 ci-dessus.

Question 14 : Pertinence de l'analogie des traités des organisations internationales

Les citations que vous faites de Paul Reuter et l'économie du traité du 21 mars 1986 semblent indiquer que le principe de la personnalité juridique domine la matière et que les Etats membres d'une organisation internationale ne sont pas, par leur seule qualité de membre, des parties aux traités que les organisations internationales concluent. Ils ne sont liés que par un engagement propre. Ceci est conforme à la position générale défendue par la première partie de cette lettre.

24. Question 15.

Il résulte de ce qui précède qu'à mon estime il existe un corps cohérent de règles de droit international en vigueur. La *lex lata* offre déjà des réponses. Sans qualifier cette activité de *lex ferenda* j'estime que l'Institut pourrait suggérer que les Etats dans les actes constitutifs des organisations internationales précisent certains points pour assurer la sécurité des tiers.

25. Question 16

Selon le système expliqué plus haut, il y a une obligation de participer au budget de l'organisation tant qu'elle existe et de veiller au paiement des dettes, à sa dissolution.

Pour la première obligation, elle s'entend, bien entendu, sauf dispositions contraires limitant les obligations des membres (de préférence dans l'acte constitutif) pourvu qu'elles aient été portées dès l'origine à la connaissance des tiers.

26. Question 17 : Recouvrement judiciaire

La question est sans doute de celle que les rédacteurs de chaque nouvel acte constitutif devrait se poser. Certaines organisations de type bancaire ne possèdent pas d'immunité de juridiction (voir par exemple la BIRD, Convention sur les privilèges et immunités des institutions spécialisées, annexe VI). De même les Communautés européennes peuvent être citées devant les tribunaux nationaux. C'est un problème d'opportunité politique en fonction de chaque cas d'espèce.

L'extension du droit d'action par les Etats membres ne me semble ni praticable aujourd'hui ni souhaitable à l'avenir.

27. Question 18.

Sauf à viser des entreprises interétatiques fondées selon des statuts de droit interne visées ci-dessus au paragraphe 4, je vois mal la transposition de ces schémas «internistes» en droit international.

28. Question 19 : Possibilités de clauses conventionnelles limitant la responsabilité des Etats.

Ceci fait partie des clauses possibles en tout état de cause, aussi bien pendant la vie de l'organisation (limitant la possibilité d'appel de fonds ou de contributions par l'organisation) qu'à sa dissolution. Le caractère exprès de ces clauses assure la protection des tiers mais limite sans doute le crédit des organisations.

Il serait aussi utile d'envisager les conséquences du retrait de certains Etats membres et les conditions dans lesquelles ils pourraient échapper à leurs obligations en cas de dissolution. A cet égard on ne peut pas non plus empêcher un Etat membre qui s'oppose à la politique d'une organisation de la quitter et il est difficile de le rendre responsable des conséquences financières d'un état de chose auquel il s'est opposé lorsqu'il était membre.

29. Question 20.

Je ne vois rien à ajouter à la réponse à la question 11.

En espérant que ces modestes observations pourront vous aider un peu dans la poursuite de vos travaux, je vous prie d'agréer, chère Consoeur, mes respectueux hommages.

Jean Salmon

8. Réponse de M. C.F. Amerasinghe

November 6, 1990

De lege lata

1(a) The answer to this question may not be the absolute choice of one or the other. In a transaction which is primarily governed by international law, such as an international agreement, the question whether there is liability of member States to third parties would also be answered by reference to international law, as the issue is one of international organizational law. On the other hand, even where the transaction is governed primarily by municipal law, there may be good reason why the same question should be answered by reference to international law for the same reason. In this case it would appear that many municipal legal

systems would characterize the issue of liability of member States as referable under the rules of private international law to the law governing the organization which would be public international law[28]. It is also possible that in the interpretation of a legislative instrument which incorporates international law, such as a treaty, reference is made to international organizational law[29]. In either case, therefore, it would appear that the issue must be settled according to the law governing international organizations[30] which is international law. What is important is that the relevant law is in these cases not municipal law as such. Some doubt has been raised in connection with this approach, insofar as the possibility has been noted, though not entirely accepted, that, while international law may legitimately attribute legal personality to an organization, municipal law may, for whatever reason, disregard such personality for the purpose of transactions governed by municipal law.

In the law of the United Kingdom, for example, a problem arises from the attitude towards treaties of the courts which complicates the choice of law governing the issue of liability of member States for debts of the organization. As was confirmed by the House of Lords in *J.H. Rayner Ltd. v. Department of Trade and Industry*, the present law is that the courts of the UK cannot enforce rights granted or obligations imposed in respect of a treaty by international law without the intervention of the legislature[31]. Thus, in the law of the UK there cannot be a direct choice of international law as such as the law of the place of incorporation or as the national law of the organization, because it involves the application of a treaty. It is only if the constituent treaty is incorporated directly or indirectly that the doctrine of non-justiciability operative in English courts becomes inapplicable and that the treaty and international law may be

---

28 See *Mazzanti v. H.A.F.S.E. and the Ministry of Defence* [1954], 22 *I.L.R.* at p. 761 (Tribunal of Florence).

29 See *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*, 3 *A.E.R.* [1988] at pp. 278, 295 *per* Kerr L.J., pp. 323, 334-5 *per* Nourse L.J., pp. 337, 342-3 *per* Ralph Gibson L.J. (UK Court of Appeal).

30 This is sometimes referred to as the «national» law of the organization. In the common law it is the law of the place of incorporation that is applicable.

31 3 *W.L.R.* [1989] (H.L.) at pp. 980, 984, 985 *per* Lord Templeman and at pp. 1002, 1004, 1010 *per* Lord Oliver. The other three Lords agreed with Lords Templeman and Oliver. This case will also be referred to as the *ITC Case (HL)*. It is the same case on appeal as *Maclaine Watson & Co., Ltd. v. Department of Trade and Industry*, 3 *A.E.R.* [1988] (C.A.) p. 257, which was decided by the Court of Appeal and is referred to as the *ITC Case (CA)*. The two cases together may be referred to as the *ITC Case*.

referred to, *in the absence of any other contrary indication,* for the purpose of resolving issues such as the liability of member States for the debts of the organization[32]. In this situation the legislation of the UK parliament is paramount and takes precedence over any principles of private international law that may be deemed to be applicable.

There is good reason to advert to the problem of the applicable law, because in most cases member States will be sued in municipal courts, as happened in the cases arising from the demise of the International Tin Council (ITC). It may be noteworthy in this context that often it may be difficult for a third party who has suffered injury to initiate in an international forum by resort to diplomatic protection suit against the member States of an organization. As happened in the case of the ITC, the national State of the third party is more often than not one of the member States of the organization which would render diplomatic protection vis-à-vis that member State inapplicable. Further, it is unlikely that his national State would exercise diplomatic protection against the other member States with whom it would be jointly liable to its national. In the case of the ITC the third parties were mainly British and the UK was one of the member States of the organization. Thus, it was unlikely that the UK would have extended them diplomatic protection as a means of securing their rights.

Since a treaty and international law reflected in the interpretation of a treaty cannot be applied by the courts of the UK because of the doctrine of non-justiciability, unless the treaty is incorporated by legislation, in general the courts of the UK will not be able to give effect to the constituent treaty of the organization or rights and obligations flowing from it, unless the legislature specifically incorporates the constituent instrument. There may also be a question of recognition that arises. However, in *Arab Monetary Fund v. Hashim and Others* it was held by Hoffman J. in the UK high court that, where, because of a clear statement of intent by the government of the UK, as was the case in respect of the Arab Monetary Fund (AMF), there were clear indications that the UK government recognized or was ready to recognize the personality of the international organization in question, when it was not a member of that organization, this was sufficient to give the organization standing before a UK court. In this case the court further indicated that there was a possibility that the law governing the organization, namely international law, might be given effect to by another route. The court said that, because a foreign State, namely UAE (referred to as Abu Dhabi), had

32 See the *ITC Case (HL)*, 3 *W.R.L.* [1989] (H.L.) at pp. 1002 and 1004 *per* Lord Oliver.

accorded the AMF legal personality under its law so that the AMF was a *persona ficta* under that law, for the purpose of deciding whether the AMF had personality, the ordinary conflict rules would be applicable, whereby the law of UAE as the law of the place of incorporation could be chosen as the relevant law[33]. It follows from this approach that the foreign law which recognizes the legal personality of the international organization would be the chosen law for questions relating to the organization. In turn, because that foreign law would generally refer to the constituent treaty and international law as the law which would be applicable to issues such as the liability of member States for the debts of the organization, such courts as those of the UK should presumably under this theory find it possible to apply the constituent treaty and international law in order to decide such an issue. The UK Court of Appeal subsequently overruled the high court (by a majority of 2 to 1), Bingham LJ agreeing with the lower court. The matter is now before the House of Lords. The view taken by the UK Court of Appeal, if applied in an action against an international organization, could result in the personality of the organization being ignored by a municipal court with the consequence that the member States could conceivably be held by that court to be *directly* liable for debts incurred by the organization on a joint and several basis. This would be so because of the quirks of a municipal legal system irrespective of what might happen before an international tribunal.

Since member States of an organization will generally be sued in municipal courts, where such member States are foreign States, the question of sovereign immunity may also arise. It will be an added impediment to the assertion of rights of third parties, if such immunity is granted, which may very well turn on the distinction between acts of a sovereign State performed *jure imperii* and *jure gestionis*. Non-justiciability, may also be an impediment to a successful suit. For other reasons, courts may not assume jurisdiction against their own States. But the problems that arise from such jurisdictional rules as those relating to sovereign or governmental immunity do not affect the importance or existence of the substantive law governing the liabilty of member States of organizations to third parties, though there may be practical difficulties standing in the way of enforcing whatever rights may exist. Moreover, particularly where immunity is waived or held not to exist, for instance, because the transaction is characterized as being *jure gestionis*, or where the municipal law does not recognize the immunity of the State of the municipal court, the substantive issue may be litigated in a municipal court. Another

33 1 *A.E.R.* [1990] at pp. 691-2.

possibility is that arbitration, whether at a municipal or transnational level, by agreement between third parties and member States, may be resorted to as a means of settling a dispute. In such a case the substantive issue of international organizational law relating to the liability of member States of the organization to third parties may be decided by the arbitral tribunal in the course of settling the dispute.

(b) Liabilities may arise from transactions, such as international agreements between States and the organization, which take place at an international level and may be governed by international law, or from transactions which are governed by municipal law, whether they are between the organization and States, individuals or legal persons. Such liabilities may be contractual, quasi-contractual or delictual. Some examples of transactions which may be governed by municipal law are (i) loans taken by the organization from States or State agencies which the intention is clear that the transaction should be at a municipal level ; (ii) loans taken by the organization from individuals or legal persons ; (iii) contracts, such as procurement or construction contracts entered into between the organization and individuals or legal persons ; and (iv) delicts committed in the territory of a State against individuals or legal persons by the organization or by the organization's staff in the course of their duties. In cases such as these, as in the case of international agreement between the organization and a State, the question may be asked whether the member States of the organization are responsible for the liabilities of the organization and in what circumstances and to what extent the third party may have recourse to the member States for the purpose of having the liability discharged. This is the central problem for the Commmission but dealing with it entails, in my opinion, addressing a number of preliminary or connected issues.

The determination of the liability of member States is a different question. The relevance of municipal law and international law to this issue has been discussed in (a) above.

(c) Private law analogy may be used, provided it is used discreetly and appropriately. Public law analogy (public corporations) may also be considered.

2. The *concept* of legal personality in international law seems to be more akin to that of the limited liability company in municipal law, if a private law analogy were used. There seems to be a similarity between the concepts of legal personality in municipal law and of legal personality for international organizations in international law insofar as both are presumptively founded on limited liability with other forms of incorporation being subsidiary and subject to proof in almost all systems where they exist. I have explained my view on the application of general principles

of law more fully in my article in the *American Journal of International Law*, Volume 85, 1991, p. 259 at pp. 273-5.

3. Yes, I think so.

4. (a) I do not think the distinction is relevant vis-à-vis the effects of legal personality from the point of view of international law.

(b) I doubt that the distinction is relevant, though it could conceivably affect the burden of proof. In practice it may be found that many of the constituent instruments of organizations which may be said to be acting *jure gestionis* are more explicit than others.

5. In regard to the liability of members to third parties, if the correct position is that there is no liability *per se*, the question is without object, while if there is liability for any reason, the participation in or support given to a resolution of an organ or the reverse does not affect liability. Once a decision is taken by the organ the members of the organization are collectively responsible for any negligence of the organization, if there is no concurrent or secondary liability, irrespective of participation or support.

6. The argument based on the theory of agency proceeds on the basis that, while the international organization falls to be treated as a legal entity which is distinct from its members in the same way as a body corporate and, therefore, has a personality of its own, the organization which would normally be solely liable in respect of the obligations it contracts may not be so liable when it contracted those obligations on behalf of its members as undisclosed principals. The agency that, thus, arises would make the members directly liable and may be «constitutional» or «factual».

The issue of factual agency could arise in any situation. It does not hinge specifically on the nature of the personality of the organization nor does it flow from the constitutional relationship between the organization and its members, since it rests entirely in the factual position which prevails between the organization and its members and on whether such position according to the law of agency warrants the inference that the organization was not acting on its own behalf but on behalf of an undisclosed principal, namely the members. Factual agency is, therefore, not intrinsic to the law of international personality which flows from the agreement creating the organization. It is entirely possible that in a given factual situation the agency relationship between the organization and its members could be established. In that case there would be a direct liability on the part of members for the obligations incurred. But then the organization itself would not be primarily liable, unless it has exceeded its powers under the law of agency. In the *ITC Case* (*CA*) the Court held that no factual agency was established as between the ITC and its

members. In any event the issue does not require elaboration, because it does not relate to the legal consequences of the relationship between the organization and its members created by the constituent instrument but to a factual situation which may vary.

«Constitutional» agency may arise when the constituent instrument by its terms, express or implicit, makes the organization an agent of the members who were undisclosed principals for a particular transaction or transactions. For this situation to obtain it must be shown that the structure set up by the constituent instrument was such that it was only consistent with the alleged agency and not with any other interpretation, it being inadequate to show that the way in which the organization *in fact* worked internally was, or may have been, consistent with the organization contracting on behalf of its members. To a large extent this is a matter of interpretation of the particular constituent instrument. Generally, it may be presumed that constitutional agency was not intended, the burden being to displace this presumption. While in a give case there may be constitutional agency, it is not easy to discover such agency in the case of the many governmental international organizations that exist.

While constitutional or factual agency may theoretically be a proper basis for the direct liability of members of an international organization, it must be recognized that proof of such agency is not easy, there being a presumption in favor of the absence of such agency. Further, it is also clear that where such agency is proved to exist the liability of the members would not really be for the obligations of the organization but a direct liability for their own obligations which had been incurred by the organization acting as their agent on behalf of undisclosed principals.

7. Fault or negligence is a separate basis for liability from secondary or concurrent liability. Where there is negligence on the part of the members or some of them they will be liable on the basis of such negligence to the extent that they had been negligent. In this case participation in and support (or the reverse) of the decision of an organ concerned will be relevant to the issue of liability. It would seem that liability in such cases is not based on the contract from which the obligation of the organization arises but is delictual or tortious. This may make a difference, especially from the point of view of damages.

8. The answer to this question requires some explanation and evidentiary support. The example often given of some relevance relating to Eurochemic is, it is submitted, inconclusive. Clearly the constituent instrument of Eurochemic was silent on the matter of members' liability for the debts of the organization. But equally there is no clear indication in or by reason of the agreement reached between the members and Belgium upon the winding up of the organization and the transfer of its

functions to Belgium that the members took responsibility for the debts of Eurochemic because they were under a legal obligation to do so. The agreement could very well have been reached as an inducement to Belgium to take over the functions of Eurochemic in order to relieve Belgium, as the successor, of any responsibility for Eurochemic's debts. Assumption of responsibility for the debts of Eurochemic by the members may well have been the *quid pro quo* for the succession of Belgium to the functions of the organization. The facts are consistent with this interpretation. What might have happened if Eurochemic had been dissolved without any question of a successor is open to speculation. Thus, this instance of practice is at best equivocal.

What other practice there is of relevance is reflected in the constituent instruments of some organizations which are numerically by no means in the majority. These organizations are in general financial organizations or those that engage in some form of banking or commercial transactions in the discharge of their main functions. In the constituent instruments of most of these there is a provision in which the liability of members is expressly limited in one way or another. A look at the earliest instrument which set up the IBRD, the prototype for all financial institutions, shows that there was (i) an explicit limitation of the liability of members to the unpaid portion of the issue price of shares [34] ; (ii) a requirement that every security issued or guaranteed by the organization should have on its face a conspicuous statement that it was not an obligation of any government unless expressly stated on the security[35] ; (iii) a ratio at any given time of 1 : 1 for outstanding loans and guarantees in relation to the equity of the organization[36] ; and (iv) a provision that in the event of termination of the operations of the organization members were liable for uncalled subscriptions to capital stock and in respect of the depreciation of their own currencies until the claims of all creditors were discharged[37].

It emerges from the manner in whose provisions are framed in the constituent instrument that it was clearly intended by the parties that members as such should not be liable for the obligations of the organization. That is to say, third parties could not under any circumstances have direct actions against members in respect of the debts of the organization, whether during the life of the organization or when the organization was being wound up or liquidated. On the other hand,

34 Article II(6).
35 Article IV(9).
36 Article III(3).
37 Article VI(5).

members would be liable to the organization, like shareholders of a company on and only to the extent of their unpaid subscriptions, in the event that the organization was short of funds to meet its liabilities, whether during its life or at liquidation. There would be no liability to the organization on the part of members beyond their uncalled subscriptions. There is a «gearing» ratio (the ratio between the IBRD's total amount of outstanding loans and guarantees and its subscribed capital) which has always to be 1 : 1. But this is not a debt/equity ratio and does not mean that the organization will always be solvent[38]. What is important is that the liability of members is limited, as in a limited liability corporation in municipal law, but in this case expressly[39].

There are some constituent instruments in which the express formulation of the limitation on the liability of members is wider and more general, as where it is stated that «No member shall be liable, by reason of its membership, for acts or obligations of the Fund»[40]. While this wording is not absolutely clear it would be unreasonable to interpret it as excluding the liability to the organization on subscribed shares or for assessed contributions to the budget of members, though there can be no doubt that third parties can have no recourse against members as such.

---

38 Debts arising from, *e.g.* administrative contracts, are apparently not included in the concept of debt for the purposes of the «gearing» ratio.

39 Other organizations in which there is a limitation of liability of members in a manner identical with and similar to that in the Articles of Agreement of the IBRD are *e.g.*, the IDB (Articles II(3)(d), IV(5), VII(2), X(3), the AFDB Articles 6(5), 21, 22, 25, 48, 49) ; MIGA (Articles 8(d), 22, 55). There are some differences in the «gearing» or equivalent ratio in these instruments.

40 Article 3(4) of the IFAD Agreement. For the same or similar wording see the constituent instruments of the IFC (Article II(4), IDA Article II(3)), African Development Fund (ADFD) (Article 10), ADB (Article 5(7), Inter-American Investment Corporation (II)(c) (Article II(6)), Caribbean Development Bank (CDB) (Article 6(8), Caribbean Investment Corporation (CIC) (Article 6(6)), Common Fund for Commodities (Article 6), International Seabed Authority (ISA) (Article 174(4) and Article 3 of the Statute of the Enterprise), Arab Fund for Economic and Social Development (Article 8(1)), Arab Monetary Fund (Article 48(a)), Islamic Development Bank (Article 7(3)), Inter-Arab Investment Guarantee Corporation (Article 7(4)), BADEA (Article 5 (III)), East African Development Bank (EADB) (Article 4(9)), International Bank for Economic Cooperation (Article 2(3)), International Investment Bank (Article 3). Slightly different wording but with the same effect is used in the constituent instruments of the International Cocoa Organization (ICO) (1986) (Article 22(5)), International Sugar Organization (ISO) (1987) (Article 29), International Natural Rubber Organization (INRO) (1987) (Article 48(4)). See also Article IV(4) of the Statute of the Council of Europe Resettlement Fund.

This is particularly so because the provisions on liquidation of the organization generally make it clear that members have such a liability on subscribed shares[41]. In a few cases there is added specific reference to the exclusion in securities of the liability of members to third parties[42]. But more importantly in many cases there is an express provision which makes it quite clear that members are liable to the organization for the unpaid portions of subscribed shares[43]. In all these cases, however, despite the differences in formulation and in the structure of the agreements, it is a fair conclusion that what was generally intended was the same result in regard to the liability of members to third parties for the obligations of the organization and to the obligations of members vis-à-vis the organization as obtained in the case of the IBRD.

In the case of the IMF, on the other hand, the constituent instrument is silent on the liability of members to third parties and to the organization for unpaid subscriptions, whether during the life of the organization or on liquidation. The agreement creating the OPEC Fund also does not provide expressly for the absence of liability of members to third parties but refers to the rights and obligations of the organization and of members vis-à-vis the organization when the organization is being liquidated[44].

It may also be noted that generally organizations do not have to maintain a debt/equity ratio (which is different from a «gearing» ratio) of 1 : 1, thus diluting any protection that third parties may have from such a requirement. In many cases there is no provision at all in the constituent instrument relating to this ratio[45]. In others the ratio is more

41 See *e.g.* the constituent instruments of the IFC (Article V(5)), IDA (Article VII(5)), ADF (Article 40), ADB (Article 46), IIC (Article VI(3)), CDB (Article 45), CIC (Articles 28 and 29), Common Fund for Commodities (Articles 35-39), Arab Fund for Economic and Social Development (Article 29), Arab Monetary Fund (Article 21), Islamic Development Bank (Article 48) BADEA (Article 46), EADB (Article 41).

42 See the constituent instruments of IFC (Article III(8)), and ADB (Article 22).

43 See the constituent instruments of the CDB (Article 6(7)), CIC (Article 6(6)), Arab Fund for Economic and Social Development (Article 8(2)), Arab Monetary Fund (Article 48(b)), Islamic Development Bank (Article 7(2)), Inter-Arab Investment Guarantee Corporation (Article 7(4), BADEA (Article 5(III), EADB (Article 4(8)).

44 Article 11.02.

45 See the constituent instruments of *e.g.*, the IBRD, ADB, AFDB, IDB, IMF, MIGA, CDB, CIC, ISA, Arab Fund for Economic and Social Development, Islamic Development Bank, BADEA, International Arab Investment Guarantee Corporation, International Bank for Economic Cooperation, International Investment Bank, ICO, ISO, INRO. In the case of the ADF, IDA and OPEC Fund where there is no debt limitation provision the institutions do not borrow.

than 1 : 1, leaving the possibility that debt may be well in excess of equity[46].

The real difficulty is evaluating the practice of including in constituent instruments a clause excluding the liability to third parties of members of international organizations. Is the inclusion of such a clause in several constituent instruments to be regarded as recognition by the States concerned of a rule of international law that absence of a non-liability clause in a constituent instrument results in the members of the organization being liable to third parties for the obligations of the organization ? A significant factor to be considered is that apart from the situation that arose in the case of the ITC there are no examples of member States either accepting or refusing to accept such liability to third parties where the constituent instrument is silent on the matter. In the only situation in which the issue arose, namely when the ITC collapsed, the members of the organization all denied that they were so liable. But this single incident cannot be taken as establishing definitively a law-creating practice even though the attitude of members was clear, just as much as the readiness of the members of Eurochemic to assume responsibility for the obligations of Eurochemic was at the most to be regarded as equivocal. In the absence of other evidence the practice of including a non-liability clause is ambiguous to the extent that it is as consistent with a belief that the absence of such a clause would entail the liability of members in the appropriate circumstances as with a desire to make absolutely clear *ex abundanti cautela* that members did not assume such liability, particularly because the issue had not been faced hitherto, with the result that it could be argued, as it was in the case of the ITC, that there was such liability.

There are more than twice as many constituent instruments in which there is no reference to liability or non-liability of members to third parties as there are instruments in which some form of non-liability clause is included. On the basis of the conclusions reached above it cannot be inferred from the mere absence of non-liability clauses that the parties to the constituent instruments necessarily by that fact intended to assume a concurrent or secondary liability to third parties for the obligations of the organizations because there is a general rule of international law that such liability exists. Further, in none of the constituent instruments in which non-liability clauses are absent is there any semblance of a provision whereby the members expressly assume a liability to third parties nor is

46 See the constituent instruments of IFC (4 : 1), Arab Monetary Fund (2 : 1).

there any indication that such an assumption of liability was intended by necessary implication. Conversely, there is no *practice* of any kind which would support the view that in the absence in the constituent instrument of an express or implied assumption of liability to third parties on the part of members for the obligations of an organization, the general law required that there be no such assumption of liability. The reference to practice as a source of law is, thus, not very helpful. Such practice as there is conclusively supports neither a general principle that in the absence of an express or implied indication in the constituent instrument that liability to third parties was being assumed by members, such liability was to be considered not to have been assumed, nor a general principle that in the absence of an express or implied indication in the constituent instrument that such liability was not being assumed by members, such liability was to be regarded as having been assumed by members.

In the ITC case, however, member States persisted in denying their liability and, thus, by this course of conduct gave a measure of support to the ruling of the English Courts. Thus, perhaps, it may also be inferred that there is a trend in practice towards the view that in the absence of an express or implied indication in the constituent instrument to the contrary there is no concurrent or secondary liability of members to third parties for the debts of an organization. It would, therefore, be fair to conclude that there is an emerging practice which would support such a presumption, while the express or implied terms of the constituent instrument would primarily determine the isue. Further, in the absence of conclusive evidence in the practice one way or another, the question may be asked whether it is not reasonable that, since one view entails the imposition of a liability, while the other does not, the view that does not involve the imposition of liability should presumptively prevail, because the burden, as Lord Oliver maintained in the House of Lords, is properly to show the incidence of such liability.

9. I see no reason to make a distinction nor do the sources warrant a distinction except, of course, that there *may* be special circumstances which do require a distinction. The mere fact of tortious liability should not result in a distinction being made from contractual liability.

10. It would seem that the example of the dissolution of the League of Nations, if at all, supports the absence of liability on the part of members — see particularly the attitude towards the discontinued staff — *The Mayras Case,* etc.

11. In these circumstances (on the basis of concurrent or secondary liability), I would suggest that liability be joint and several, because in principle there is no reason to hold otherwise.

12. Direct liability should be distinguished from secondary or concurrent liability. Direct liability is a primary one. The answer to the question asked would seem to have little bearing on this kind of liability. In general the absence of a positive rule of direct liability raises a presumption against such liability.

13. The absence of vires has no relevance, if there is no concurrent or secondary liability. If there were such liability, it may be relevant to the question which members are liable. Only where the obligation is created by a decision of a particular organ, it may be possible to take the position that only those members who supported the decision were jointly and severally liable.

14. Article 34 and 35 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations provide that, where there is a treaty to which an international organization is a party, liabilities arising from the treaty shall not attach to third States without their consent. For the purpose in hand, in the case of the obligations of an organization which arise from a treaty this would mean that member States could not be made secondarily or concurrently liable as a matter of course, since their consent would be required for this to happen. It is believed that Articles 34 and 35 reflect correctly the customary law (even apart from the convention). The analysis is relevant for our purposes.

De lege ferenda

15. It is not desirable that the present law relating to direct or secondary or concurrent liability of members for the liabilities of international organizations should be changed. It has worked for the past 70(?) years. Moreover, it has been sufficiently justified in the authorities. If at all, the liability for negligence should be construed in a fairly strict manner on the basis that there is a special duty of care placed upon members.

16. I find it difficult to answer this question. But my initial reaction is to hold that the law of direct or secondary or concurrent liability should remain unchanged and that the liability should be of members to the organization to keep it in funds.

17. (a) Ideally, arrangements should be made in constituent instruments. A resolution of the main legislative or executive organ would clearly be subject to amendment by that body itself and would not have the stamp of irrevocability, the members of the organ being the members of the organization upon whom the obligation would be placed. In any event the right to the funds would be the organization's and not the third party's.

(b) The liability of members to the organization would be under the constituent instrument and, therefore, would be under international law. The question whether the issue of such liability could be litigated before municipal courts would be a matter for the relevant municipal law.

18. If the liability were of members to third parties on a concurrent or secondary basis, this would depend certainly, in the first place, on the express or necessarily implied terms of the constituent instrument. In the absence of such terms, liability would have to be based on the theory that the organization is a mixed entity, as in French or German law, whereby secondary or concurrent liability arises in addition to the liability of the organization. But I find it an unsatisfactory position that there should be a presumption that all organizations whose constituent instruments are silent should be treated in this way. Perhaps, the nature of the personality of the organization in this position should be dealt with on an individual basis and be determined on the basis of many considerations, on the understanding that circumstances must be shown that there was an intention (implied, of course) to subject members to concurrent or secondary liability in the given case, there being no special presumption of limited liability.

19. If concurrent or secondary liability exists, members should not be able to limit their liability or exempt themselves from liability by reservations or in any other way.

20. Concurrent or secondary liability should, *de lege ferenda*, be joint and several, unless the constituent instrument expressly or by necessary implication indicates that the position is different, *e.g.* that liability is only in proportion to the individual members' budgetary contributions.

9. Réponse de M. D. W. Bowett

October 11, 1990

1. The question cannot be answered in the abstract : it all depends on the circumstances.

For example, I see no reason why a contractual obligation under private law could not be so framed as to commit the Member States, especially where an express acceptance of some clause of guarantee or indemnity by each member State is made a precondition to the private party's commitment — and even where the other party is the organization as such. But this would be rare, and quite different from the situation in which it is argued that the obligations of member States arise from the treaty.

In the absence of such a clear undertaking by member states, however, I cannot think that their relationship with *private* third parties would be governed by private law.

Member States' relations *inter se*, and with the international organization would *prima facie* be governed by international law, and primarily by the constituent treaty. The same treaty could, in theory, establish obligations for private individuals, but this would need to be expressed, and would be rare.

My personal belief is that private law analogies will be strained and unhelpful. We need to devise a sensible, fair system without being constrained by so-called analogies. I realise that the questionnaire attempts to distinguish between issues subject to the *lex lata* and questions *de lege ferenda*. I suppose my hesitation goes to the value of this distinction in this case. My preference would be to concentrate on a good *future* regime which organizations could adopt.

2. Yes, there must be. The two systems do not recognise identical legal persons, or attach identical rights and duties to them.

3. We ought to proceed on the basis that a third party, dealing with an international organization, is assumed to have knowledge of the basic, constituent treaty of such an organization. A party would certainly be deemed to have knowledge of the memorandum or articles of association of a company, so I see no reason why the same principle should not be extended to a constituent treaty. And relevant clauses in this treaty would be opposable to third parties.

But I do not believe the same argument can be made for :

(a) rules of general international law, or

(b) internal resolutions, rules for decisions of the organization, unless these are expressly drawn to the attention of the third party.

4. I think not. The distinction is far from easy and if we are to devise new, sensible principles, it would be a pity to render them uncertain or obscure by incorporating this doctrine. In any event the distinction has little to do with liability, and more to do with immunity from jurisdiction in municipal courts.

5. The only relevance would be where :

(a) the decision had to do with liability to third parties, *and*

(b) this decision had been communicated to such third parties before the liability was incurred.

6. It may do (see Article 24 of the Charter), but that is scarcely the question. The question has to be confined to whether the organization

does so with the effect that member States assume a liability for the organization's acts vis-à-vis third parties. And that question ought to be resolved in the constituent treaty, *or* in decisions notified to the third parties.

The answer may reflect a difference about how we approach our task. The question seem to invite a response about what we think the law now is. My own view is that very few of these questions can be answered with confidence in that way, because the law simply is not clear, and answers cannot be given with confidence. My own preference would be to start by admitting that existing law and practice provide very few answers, so it is more useful for us to identify the problems and suggest how they should be resolved in future.

7. It do not know of any practice which enable one to answer this question. If one looks to what the principle *ought* to be, then my view would be that it ought to be irrelevant. .

8. I believe the details of existing practice — on acceptance or exclusion of liability —were collected for the purposes of the Tin litigation, and you will have them to hand. But I am by no means sure that, on the basis of such practice, general conclusions ought to be reached. My own view would be that, in principle, an international organization is a separate legal entity, distinct from its members, and the liability of the members for the acts of the organization ought *not* to be presumed. This would then require an express acceptance of liability, in the constitution or in a decision communicated to the third party.

9. I believe not. I find it difficult to envisage situations in which member States ought to assume tortious liability. There may well be situations in which the members should make financial provision to cover any possible, and prospective, tortious liability (peace-keeping operations, for example) or even to meet liabilities already incurred. But that is rather different. Perhaps we should distinguish :

(a) situations of members' liability towards third parties,

(b) obligations of members to ensure that the organization has the financial funds to meet its own liabilities.

10. My recollection is that dissolution procedures seem to envisage distribution of *assets* among members, rather than distribution of liabilities.

11. In the absence of a provision or decision to the contrary, liability ought to be proportionate to budgetary contributions. I do not see any other basis being acceptable to member States.

12. In this case, as indicated in my answer to question 8, the presumption ought to be that members have no responsibility for the acts of the organization.

13. I doubt that it should be relevant. Or course the question of *vires* may affect the preliminary issue of whether there is any primary responsibility on the organization. If there is no such responsibility, then I see no basis for allocating any liability to members. If there is responsibility on the organization there may be. But the question of *vires* affects the primary responsibility of the organization, not the secondary responsibility of members (if any) !

14. I doubt its relevance. As already indicated, I believe we must start from what we believe to be sound first principles, and not rely on analogies.

15. In my view this is a question which each organization must ask itself, and resolve by provision in its constituent treaty or specific decision communicated to third parties. I doubt we can give general answers true for all organizations. But we could identify categories of activities where liability ought to be assumed of members, *e.g.* :

(i) Purchases of goods or services.

(ii) Contracts of loan whereby debts are incurred by the organization.

(iii) Financial obligations towards staff members.

(iv) Tortious acts committed by servants or agents of the organization within the scope of their employment.

16. My preference would be for a liability to put the organization in funds, and a liability to be apportioned in the ratio of a member's budgetary liability.

This has the advantage of simplifying the claimant's case : he claims against the one defendant — the organization — and not against maybe 150 States. This would leave the liability of the members as such as the exceptional case, applicable only where expressly provided for, and where the third party has therefore relied on this liability.

17. If the liability of a member is to put the organization in funds, this should certainly be so provided in the constituent instrument. But I rather doubt whether the obligation should be made « justiciable «. Most budgetary obligations are not. However, I suppose that there might be some advantage in a form of arbitral process if there was a dispute between the member state and the organization over whether the particular liability property fell within the categories specified in the constituent instrument. And, accordingly, it would be a matter for public international law rather than municipal law.

18. I think each organization should decide for itself which of its activities or functions would give rise to a member's liability to contribute financially. I have suggested some categories in my answer to question

15, but it would be for each organization to decide, and so provide in its constituent instruments or decisions. A third party with actual or constructive notice of these categories would then be able to take a commercial decision on the financial risks involved in dealing with the organization.

19. Again, this would be for each organization to decide. But it would seem to be essential that, if members did limit their liability then this should be a fact of which third parties have actual or constructive knowledge : in short, a matter of public record.

20. I should have thought any liability should be proportionate to the liability for regular, budgetary contributions. But this would leave open the question of how to deal with activities financed on a voluntary basis. *Prima facie*, the notion of a *liability* to contribute would seem out of place in relation to activities financed on a voluntary basis.

Derek William Bowett

10. Réponse de M. Francis Mann

1. (a) I do not see the practical significance of this question, which seems to me of an entirely academic character, but my view would be that it is a matter of public international law.

(b) I assume that international law is part of English law, and the same applies to the answer to the problem with which we are concerned. As I shall indicate below, private law analogies are vital.

2. No, but it is important to remember that legal personality and liability for debts are two entirely different matters. The existence of legal personality does not exclude liability of the members for debts. The non-liability of members for debts does not mean that the organization necessarily has legal personality.

3. Yes, but see further below.

4. No.

5. The answer depends on the legal character of the organization. If it is similar to a corporation, the answer is : none. If it is similar to a partnership, it may be relevant, but the answer depends on the constitution.

6. Not necessarily. Again the answer depends on the constitution.

7. Fault can only be relevant insofar as tortious liability is concerned.

8. I suggest the test is : does the organization have a structure which is similar to that of a company limited by shares or is it similar to a partnership ? In the former case the liability of members is excluded, and the constitutions of international financial constitutions confirm this. In the latter case, the liability is not and cannot be excluded for the reason given below.

9. Probably yes.

10. The League of Nations is a very special case which in my view has no bearing upon other international organizations, particularly those of a commercial character.

11. If the liability arises from the partnership-like character of the organization, then I would think that the liability is joint and several.

12. This to my mind is the crucial question. The problem as a whole can only be solved by private law analogies. The general principle which is relevant for this purpose is, I suggest, as follows : no-one can, by acting through another entity (whether it has legal personality or not), exclude or limit his liability except by appropriately publicising such exclusion or limitation. For this purpose in private law one finds the universal use of such words as Limited, Inc., S.A., A.G., etc. In public international law, there are treaties which expressly or impliedly provide for exclusion. The implied exclusion may occur where the structure of the international organization is that of a company limited by shares : see the constitutions of the great international financial organizations such as the World Bank, and see in particular the excellent decision of the Swiss Federal Tribunal in the case of the *Arab Industrial Organization v. Westland.* Unfortunately, many courts are not yet familiar with the fact that private law analogies are a source of public international law, though the Swiss Federal Tribunal found the right solution without any theoretical inhibitions. It is, however, in this sphere that much instruction and education is required.

13. This may be relevant, depending on the character of the constitution.

14. I cannot see why this should be relevant.

15. For the reason which I have given in paragraph 12 above I think this is the law, and if it is not the law I think it is highly desirable to make it the law.

16. This depends on the constitution.

17. I cannot imagine that an international organization would be given a private law remedy against constituent member States. A remedy under public international law would be desirable but would probably not be provided for in practice.

18. The answer depends on the constitution.

19. If the organization has the character of a partnership, then liability, I suggest, cannot be excluded by virtue of private law analogies. If it has the character of a company limited by shares, then an exclusion or limitation is unnecessary : see the Swiss Federal Tribunal.

20. The same as that given in paragraph 11.

Francis Mann

11. Réponse de M. Ignaz Seidl-Hohenveldern

My dear Confrère,

Many thanks for your thought-provoking questionnaire. In reading my answers I beg you to keep in mind how difficult it is to make general statements about international organizations. After all, each such entity forms a legal system of its own and not even two of them are perfectly alike. I assume that the mandate of the Institute given to your Commission did intend to exclude the liability of joint international State or quasi-State enterprises, which were dealt with in the resolution adopted by the Institute in its session at Helsinki in 1986.

1. The liability of states members for acts or omissions of an international organization appears to be mostly a question of private law. As far as the liability for failure of the organization to fulfil its obligations to third parties is concerned, already the organization's obligation towards third parties, in the very vast majority of cases, will be governed by some municipal private law, *e.g.* failure of the organization to pay the purchase price for a new building site. More often than not, contractual obligations of the organization will be based on some municipal law — although this will not necessarily be the case (*cf.* the resolution of the Institute in its session at Oslo, 1977). But even if the cotnractual obligation would be determined by reference *e.g.* to general principles of law, liability would ensue according to general principles of private law.

Only where the obligation of the organization results from *jure imperii* activities, *e.g.* the UN's obligation to compensate victims of war crimes committed by troops under UN command in the Congo, such obligation basically appears to be of a public law nature. Most municipal legal systems might consider the duty to repair official torts as forming parts of its public law. However, is international law sophisticated enough to allow for this distinction ? Basically, the duty to repair a wrong done to a third party is a duty under private law. Yet, the U Thant-Spaak agreement concerning the events in the Congo is to be qualified as a

treaty, Belgium espousing the claims of the victims. The claims of the victims for reparation, likewise, would be based on public international law.

If the organization fails to fulfil its obligation, the states members, under certain circumstances, may become liable for such failure. As far as the states members' liability towards third parties is concerned, this liability towards such parties will be either under private law or under public international law, depending on the basis of the original obligation of the organization.

A failure of the organization to fulfil its obligations will, however, entail also legal consequences between the organization and its states members as well as between the several states members. As I intend to show below, a rule of customary public international law applicable generally to international organizations may hold its states members subsidiarily liable for the latter's obligations, or the treaty establishing the organization may contain a specific rule to this effect. This relation between the organization and its states members will be governed by public international law. It will make no difference, whether the original obligation of the organization was governed by private law or public international law.

Should the states members, in case of default of the organization, become jointly and severally liable, the state or states having satisfied the claim of the third party will turn towards the other states members that the latter may assume their share of the burden. This claim, too, will always be governed by public international law, whether it is the result of a specific provision of the law of that organization or merely the consequence of the bond of solidarity established between the states members by their adherence to the treaty establishing the organization (*cf. J.J. Rayner v. Dept. of Trade* (1989) 3 *WLR* 984).

Private law analogies are relevant and appropriate in these matters. I do not share the opposite view held by Advocate General Darmon in his Opinion in the *ITC Case* paragraph 136. We must, however, keep in mind that public international law is a much more primitive system of law than most municipal laws.

2. I believe that states acting jointly by treaty may do what any state may do individually by operation of its municipal law — they may create a legal person, which, under the conflict of law rules of the forum, will be recognized there as a legal person. It may be a question of semantics, but an entity created by a treaty might be qualified as a legal person created under international law.

Like Judge Hoffmann deciding the *Arab Monetary Fund* case in the Chancery Division (1990) 1 A11 ER 685 and Bingham LJ dissenting

in the Court of Appeals (1990) 2 A11 ER 776, I consider the way by which these judges tried to cope with the problem a second best choice, compared to the one I mentioned in the preceding paragraph. For me, the main weakness of this second-best solution lies in the fact that the states establishing the Arab Monetary Fund did not *intend* to establish it as an entity subject to the law of Abu Dhabi, but the Fund, none the less, enjoys a legal personality there. Such personality should be recognized by the conflict of law rules in any foreign forum. Not to do so, as the majority in the Court of Appeals did, is legal prositivism at its worst, flying in the face of all notions of equity.

Legal personality in municipal law offers several possibilities for holding or not holding the members of a legal person liable for that person's obligations, *e.g. société en nom collectif v. société anonyme.* Legal personality in international law does not distinguish between several types of legal personality.

3. If provisions on liability figure in the constitutive treaty of the organization and if such treaty has been published (as will usually be the case), such provisions are opposable to third parties. They either are aware of them or should have made themselves familiar with them.

As far as general rules of international law are concerned things are not so easy. Some authors, *e.g.* Adam, believe that states members will have to assume a subsidiary liability for the obligations of their organization, unless such liability is excluded by specific rules. Other authors and some case-law push the separation of person of the organization from that of its states members to its extreme consequence. According to them, the states members would never be liable for the obligations of the organization, except where they specifically accept such a liability. The prevailing practice and most writers admit a lifting of the corporate veil under certain circumstances, differently defined. In view of the divergencies states members could not oppose claims of third parties by alleging that the latter should have been aware of a general rule, that states members will never be liable for acts or omissions of the organization. The mere use of the word «person» does not imply that the member states of an organization qualified as a legal person are — under international law — exempt from all subsidiary liability for the obligations of the organization. Hence the burden of proving the non-existence of such subsidiary liability of the member state rests with those claiming the exclusive liability of the organization. I thus disagree with Lord Oliver in *J.H. Rayner v. Department of Trade* (1989) 3 *WLR* 1014.

4. By definition, an international organization *stricto sensu* — and they are the only ones which our Commission is concerned with — will exercise mainly activities *jure imperii.* In general, its *jure gestionis* activities will be so ancillary that most rules on privileges and immunities of

organizations grant them immunity also for their *jure gestionis* acts. Hitherto, only Italy rejects an organization's immunity *jure gestionis* for its activities.

The distinction between activities *jure imperii* and *jure gestionis* will play a role in the chances of a possible enforcement of possible subsidiary liabilities of states members. The prevailing view on immunities, at least State immunities, distinguishes between these activities according to the nature of the act rather than according to the purpose. Anybody can hire a cook. Anybody can buy tin. However, NATO can fulfil its purpose without its canteen, but would the ITC be the same without its buffer stock ? Should this fact lead *de lege ferenda* to limit immunity of international organizations to acts *jure imperii* and qualify such acts according to their main and immediate purpose ?

5. It is irrelevant whether the state member in the organization's organ voted for or against the act creating the obligation for the organization.

6. The notion of « person « is much looser in international law than in the municipal laws. It is conceivable that states may act in the interest of the organization, in matters beyond the *vires* of the organization, *e.g.* by giving guarantees, even by implication, to third parties beyond the liabilities the states assumed when they became members of the organization. The liability of the member states for such implied guarantees could be based on the assumption that they acted as agents for the organization.

7. If the « fault » consists of a vote or abstention from voting in the organization *cf.* 5. If the fault of the state member is severable from the act of the organization, *e.g.* an abusive reliance on the right of collective self-defence under art. 51 of the UN Charter, only the state member concerned will be liable for the consequences of this act. *Cf.* also 13 *infra.*

8. There exists no special customary rule concerning financial institutions. *Cf.* 3 *supra.*

9. Yes.

10. *Pro rata* distribution of assets and liabilities proportionate to each member state's contribution to the budget. *Cf.* especially Article 6 of the Convention on the Establishment of the International Institute for the Management of Technologies of 6 October 1971, *Austrian Bundesgesetzblatt* 1975/516, but see also 11 *infra.*

11. Most treaties establishing organizations will be silent on this point. The lacuna will have to be filled according to the intentions of the states members. The latter intend to establish an organization able to fulfil its purpose. This purpose requires the creditworthiness of the organization, even for organizations exercising other than financial activities (*cf.* Eurocontrol). This creditworthiness requires a subsidiary liability of the states members. In general, we may assume that each state member would

like to be made liable only proportionate to the contributions made by the budget. It would not correspond to any economic realities to hold each of *e.g.* 23 member states of an organization liable for 1/23 of the debts of the organization. However, creditors of an organization usually will insist on holding all states members jointly and severally liable. It will depend on the circumstances of the case if the lacuna concerned will be filled in accordance with the assumed intention of the states members or with the legitimate expectations of the creditors.

12. There is no direct liability of the member states. As for their subsidiary liability *cf.* 3 and 11 *supra*.

13. An act *ultra vires* will not entail the liability of the organization, but render the member states having voted for such act, and them only, — directly liable for the act concerned. Such liability would be joint and several, as without the *ultra vires* vote of each such member the act, giving itself out to be an act of the organization, could not have been adopted.

14. The analogy is relevant.

15. Yes, in a subsidiary manner, *cf.* 3, 11 and 12 *supra*.

16. A liability to the third parties is to be preferred. This would shorten proceedings and avoid the risk that the organization might attempt, however abusively, to rely on its immunity.

17. Yes. Justiciability under municipal law appears more efficient.

18. I believe that already *de lege lata*, a subsidiary liability of states members of any organization exists in view of the organization's personality in public international law being comparable to that of unincorporated associations in municipal law. Apart from the factors already mentioned under 3 and 11 *supra* equity likewise commands that the members states are subsidiarily liable for deficits of the organization, incurred for obvious political ends. Such liability should be joint and several or proportionate to the participation made to the budget. A member state unwiling to accept such liability, *e.g.* a UN member contributing a high percentage to the UN budget outvoted by a majority in the General Assembly, such majority composed of states contributing altogether only 5 % to the UN budget voting in favour of a loan for a purpose disapproved by the rich member, this member would be legally bound to honour the loan. However, if such a member clearly proclaims its intention not to honour the loan the problem would become moot, as no prospective creditor would lend money under these circumstances.

With best regards I am

Yours sincerely,

Ignaz Seidl-Hohenveldern

Provisional Report

August 1993

Introductory

A. Direct liability

I. Legal consequences for member states and the legal personality of organizations

(a) International bodies possessing no separate personality

- The classic approach to personality
- The distinction *acta jure imperii* and *acta jure gestionis*

(b) International organizations possessing their own legal personality

(c) Personality and opposability

II. The case law

III. The writings

IV. State practice

(a) The specific exclusion or limitation of liability in the constitutive instruments of international organizations

(b) The question of host State liability

(c) The precedent of the League of Nations

V. The question of *vires*

VI. Analogy to the problem raised for member states by the conclusion of treaties by an international organization to which they belong

VII. Application of principles of state responsibility

B. A duty to put the organization into funds

C. The absence of a norm, burden of proof, and private law analogies

D. The future

INTRODUCTORY

1. In preparing this Provisional Report I have been able to benefit from the comments of the members of the Fifth Commission on my Preliminary Report ; discussions at the session of Basel ; written responses to my Questionnaire ; and suggestions made by the Commission members as to further writings to be taken into account. Some members have also made available to me the results of further research they have engaged in, on specific matters of detail falling within our topic. I express my appreciation for all the active and helpful support given to the Rapporteur.

2. In addition to the developments mentioned above, this Report contains analysis of relevant case law that has occurred since the Preliminary Report was written. Accordingly, this Report carries forward some of what was in the Preliminary Report, amended and revised in the light of colleagues' suggestions and observations ; and it also contains parts that are new.

3. The Commission members early decided that, given the problems and diverse views as to the contemporary state of the law on our topic, it would be useful and desirable for our work to conclude with recommendations for future practice. Accordingly, I include questions directed to this end in the Questionnaire ; and this Report (and the Draft Resolution) reflect that decision.

4. The absence of legal certainty as to the question of the liability of member states for the defaults of international organizations (Vignes : «un *no man's land* juridique») could suggest immediately passing to a project *de lege ferenda*. But I believe that the reasoning underlying our proposals for the future can only be understood by an appreciation of the immensely complex issues that have arisen heretofore. It is our study of the recent past that guides us as to what would be desirable in the future. There is no easy division between *lex lata* and *lex ferenda* — it is a seamless web. This Report addresses the contemporary state of international law on our assigned topic. The Resolution builds on that, describing the present but also looking forward.

5. This topic stands at the confluence of many different elements — themes of international law (personality, responsibility, immunity, opposability). And because the issues under discussion often fall to be determined within national jurisdictions, we have also to take into account — if only to distinguish what is really international law, and what is rather the response of a specific jurisdiction to the invocation and

application of various sources of international law — such matters as justiciability, and personality in domestic law as well as on the international plane.

It will be seen that the task is not an easy one.

6. Our focus is the legal consequences for states, in international law, for the non-fulfilment by international organizations of their obligations towards third parties. But sometimes municipal courts will want to know the answer to this question — but will at the same time superimpose their own domestic rules in the way they avail themselves of such answers as can be given by international law. As judicial decisions — including those of municipal law — are in turn a relevant source of international law. Further, the substantive determinations of municipal tribunals on our topic has been severely curtailed through the operation of immunities from jurisdiction on the one hand, and the concept of non-justiciability on the other. While an international organization may be liable for certain acts and omissions on the domestic level, it may often be protected from the consequences of the liability by virtue of having certain immunities from suit and/or execution. That of itself should be irrelevant to the question of whether member states are themselves liable for the obligations of the organization. But insofar as the answer is said to rest upon provisions in the treaty establishing the organization, it may be contended that this is a non-justiciable issue for the local courts (perhaps because the treaty is not part of the local law, or because the matter involves relations between international actors that are felt inappropriate for local determination). Further, a claim that the member states are liable for the obligations of an international organization to which they belong may be met by the assertion by the states concerned of state immunity from local jurisdiction. I have thought it right to include analysis of relevant domestic decisions. But the caveat to which I have just referred should be born in mind.

7. There are yet more complications. The obligations may be obligations arising in contract or in tort. The third parties to whom they are owed may be states, other organizations, legal persons or individuals. And even if we are concerned with the consequences at international law of the non-fulfilment of obligations, the obligations themselves may arise from transactions governed by international law (such as international agreements between the states and the organization) or from transactions governed by domestic law (such as agreements between the organization and legal persons or individuals). Loans taken by the organization, or procurement or construction contracts, or delicts in the territory of a state committed by the organization or its staff in the course of their duties, all afford

examples[47]. For all of these variables of obligation by the organization, the question arises as to the liability of members.

8. The necessary starting point in determining the legal consequences for member states of the non-fulfilment by international organizations of their obligations towards third parties is the concept of personality. We may simply say that, if an international organization has no distinct legal personality, it cannot itself be legally liable for obligations even if incurred in its name ; and it is likely that the liability will rather be that of the member states.

9. While separate personality may be a prerequisite for the liability of the organization, it is not necessarily sufficient to establish whether there is liability on the part of the members, of a concurrent or secondary nature. This requires many further questions to be addressed. Is the organization to be regarded as having acted as the agent of its members ? Is the method by which the organizational decisions were taken that led to the obligation to a third party a relevant factor ? Does a host state retain special liabilities vis-à-vis the conduct of an organization headquartered on its territory — and indeed, are the general principles of state responsibility illuminating in regard to the problem before us ? We will also need to consider whether considerations of *vires* on the part of the international organization can affect the answer to the question of state liability.

A. Direct liability to third parties

I. Legal consequences for member states and the legal personality of organizations

(a) International bodies possessing no separate personality

- *The classic approach to personality*

10. It is widely accepted that an entity without legal personality cannot be the bearer of either rights or duties. (Conceivably, it might be otherwise provided under a particular municipal system : Crawford). This may be deduced from the fact that the issue of whether an entity itself has rights and obligations in international law has invariably been regarded as

47 The points in this paragraph are well made by Amerasinghe, «The Ruling in the ITC Case in the Light of State Practice and General Principles of Law», 85 *AJIL* (1991) 259. Professor Zemanek also emphasizes the importance of distinguishing between various third parties.

synonymous with whether it has international legal personality. This has been true both for those early writers who insisted that only states could have international legal personality, and for those who saw, even by 1930, that :[48]

> «the exclusive possession of the field of international law by states ... is being broken down by the invasion of bodies which are neither states nor individuals, nor combinations of states or individuals, but right-and-duty bearing international creations, to which for the want of a better name the title of 'international body corporate', '*personne juridique internationale*' may perhaps be accorded».
> (Sir John Fischer Williams, «The Legal Character of the Bank for International Settlements», 24 *A.J.I.L.* (1930) 665 at 66).

Equally, the International Court of Justice found that, to say that the United Nations was an international person means that it is «capable of possessing international rights and duties» (*Reparation for Injuries Suffered in the Service of the United Nations* [1949] I.C.J. *Reports* 174 at 179). Indeed, without deviating into an analysis of the arcane question of whether personality is something other than a compendium of capacities, we may safely say that one of the *indicia* of international personality is that the entity concerned can bring claims or have claims brought against it. This necessarily implies liability (though without determining whether it has sole liability).

11. In international associations which have no separate legal personality, it is the states members and not the association which will be liable for unfulfilled obligations entered into in the name of the association. An international association lacking legal personality, and possessing no *volonté distincte* (Alexander Nekam. *The Personality Conception of the Legal Entity*. W. S. Hein, 1978), remains the creature of the states members, who are thus liable for its acts.

12. This classic approach has recently been adopted by the ICC Tribunal in its Award of 1991 in the *Westland Helicopters* Affair. In deciding that the Arab Organization for Industry (AOI) had international legal personality, the Tribunal noted that it had legal capacity and financial autonomy. Although the member states exercised significant powers through the High Council, that organ acted «within the AOI's system and not as a third party which exercises external domination over another subject».

13. The approach seems to be the same when it falls for consideration under domestic law. In the English Court of Appeal Judgment in the

48 See also C.W. Jenks, «The Legal Personality of International Organizations» 22 *BYIL* (1945), pp. 267-275 and the vast international literature gathered in footnote 1 thereof.

Direct Action cases the question of separate personality (and the consequences for members' liability) was concerned in significant part with whether any international personality had been carried into English law. (Both the Sixth International Tin Agreement (ITA6) and the Headquarters Agreement (HQA) provided in terms that the ITC should have legal personality). The pertinent statutory instrument (which did *not* purport to give effect to the ITA6 but was directed to giving effect to relevant provisions of HQA) merely stated that the ITC should «have the legal capacities of a body corporate». The Court decided that this formula (which was a standard one used in English statutory instruments under the International Organizations Act 1968) :

> «was not merely to enable the members of an international organization, in most cases sovereign states, to function within the framework of English law under a collective name as individual legal entities. The objective must also have been to give recognition to the fact that all the members, including the United Kingdom itself, intended that the international organization 'shall have legal personality'».
> (*Maclaine Watson v. Dept. of Trade* [1988] 3 *A.E.R.* 257 at 296 C.A.).

14. More generally, the Court of Appeal found that, although the ITC was not a body corporate in terms of English law (but had only been given the capacities of a body corporate in English law) it was recognised in English law as a legal entity separate from its members. This was affirmed in the House of Lords.

15. The question of the ITC's separate legal personality, and its own liability, was in issue also in an action brought by Maclaine Watson against the European Community (a party to the Sixth International Tin Agreement) before the European Court of Justice. The entire tin matter reached final settlement before the Court gave its judgment, but the Opinion of Advocate-General is full of legal interest. One of Maclaine Watson's submissions had been that if the ITC did not have legal personality, its wrongful acts were to be directly imputed to its members. The Advocate-General had no difficulty in finding a separate legal personality for the ITC (and, unlike the English courts, did not have to address this question as a matter of domestic law, nor hesitate about interpreting the Sixth Tin Agreement). He noted that the ITC, when implementing the Sixth International Tin Agreement, was not limited to harmonizing members' efforts to achieve its objectives (world-wide equilibrium in the market in tin). It carried out the task itself, using its own means. And in so doing, it exercised its own decision-making power distinct from that of its members, adopting decisions by majority vote, simple or qualified, on certain key issues (floor and ceiling prices, borrowing, export controls). Pursuing further classic international law analysis on personality, the Advocate-General noted that the members were

bound by all decisions of the Council. And the Chairman was a genuine independent organ, with his own powers. Accordingly, the ITC had legal personality. *(Maclaine Watson v. European Community*, Op. 241/87).

- *The distinction* acta jure imperii *and* acta jure gestionis

16. Most writers believe personality to be a matter of the constituent instrument, either express or as an implied power. A few others, such as Zemanek (see *Völkerrecht ... : Festschrift für Ignaz Seidl-Hohenveldern)* believe the personality of an international organization to derive from customary international law, the constituent instrument only determining its limitations. In a position that may fairly be described as unique, Seidl-Hohenveldern has taken the position that an international organization is only a subject of international law insofar as its rights are of a *jure imperii* quality. More precisely, he is of the view that :

> «an international organization will be a subject of international law if it has been established by a meeting of the wills of its member states for activities which, if pursued by a single state, would be *jure imperii* activities and if the member states have enabled the organization to have rights and duties of its own under international and domestic law and to express a will not necessarily identical with the will of each of them, such will to be expressed by an organ not subject to instructions of any single member state».
> *Corporations In and Under International Law* (1988 at p. 72). See also *Das Recht der Internationaler Organisationen*, p. 4.

17. Classifying international bodies engaged in activities *jure gestionis* as interstate enterprises rather than as international organizations (see also Valticos, I.D.I. *Annuaire* 57 (1977-I), p. 13), Seidl-Hohenveldern finds that they lack international personality and draws the conclusion that member states may not escape liability for debts incurred by the interstate enterprise. He finds that :

> «Just as a state cannot escape its legal responsibility under international law by entrusting to another person the fulfilment of its international obligations, the partners of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise».
> (*Corporations In and Under International Law* at p. 121).

18. In the view of this writer liability for international bodies that have no legal personality and are merely a vehicle for interstate coooperation, remains that of the members. However, the implication of Seidl-Hohenveldern's position is that even if an organization has under its constituent instrument been granted its own rights and duties, and can express a *volonté distincte* through organs not subject to the instructions of a single member state, it still has no personality or liability of its own if its functions are those that would be described as *jure gestionis*

if carried out by a state. No other Commission member shared this view. Indeed, many international organizations exist which are dedicated to activities *jure gestionis* but are universally acknowledged to have international legal personality, such as the IMF, IBRD, etc. (Salmon). Moreover, many organizations have mixed activities (UNHCR, ITC : Salmon, Higgins). And even an organization broadly dedicated to *acta jure imperii* will need to engage in commercial acts such as contracts for goods, etc. In the view of Vignes, in any event, whatever the activity of the organization, the relationship of the members to the organization is always *imperii*.

19. The relationship between activities *jure gestionis* of an international body and its separate legal personality has been in issue in one facet of the International Tin Council litigation. It had been suggested to the Court of Appeal that the *Reparation for Injuries Case* and other authorities dealing with international legal personality were concerned only with the United Nations and that the same consequences should not be drawn for an organization acting *jure gestionis*[49]. The Court of Appeal had also studied Seidl-Hohenveldern's approach to common interstate enterprises. In its judgment it said :

> «Of course, the constitutional objectives of the United Nations are wholly different from those of more commonplace international organizations such as the ITC. But the fact that the ITC is largely designed to conduct trading activities in order to achieve its objectives, whereas the United Nations will presumably enter into contracts mainly for administrative and similar purposes only, is no reason for differentiating between them as legal entities».
> ([1988] 3 *A.E.R.* 257 at 297).

Thus, even though the ITC was engaging in trading, it was held to be an international legal person and not merely a collective name for

---

49 I do not here need to deal with the question of whether every international organization that is trading is *ipso facto* an organization which functions *jure gestionis* rather than *jure imperii*. The contending parties took different positions on this in the *Direct Action* in the Tin Case ; and the Court of Appeal satisfied itself with saying that the ITC was «'largely' designed to conduct trading activities in order to achieve objectives». It undoubtedly also had a few *imperii* type activities too ; and whether the stabilisation of international tin prices is an objective *imperii* or *gestionis* is perhaps open to argument. Seidl-Hohenveldern, in his remarks on OPEC, accepts that an international body which has functions, some of which are *gestionis* but others of which are *imperii*, cannot be considered a common inter-state enterprise but rather an international organization : *Corporations In and Under International Law*, p. 111.

its members ; and was itself liable for its acts, for contracts entered into[50] and liable on awards and judgments.

20. There is some diverse practice, at the level of domestic courts, as to whether a distinction *jure gestionis* and *jure imperii* should be made in the case of international organizations, *for the purpose of interpreting the immunity* to be granted. This is a topic which is beyond the scope of this paper[51], where we address only the issue of whether an international organization established by treaty to engage in trading activities is necessarily devoid of international personality (and is thus not responsible for debts incurred in its name).

(b) International organizations possessing their own legal personality

21. While the possession of separate legal personality is a necessary precondition for an organization to be liable for its own obligations, it does not follow that separate personality is necessarily determinative of whether member states have a concurrent or residual liability. The contention that there existed such liability on the part of members, notwithstanding the personality of the organization, was the second of three[52] arguments on liability advanced by the plaintiffs before the English

50 The claim for contract was summarised thus : «The ITC has no legal personality distinct from its members. The members are an unincorporated association who agreed to trade, and traded in the name of the ITC. The plaintiffs' contracts, although made nominally with the ITC, were accordingly made directly with the members, and the members are accordingly jointly or severally liable as trading partners». [1988] 3 *A.E.R.* at 274.

51 See, for example, *Branno v. Ministry of War*, 22 *I.L.R.* 756. In all these cases matters internal to the organization, *i.e.* concerning the relationship of the staff to the organization, have been held to be *jure imperii* and/or immune from local jurisdiction. For a rehearsal of the arguments supporting absolute immunity of international organizations, see Morgenstern, *Legal Problems of International Organizations* (1986) at 6, who includes «the fact that the capacity of international organizations is directly related to their public functions seems to imply that, as a matter of principle, the problems of acts *jure gestionis* should remain unimportant». She asks, «Would, for instance, the sweeping denial of immunity for contracts for the supply of goods under the United Kingdom State Immunity Act, 1978, be suitable for application to purchases by an organization for technical cooperation projects ?»

52 The first argument was that the ITC had no legal personality distinct from its members ; and that contracts with the ITC were in fact contracts made directly with members, who were accordingly jointly and severally liable as trading partners. The third argument was that, even if the ITC had separate legal personality, in contracting with third parties it acted as agent for its members as undisclosed principals.

courts in the *Direct Action* in tin. This required the Court of Appeal, said the plaintiff, to regard the ITC as :

> «analogous to that of bodies in the nature of quasi-partnerships well-known in the civil law systems, where both the entity and the members are liable to creditors, or the members are in any event secondarily liable for the debts of the entity. This concept is exemplified in the United Kingdom by a Scottish partnership, in France by a *société en nom collectif* and in Germany by a *Kommanditgesellschaft auf Aktien*».
> ([1988] 3 A.E.R. at 274.

22. This argument was advanced as one applicable both from the perspective of international law and domestic law. It was claimed that the nature of the ITC in international law was that of such a mixed entity ; and that English law merely conferred capacities on the ITC (through the 1972 Order in Council) but did not purport to change its legal character. And it was further argued that the association of the members for purposes of trade, taken together with the absence of any limitation of their liability meant that the members, as well as the organization, was liable for debts.

23. The Court of Appeal found that the concept of secondary liability of members in the face of the separate personality of an association had not been developed in English law :

> «The interposition of a legal entity between an unincorporated group of persons on the one hand, and third parties who enter into contracts with the legal entity on the other, has the consequence under the common law that the members of the group have no liability for the contracts made by the entity».
> ([1988] 3 *A.E.R.* at 301).

24. The Court of Appeal therefore turned to deal with the issue of what it termed «secondary liability via the route of international law»[53]. This it did partly by an examination of the particular constituent instrument

53 To be able to address this question as a matter of substance, the Court of Appeal had first to be able to dispose of the contention that the matter was non-justiciable, because any argument on secondary liability required reliance on ITA6, which had not been incorporated into English law. Kerr and Nourse LJJ (but not Ralph Gibson LJ) found that although unincorporated treaties are not part of English law, and no rights or obligations arising under them can provide a basis for a claim in English law, «there seems no harm in permitting resort to the Sixth International Tin Agreement for the purpose of establishing who, on the plane of international law, is liable for the debts of the ITC ...» [1988] 3 *A.E.R.* at 303.

(finding that ITA6 «nowhere envisages any liability by the members to anyone other than the Council or the members *inter se*. There is nothing which points to the assumption of any obligation to any creditor of the Council. On the contrary, everything points in the opposite direction», *ibid.* at 304) and partly by reference to the general principles of international law.

25. In seeking to identify the pertinent rules of general international law, the Court of Appeal heard extensive submissions on the writings of leading jurists and on international case law. Lord Justice Kerr, writing the majority opinion for the Court of Appeal, found on the basis of these sources that there was no :

> «basis for concluding that it has been shown that there is any rule of international law, binding on the member states of the ITC, whereby they can be held liable, let alone jointly and severally, in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name».
> (*Ibid.*, p. 307).

(c) Personality and opposability

26. We may posit this related proposition for discussion (without necessarily agreeing with it) : While the unique situation of the United Nations, with its near universal membership, may invest it with objective legal personality, this should not be presumed to apply to all international organizations. Treaties establishing such organizations may provide them with legal personality so far as the states parties to the constitutive treaty are concerned ; such personality may be given effect to on the domestic plane by various acts of host state (or directly, if the host state automatically «receives» treaties into its domestic law). But nothing in the *Reparation for Injuries* case provides for objective legal personality for each and every international organization. Therefore, in such other cases, third parties are not obliged to recognise the personality of the organization and can insist that any liability incurred in its name is still that of its members. Put differently, any arrangements states make to confer separate personality (insofar as it is concluded that that operates to exclude state liability) or in terms to exclude or limit states' liability, can only operate *inter se*. It has no effect on third states, being for them *res inter alios acta*.

27. This argument has been advanced by various of the plaintiffs in the tin action in the Court of Appeal ; and is echoed in some of the literature. See, for example, Schwarzenberger, *International Law*, Vol. I, 3rd ed (1957) pp. 128-30 ; Bindschedler, «Die Anerkennung im Völkerrecht», IX *Archiv des Völkerrechts* (1961-2) 387-8 ; Seidl-Hohenveldern, «Die Völkerrechtliche Haftung für Handlungen

internationales Organisationen im Verhältnis zu Nichtmitgliedstaaten», XI *Österreichische Zeitschrift für öffentliches Recht* (1961) 497-506 ; and «Recentsbeziehungen zwischen Internationalen Organisationen und den Einselnenstaaten», IV *Archiv des Völkerrechts* (1953-4) 33 ; Mosler, «Réflexions sur la personnalité juridique en droit international public», *Mélanges offerts à Henri Rolin* (1964) ; Wengler, *Actes officiels du Congrès international d'études sur la Communauté européenne du charbon et de l'acier* (1958) Vol. III, pp. 10-13 and 318-9 ; and others cited by Seyersted, *Indian Journal of International Law* (1964), pp. 233-5 ; and elsewhere.

28. Professor Seyersted, in his study on this matter, in both the *Indian Journal of International Law* (entitled «Is the International Personality of Intergovernmental Organizations Valid vis-à-vis Non-Members ?») and in *Objective International Personality of Intergovernmental Organizations* (1963) 62-107, analyses the views taken by these and other writers, noting variations that occur between them. He notes that most writers taking this view share two starting points, namely (1) that an international organization has international personality only if and to the extent that it follows from its constitution and the intention of its drafters, and (2) that the constitution of an international organization cannot bind states that have not acceded to it. Seyersted further notes that Seidl-Hohenveldern, while sharing these positions, in his *Österreichische Zeitschrift* study bases himself primarily «on the general principal of law that a creditor is not obliged to accept a new debtor in lieu of the old one» (*Indian Journal*, p. 241). Seyersted rejects the appropriateness of this principle to the matter at hand. He further finds that :

> «It is not possible, on the basis of the principle that a creditor is not obliged to accept a new debtor in lieu of the old one, to hold the member states responsible for acts of the organization which involve no delegation of powers from these states».
>
> *Objective Personality*, etc. at p. 70.

Seyersted has here expressed the view that a general delegation of powers occurs only in supranational organizations such as the EEC ; and that some of the writers insisting upon the liability of states members are in fact writing about such organizations.

29. The critical aspect of Seyersted's analysis is that international organizations exist when there are international organs not subject to the jurisdiction of any one state and which assume obligations otherwise than on behalf of the states members. In his view these factors are the basis of their objective existence, and thus the fact that the treaty which forms the constitutive instrument is *res inter alios acta* third parties is irrelevant.

30. The Rapporteur agrees with the view that the objective existence of an organization on the international plane is not simply a matter of widely shared participation in the founding threaty (as in the case of the UN), but of an objective reality. Insofar as third parties deal with the organization in contract, they by implication accept this reality (and the onus would be on them to show that at all times they thought they were, and indeed were, contracting with the member states). The objective existence of the organization, occasioned by its constituent instrument, but not simply a matter of participation in its constituent instrument, leads to the same conclusion so far as non-contractual liability is concerned — that is to say, duties under general international law. There exist throughout the world associations and bodies that a claimant is not called upon to «recognise». Nor, if the shareholders or directors of such bodies are not liable under the applicable governing law for the failures of the association,can a claimant insist upon such liability because it was not a party to the arrangements establishing the association. the fact that international organizations are established by treaty rather than by, *e.g.*, articles of association, does not change the position and introduces no releant element or *res inter alios acta.*

31. Save for Professor Salmon, Commission members generally share the view that the legal personality of an international organization is opposable to third parties (*Cf.* Salmon : «*La personnalité juridique d'une organisation internationale n'est opposable qu'aux sujets de droit international qui acceptent de la reconnaître explicitement ou implicitement*»). As many of them point out in their answer to Question 3, the question of the opposability of any provisions in the constituent treaty on liability, is a question of whether they have been «put on notice» (Waelbroeck). A published constituent treaty will suffice for this purpose : a third party is deemed to have knowledge of this treaty in the same way as is a private party of the memorandum or articles of association of a company with which it deals (Bowett).

32. This approach accords with reality. Thus the Court of Appeal noted (albeit while pronouncing upon a different point) that «in a recent decision of the Supreme Court of the State of New York, *International Tin Council v. Amalgamet Inc.* (1988) 524 *N.Y.S* 2d 971, the court clearly took it for granted that the ITC is a legal entity» (per Kerr LJ 3 *A.E.R.* [1988] at 297. This was so notwithstanding that the United States was not a party to the Sixth International Tin Agreement and that there was no domestic United States legislation recognising the existence and status of the ITC.

II. The case law

33. The judgments in the English High Court in the *Direct Action* in tin are judicial decisions to which one must now look to identify the international law on this matter[54]. (Article 38 of the Statute of the ICJ, the reference to judicial decisions as a subsidiary source not being limited to international judicial decisions). The Court of Appeal judgment remains intellectually important. Accordingly, it should be noted that while a majority of the Court (Kerr LJ and Ralph Gibson LJ) rejected the submission of a concurrent or secondary liability on the part of members, they did so on significantly different grounds, at least so far as international law was concerned[55]. Lord Justice Ralph Gibson bases himself not so much on a conviction that general international law did not contain any rule of separate liability, but rather on arguments of non-justiciability. In his view the transactions of members within the ITC — even directed to buffer stock trading and borrowing — were transactions between foreign sovereign states (and the EEC) and non-reviewable by the English courts :

> « ... the actions of the members in conducting their international purposes through the means of the ITC, on which they conferred international legal personality, and for which they souhgt and obtained legal personality under our law for the purposes of its trading activity, show, in my judgment, that the intention of the members was to prevent their actions as members within the organization from being subjected to the jurisdiction of our courts».([1988] 3 *A.E.R.* at 348).

34. By contrast, the starting point for Lord Justice Nourse was that «in international law the attribution of legal personality to an international organization does not necessarily free its members from liability for its obligations». From that point he reasoned that when states engage in extensive participation and control in the affairs of an international organization, the presumption is of liability for its obligations. Nor should the liability be limited to fault on the part of member states «because that would make third parties' rights of recovery against the members precarious and dependent on circumstances outside their knowledge and control». Members could still limit or exclude their liability by expressly so providing in the relevant treaty. Nor should liability be excluded for *acta jure imperii*, because a third party dealing with an international

54 However, appeals on this judgment are now (June 1989) being heard before the House of Lords.

55 As to municipal law, Lord Justice Ralph Gibson agreed with Lord Justice Kerr that «the rules of law of England and Wales including the 1972 Order» did not lead to the secondary liability on the part of the members notwithstanding the separate legal personality of the ITC.

organization should be in no worse a position than if the organization were acting *jure gestionis* (*ibid.*, pp. 332-3).

35. The present writer believes that the only real reliance placed by Nourse LJ on substantive international law was the finding that legal personality of an organization does not necessarily free its members from liability. Lord Justice Nourse pointed to policy reasons why, in his view, the protection of third parties made desirable the secondary liability of states. In an uncertain area policy factors are not to be discounted as irrelevant, and we later offer our views as to preferred policy considerations. Lord Justice Nourse also thought (although again he pointed to no specific international law that addressed the matter) that extensive participation and control by members in the affairs of an international organization «points strongly towards their liability for its obligations». At the level of domestic law we may note that the members of associations often continue to have an important role in the decision-making of the association without being liable for its obligations : their liability depends upon the nature of the association rather than their institutional interest in its affairs.

36. At the international level this leads one into the area of *dédoublement fonctionnel*, the role of the members not being as individual states, but rather as members of the relevant decision-making organ. Nearly all international organizations with separate personality have a secretariat, and one or more organs on which all, or some, of the member states are represented. But if an international organization is really the creature of the states members, it will be an interstate enterprise without a *volonté distincte*. Where the organization has a *volonté distincte* the continuing role of states members *qua* organs should be regarded as neutral as regards the issue of members' liability for the acts of the international organization. The Advocate-General in the aborted case of *MacLaine Watson v. European Community* showed a keen appreciation of this *dédoublement fonctionnel,* when he addressed a claim for liability based on the alleged conduct of the Community itself (rather than Community liability for ITC conduct). He thought that «the alleged 'conduct' of the Community is in reality an integral part of the internal decision-making process of that organization». (Op. 241/87, paragraph 144).

37. There are other considerations which lead in the same direction. If 'continuing involvement and control' were the test for member states' liability, would it be argued that states would be liable for decisions taken in organs in which they are represented (even if they did not vote for them) but not in organs in which they are not represented ? Is it to be argued that states are liable for, *e.g.*, decisions made in a plenary organ or organ of limited representation, but not, *e.g.* for embezzlement by a secretariat member ? International organizations are of course an integral

whole, and not interstate organs on the one hand and 'real' international organizations (*i.e.* secretariats) on the other.

38. The House of Lords, when the *Direct Action* in tin arrived there on appeal, approached the matter much more from the starting point of domestic statutory law. As the Sixth International Tin Agreement was unincorporated into English law, it was not to that that one should look to see if the ITC had personality in English law. It was the Order in Council of 1972, giving the ITC the legal capacities of a body corporate, that was inconsistent with any intention on the part of Parliament that the ITC whould be regarded as a partnership between the twenty three sovereign states and the European Community. It created a legal person in the United Kingdom, independent from its members ; and there was thus no primary responsibility upon the members for its defaults.

39. Lord Templeman, focusing firmly on English law, said that the only parties to the relevant contracts were the ITC and the appellants ; and «Members of a body corporate are not liable for the debts of the body corporate because the members are not parties to the corporation's contracts». [*J.H. Rayner Ltd. v. Department of Trade*, H.L., 3 *WLR* (1989) at 983]. This remark is puzzling as the ITC was not, even as a matter of English law, a body corporate (as Millett J. had rightly held at an earlier phase of the litigation. (*In re ITC*, 1 Ch. 419). But he also found that there was no evidence of «a rule of international law [that] imposes on sovereign states, members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organizations clearly disclaims any liability on the part of the members». (*op.cit.*, p. 983).

40. In a further disconcerting comment, however, Lord Templeman opined that even if such a rule of international law existed it «could only be enforced under international law», pp. 983-4. This was because «treaty rights ... cannot be enforced by the courts of the United Kingdom» (p. 984). But what is under discussion here is exactly a general rule of international law, *not* a specific provision of the unincorporated Tin Agreement. And there is no reason why general international law could not be enforced in the English courts.

41. Lord Oliver, who gave the leading judgment, found that once it was clear that the ITC had separate legal personality, it was the only person responsible for the contract it had entered into, «unless there can be found some positive provision in the law imposing liability on somebody else» (p. 1010). And the answer to that — the negative answer — lay in the Order in Council of 1972.

42. As for secondary liability, Lord Oliver *was* prepared to consider whether there existed a relevant rule of international law, *and* that it could be referred to as part of English law (and accordingly should not be precluded as non-justiciable). But, he continued «[i]f such a rule exists, it is at highest a rule of construction, and however the matter is looked at, the question of liability or no liability stems from an unincorporated treaty which, without legislation, can neither create nor destroy rights under domestic law» (p. 1014). The Rapporteur finds this equally puzzling, as *exactly what is being discussed* is whether there exists a general rule of international law that applies to a treaty that says nothing on the matter — so, if it existed, it could not be said to «stem from the treaty».

43. We may conclude thus : although our topic has been analysed in enormous detail in the English courts, that analysis has been heavily coloured by the peculiarities of the English law on unincorporated treaties[56], and by a disturbingly restricted approach to the place of general rules of international law in English judicial proceedings. But, that being said, no rule of liability of members for the contractual debts of an organization has been found.

44. Other case law remains of limited value in determining the problems of members' liability. The question arose in the ICC arbitration, *Westland Helicopters Ltd. v. Arab Organization for Industrialisation,* 5 March 1984, 23 *ILM* (1984) 1071. This was an Interim Award on Jurisdiction, but dealt with some matters of relevance to our study. The claimant, the AOI, had entered into certain contracts. Prior to this the Higher Committee of the AOI (ministers delegated by the four states members) had signed with the United Kingdom a memorandum of understanding guaranteeing performance by the four states of AOI commitments. Difficulties arose

56 The insistence of the House of Lords that the 1972 Order in Council *created* the ITC in English law (and did not merely recognise an already existing international organization) has had important consequences. In *Arab Monetary Fund v. Hashim* (N° 3) [1991] 1 *AER* 871, the House of Lords had to decide if an international organization in respect of which there was no domestic legislation (because the UK was not a member) could sue in the English courts. It was faced with its own finding in Tin that the ITC was «created» by the Order in Council. The AMF was thus not «created» in English law. To avoid the consequences of what it had decided, the House of Lords determined that the AMF, having legal personality under the law of one of its members (Abu Dhabi), was to be treated as a corporate body created by the law of Abu Dhabi and recognised as such — and thus allowed to sue in the English courts. The artificiality is apparent of declaring certain international organizations «created» by English Order in Council, and other international organizations to be foreign corporations. These matters are, however, beyond the scope of our study, having no implications for the question of liability of members.

within the AOI as a result of Egypt's role in the Camp David Agreements and consequential problems led the claimant to seek arbitration. The issue of personality of AOI and liability of members arose indirectly, in the context of the need of the Tribunal to decide whether an arbitration agreement had been entered into only with AOI, or with the states parties also (notwithstanding that they were not signatories to the arbitration agreement). The Tribunal decided that this question was «exactly the same» as whether the obligations generally of the AOI under the Shareholders Agreement were obligations attributable to the members.

45. We should treat this finding as specific to the case. So far as separate legal personality of AOI is concerned, the Tribunal noted that it was not subject to any national law and that its legal status was established by treaty. The Tribunal took no further the analysis of whether the AOI really had international legal personality, because it took the view that, in deciding whether the states were bound by obligations undertaken by it. «One must ... disregard any question relating to the personality of the AOI. The possible liability of the four states must be determined by directly examining the founding documents of the AOI in relation to this problem». But these documents, to which category the Memorandum of Understanding did not belong were silent on the matter and the Tribunal was leflt to make inferences from such silence[57]. It found that the express

57 This interim award is not satisfactorily addressed in the Court of Appeal (*Direct Action*) judgment on tin. That the award had been successfully challenged in part in the Swiss courts should not have affected any inherent value in the analysis it provides (the challenge being on other grounds). But its lack of value as «a satisfactory precedent» (not the test that international law would apply in assessing a case as a relevant source) was what was emphasised. Kerr LJ found that as the award was made in an international arbitration pursuant to an international arbitral agreement «its reasoning cannot simply be transposed to found an acceptance of obligations to the creditors of the ITC at the level of municipal law» [1988] 3 *A.E.R.* at 307. But the exercise being undertaken by the Court of Appeal was not to found an acceptance of obligations under municipal law, but to identify general principles of international law, to see if there was secondary liability «via the route of international law» (p. 301). Ralph Gibson LJ accepted that the tribunal was applying general principles of international law, but said he would not «apply that decision» (which was never in issue : what was involved was trying to identify general international law on the subject at hand). His reason was that «where the contract has been made by the organization as a separate legal personality, then, in my view, international law would not impose such liability on the members, simply by virtue of their membership, unless on a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability had been assumed by the members» (P. 353). Ralph Gibson LJ does not identify the sources of international law by reference to which he arrives at this view.

attribution of legal personality does not allow one «to deduce an exclusion of the liability of the four states». Further :

> «One could perhaps infer that the four states' liability is secondary, in that they could not be proceeded against so long as AOI performed its obligations .. but it does not follow that the four states would have no liability whatsoever for obligations entered into by AOI».

The tribunal continued :

> «In the absence of any provision expressly or impliedly excluding the liability of the four states, this liability subsists since, as a general rule, whose who engage in transactions of an economic nature are deemed liable for the obligations which flow therefrom. In default by the four states of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability».

46. This was said by the Tribunal to be a «rule» which «flows from general principles of law and from good faith». We can make several brief observations. The «general principles of law» seemed to consist on analogizing «commercial organizations» to partnerships in English or United States law, or *société en nom collectif* under French, Swiss or German law. The Rapporteur believes this approach to be question-begging and inappropriate. International organizations fall ultimately to be understood and analysed within their own terms. The Tribunal also referred to the states engaging in transactions of an economic nature : again, this begs the question of whether it was they, or the AOI, which so engaged. Nor was there any analysis as to whether contracts for the provision of arms entered into by an international organization established for this very purpose are or are not necessarily to be regarded as *jure gestionis* ; or the legal consequences that might be said to flow from an affirmative conclusion[58]. Above all, the Tribunal seemed to assume that there was an *a priori* liabiltiy on the part of members which they had failed to exclude : this reasoning appeared in the specific case to flow from the technique of analogizing to certain private law entities ; from the «limited personality» conferred by the constituent instruments ; and from the fact that «one must admit that in reality, in the circumstances of this case, the AOI is one with the states».

47. In the opinion of this writer the analysis lacks a certain rigour, and even on its own terms can be said to rest on a scepticism about the 'real' independent personality of the AOI, which was really to be identified with the states.

48. In the circumstances (and leaving entirely aside the status of the Interim Award, which has been challenged for other reasons in certain

58 Which we have briefly alluded to above, pp. 377-378.

jurisdictions : we are here concerned with the realm of intellectual analysis rather than precedent or authority in any other sense) the *Westland Helicopters* (Interim Award) case does not carry the matter forward.

49. The *Westland Helicopters* affair has been the subject of protracted litigation in a variety of jurisdictions. Of relevance to this study is the Partial Award of the ICC on liability, handed down on 21 July 1991. This Tribunal[59] emphasised that the Interim Award had been given only in the context of jurisdictional matters, and it now proceeded to its own analysis of questions of personality and of liability. It was made clear that any violations of the founding treaty was governed by international law and was outside of its jurisdiction. It was concerned with the issue of the responsibility of the states only in the context of the shareholders' agreement and the connected contracts. It first held that the AOI did have separate legal personality. The AOI was thus liable for its own contracts.

50. The Tribunal then turned to whether there still might be a joint or residual liability by the states, and offered a persuasive analysis. It suggested that «the States' responsiblity in each individual case can be assessed only on the basis of the acts constituting the joint organization when construed also in accordance with the behaviour of the founder states» (paragraph 56, Award). It expressly agreed with the House of Lords in Tin that there was no general rule of public international law which imposed liability on members of an international organization.

51. The Tribunal found further that nothing was to be deduced from the fact that the form chosen for enterprise was that of an international organization, rather than a joint-stock company — this showed only that the states did not wish to make the AOI subject to a national law. But, taken with other indicators in the constituent elements, there was evidence that the states had not intended to exclude their liability. Among these indicators were the size of the financial commitments, the speed with which all the share capital was to be paid, the provisions for increases in capital, together with the absence of a clause excluding member states' responsiblity. This last factor was important not as a legal presumption operating *per se* — the Tribunal explicitly finds that the absence of such a clause is of itself legally neutral — but because, taken with everything else, it invited «the trust of third parties contracting with the Organization

59 Differently composed from the Tribunal which handed down the Interim Award, for reasons beyond the scope of this study. In this later hearing the Arab Republic of Egypt was no longer a party to the arbitration, having been stricken from the case by a judgment of the Court of Geneva Canton of 23 October 1987, later confirmed by the Federal Tribunal on 19 July 1988. The Interim Award remained valid in respect of the UAE, Saudi Arabia and Qatar.

as to its ability to cope with its commitments because of the constant support of the member states» (paragraph 60)[60].

52. The Partial Award was supplemented in July 1993 by a Final Award, on Compensation.

53. In seeking to identify relevant judicial decisions, reference must properly be made to the *Case of Reparation for Injuries Suffered in the Service of the United Nations*, ICJ *Reports* (1949) 174 ; the *Case of Certain Expenses of the United Nations*, ICJ *Reports* (1962) 151 ; and the *Namibia Case*, ICJ *Reports* (1971), though, as will be seen, they do not really address the issue before us. The *Reparation for Injuries Case* addresses the issue of powers to be implied to international organizations possessing international legal personality, notably the power to bear rights and obligations ; it is not directed to the liability of its members for the obligations of the organizations. The *Namibia Case* does of course make clear that when a decision by the Security Council has been made under Article 24 of the UN Charter, it is binding on the membership as a whole. But the fact that, under a constituent instrument, decisions validly taken by one organ may bind those who did not take part in the decision, and indeed even those who voted against the decision, does not greatly illuminate our problem. What is the relationship between being «bound by» the decision of an international organization and being «liable for» such a decision ? To be bound by a decision means that one cannot deny its validity or binding force ; or the consequences of it so far as it requires conduct or abstention from conduct on the part of members. Thus in the *Namibia Case* the decision of the Security Council in resolution 276 required members to desist from trade with South Africa in respect of Namibia. In the case of tin, once tin contracts were made by the ITC, the members were not free to denounce them or to act in a way on the tin markets that would undermine the actions agreed upon by the ITC (even this analogy is not quite correct, because tin trading contracts were not in fact entered into by organs on which the states were represented ; rather, specific contracts were entered into under delegated powers, by the Buffer Stock Manager, an international civil servant. For a real analogy between the *Namibia Case* and our problem to arise, the following scenario would have had to occur : the UN acting *intra vires*[61] its powers, engages

60 The author sould properly note that she was one of *Westland Helicopters'* counsel in the Partial Award.

61 The extent to which the trading in 1988 was *intra vires* ITA6 has received some passing attention only (in part because of the reluctance of English courts to interpret complicated provisions of an unincorporated treaty : though Kerr LJ has limited this doctrine to two circumstances : (1) no private rights or obligations can be derived from such treaties and (2) such treaties cannot be enforced by the English courts : *Maclaine Watson v. Dept. of Trade*, [1988] 3 *A.E.R.* at 291).

in action that resulted in loss and damage to third parties, and it was claimed that the members, rather than (or as well as) the UN was liable. It will readily be seen that, by contrast, in the Namibia Case, the question was not whether the members were liable to third parties for action taken by the UN, but rather whether they themselves were free to engage in acts (which had no loss to third parties, other than Namibia itself) in the face of UN decisions which bound them.

54. So far as the general question is concerned — that is to say, whether the members of international organizations are liable for the obligations of the international organization — the Advisory Opinion of the International Court of Justice in the case of *Certain Expenses of the United Nations* is also of limited authority. The Court was asked whether certain expenditures authorised in specific General Assembly resolutions constituted «expenses of the Organization». The question was not formulated so as to ask the Court in terms whether members were obliged to pay for these expenditures. This was because, in the particular cases of UNEF and ONUC, there was controversy as to whether they had each been established in accordance with the provisions of the Charter. Further, the Court *was* asked whether the expenditures constituted expenses of the Organization «within the meaning of Article 17, paragraph 2 of the Charter of the United Nations» ; and Article 17, paragraph 2 itself provides : «The expenses of the Organization shall be borne by the members as apportioned by the General Assembly». It might thus seem that the identification of expenditures as an expense of the organization necessarily answered the question as to the obligation of members to bear them, given the particular treaty provisions of the Charter. In the way that the matter was handled by the Court, however, the matter was not quite so clear. The Court stated that three questions arose under paragraph 2 of Article 17, the first being what constituted the expenses of the Organization ; the second concerning apportionment by the General Assembly ; «while a third question might involve the interpretation of the phrase «'shall be borne by the Members'». (*Certain Expenses,* Advisory Opinion, 20 July 1962, p. 158). The Court stated that these second and third questions directly involved the financial obligations of the Members, «but it is only the first question which is posed by the request for the advisory opinion». (*Ibid*). This is difficult to follow. If there had been any controversy about questions of apportionment, or about the interpretation of the phrase «borne by the Members», the question put to the Court («Do the expenditures ... constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2 of the Charter of the United Nations ?») would necessarily have encompassed responses on these other elements in Article 17, paragraph 2. In the event, the United Nations certainly took the view that, once the Court had determined that the expenditures were expenses, it necessarily followed that, by virtue of

Article 17(2), they were to be borne by the Membership, as apportioned by the Assembly.

55. The separate opinion of Judge Sir Gerald Fitzmaurice seems equally unclear as to the extent that the Court was, by necessary implication, deciding on financial obligation as well as on the identification of expenses. Having stated (at p. 198) that the Court has taken the view that it is only required to say whether specified expenditures are expenses, and not to declare what are the financial obligations of Members, he elsewhere says (p. 207) that «because the Court has proceeded on the basis that once it is established that certain expenditures constitute 'expenses of the Organization', it follows necessarily and automatically that every member state is obliged to pay its apportioned share of these expenses *in all circumstances*». Sir Gerald does not identify where in its Opinion the Court adopts this position. The view Fitzmaurice stated at p. 198 of his separate Opinion seems the more correct.

56. Much of the Court's Advisory Opinion is of course directed towards the specific question of financial obligation, in accordance with specific treaty terms, in the face of possible *ultra vires* commitments entered into by the organization. (We return to the question of *vires* below). Leaving this aspect aside, the *Expenses Case* is very limited authority for our purposes. The states were, in a sense, obliged to put the UN in funds so that the UN could meet its obligations to, *inter alia*, third parties, regarding expenses incurred for peacekeeping. But this is because under the UN system states are obliged to pay their apportioned share of the expenses of the Organization ; and obligations incurred *inter alia* to third parties were deemed to be such expenses.

57. Concurrent or secondary liability of the UN members directly to these third parties was simply not in issue. The matter becomes in issue in an international organization in which only a fixed capital sum is required under the constitutive instrument to be paid by the members (rather than an open-ended commitment to pay legitimate expenses, to the organization itself, without a ceiling being imposed). What is apparent from the Opinion is that the duty of the UN to honour its debts to third parties operates as a presumption to make decisions incurring such debts *intra vires*. But that is not the same as a finding that the importance that other organizations (differently structured from a financing point of view) should honour their debts to third parties, operates as a presumption that states have a direct secondary liability for such debts. Nor is it even the same as a finding that, where a fixed contribution is payable and in the absence of a clause requiring expenses to be apportioned among the members, the members must «make the organization good» for debts that it occurs beyond what can be met by the fixed contributions due.

III. The Writings

58. The simplest statement of principle is offered by Schermers, *International Institutional Law* (1980) at 780, who says :

> «Under a general principle of law, an organization, as well as a natural person, is responsible for its own legal acts and therefore liable if such acts cause damage to others ...
> ... Under national legal systems, companies can be created with restricted liability. An express provision thus enables natural persons to create, under specific conditions, a new legal person in such a way that they are no longer personally liable for the acts of the new person.
> In international law no such provisions exist. It is therefore impossible to create international legal persons in such a way as to limit the responsibility of the individual members. Even though international organizations, as international persons, may be held liable under international law for the acts they perform, this cannot exclude the secondary liability of the member states themselves. When an international organization is unable to meet its liabilities the members are obliged to stand in, according to the amount by which each member is assessed for contributions to the organizations's budget».

59. This view naturally has attracted a great deal of attention in the course of the tin litigation. The opinion here stated covers three separate elements : (1) that states are, as a matter of general principle, liable for the debts of international organizations ; (2) that this is true not only in the face of silence of the constituent instrument, but generally, because international organizations cannot be created in such a way as to limit or exclude liability ; (3) that the liability is proportionate to the contributions due for the organization's budget.

60. While these pronouncements are of the greatest interest, no authority is cited for any of them ; nor does the distinguished author make clear the analytical basis of his views. It would *seem* that his starging point is analogy with the national company, with liability resting with those establishing it unless excluded. We may question whether the analogy is apposite, and thus also whether the right starging point is the assumption of liability unless specifically excluded. As to the «impossibility» of creating, in specific terms, international organizations that exclude liability, we know (since the time that Professor Schermers wrote his study) that there exist many treaties which expressly disclaim liability on the part of member states : we comment on these below. (We may note at this juncture that Nourse LJ in the Court of Appeal accepted Schermers's view in favour of the liability of members on the basis that «international law would surely presume that states which were willing to join together in such an enterprise would intend that they should bear the burdens no less than the benefits». However, Nourse LJ rejected Schermers's view that it is impossible for members of international organizations to exclude or limit their liability for its obligations : [1988] 3 *A.E.R.* at 333.

61. Kerr LJ appears to accept that, as a matter of international law alone, «on the available material the better view may well be that the characteristics of an international organization are those of a mixed entity [entailing the secondary liability of members] rather than of a body corporate, unless, of course, there is an express disclaimer of liability» (*op.cit.*, *supra*, 307). But he acknowledges that those who have written on this topic are relatively few, and «their views, however learned, are based on their personal opinions ; and in many cases they are expressed with a degree of understandable uncertainty. As yet there is clearly no settled jurisprudence about these aspects of international organizations». (*Ibid.* 306).

62. Interestingly, however, Kerr LJ finds that Schermers's views are consistent with an application on the plane of international law alone. In other words, he believes that though Schermers might be saying that, if an international organization defaults, then a secondary regime of liability on the part of its members applies as a matter of international law — but that he is not necessarily to be understood as saying that there is a rule of international law whereby such members can be held liable in any national court for debts assumed by an organization in its own name. Ralph Gibson LJ believes that the Schermers passage, read as a whole, posits a liability of the members to the organization, but not secondary liability to creditors (p. 351). It may well be that either of these interpretations is a correct reading of Schermers, and further elucidation from the author will be helpful for our work. But what does it mean to say that there is no international law rule whereby a member (if secondarily liable at international law) can be held liable in a domestic court ? Is this not to posit a non-question, to raise an irrelevancy ? Whether such a member would be liable in a domestic court is surely not a matter for which an international law permissive rule would need to be sought. If secondary liability at international law were to be established, then liability in a domestic court, *as a matter of international law*, would rather be a matter of whether international law *precluded*, for reasons of international public policy, such liability being upheld on the domestic plane. If such considerations are to be addressed, they would normally be so by reference to the concepts of non-justiciability or immunity[62].

62 Kerr LJ also seemed influenced by the fact that an action for the liability of members of an association with distinct legal personality (not being a body corporate) is not available under English law, and that for there to be an international law rule that there should be such a liability in the English courts «would be tantamount to legislating on the plane of international law». This analysis starts, as we have indicated, from the wrong point.

63. The matter of state liability for the obligations of international organizations has been commented on by Professor H.-T. Adam, *Les organismes internationaux spécialisés : contribution à la théorie générale des établissements publics internationaux* (1965). Some of his most important comments are directed to the relationship of state liability to the absence of third-party recognition of international personality. More generally, he suggests that the control which states exercise over an organization (even one with separate legal personality «*peut, par application des principes généraux de droit, donner prise à cette responsabilité, dont l'étendue et la portée resteront évidemment imprécises, faute de législation internationale en la matière*»[63].

64. Kerr LJ, in the Court of Appeal in the Tin *Direct Action*, found Adam (together with the other writers) important but inconclusive on the point — a view shared by Nourse LJ who said in his judgment that Adam's views were such that they were relied on by both sides, and were :

> «on the whole inconclusive ; see in particular paragraph 110. On the one hand, he instances the control which the member states exercise over the organization as pointing towards liability. On the other hand, he questions whether there can be liability independent of fault ; and, while he is disposed to regard provisions limiting the members' liability to contribute to capital as being equivocal, he reminds us that the obligations of states are to be interpreted restrictively, particularly as regards third parties».
> [1988] 3 *A.E.R.* at 327.

65. Professor Seidl-Hohenveldern has recently written at length on *Corporations In and Under International Law* (1987). In a significant passage he makes his starting point the «generally accepted principle[s] of the conflict of laws» that the respective responsibilities of a corporate entity and its members is determined by «the national law of that entity» (pp. 119-120).

But this does not lead Seidl-Hohenveldern to analyse international law generally, as «the national law» of an international organization ; rather, he goes straight to the constitutive instrument, saying :

> «If the treaty establishing the enterprise does not contain any such rules, the member state will be jointly and severally responsible for its acts, as general international law does not contain any rules comparable to

63 Paragraph 110, *Les organismes internationaux* ... The footnote which Adam cites in this passage seems to indicate that Adam is here speaking of what Seidl-Hohenveldern has described as an interstate enterprise, *i.e.* an association which has no real *volonté distincte*.

> those which, in domestic law, limit the responsibility of the member of a corporation for the latter's act».

Seidl-Hohenveldern denies that the member states may «hide behing this veil at all in order to escape liability for debts incurred by their common state enterprise» and continues :

> «Just as a state cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner states of a common interstate enterprise are jointly and severally responsible in international law for the acts of the enterprise». (p. 121).

66. These comments are made in the context of a discussion on what the author terms «interstate enterprises», viz. those international associations which act *jure gestionis* and are not, in his view, international organizations properly so-called (on which facet, see above, pp.). This much is clear both from the terminology employed and from the fact that it is treated in the chapter dealing with interstate enterprises and not in that dealing with international organizations (Chapter 9). This is noted also by Nourse LJ in the Court of Appeal judgment, who draws no conclusion from that fact save to observe that the ITC was a trader in tin even if, in contract to any ordinary trader, it idi not seek a profit. Kerr LJ, who finds no rule of international law indicating state liability that can be sued upon in an English court, nonetheless finds the location of Seidl-Hohenveldern's comments in the section on interstate enterpirses as without significance. No doubt our distinguished colleague can elucidate for us whether his remarks were intended to be limited to interstate enterprises in his sense of the term.

67. Dr. Shihata, touching on both the position vis-à-vis third parties, the factor of control and the relationship of any liability to fault, writes as follows :

> «A question usually raised in this respect is whether the members of an international company can be held liable to third parties for its acts. It has been argued that since the company has an independent personality, the states constituting it will not be answerable to its creditors unless some misconduct or negligence can be imparted to them in the exercise of their supervision over its activities. Influenced by the same logic, some writers suggested that only the state exercising control over the company (l'*Etat-tuteur*) assumes an unlimited liability. Others, having found no rule of limited liability in international law, concluded that all member states are liable beyond the limits of the value of their shares. My point here is that we cannot conclude a rule of unlimited liability merely / from the absence of a rule of limited liability in international law. All relevant provisions and circumstances must be studies to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties

> dealing with the enterprise. Present general rules of international law cannot, in my opinion, be quoted as a basis of the unlimited liability of the parties to an international corporation for its acts or omissions unless of course the corporation is considered, despite its independent personality, an organ of the state establishing it». «Role of Law in Economic Development : The Legal Problems of International Public Ventures», 25 *Revue égyptienne de droit international* (1969) 119 at 125.

Dr. Shihata's entire study is in terms addressed to «joint enterprises to achieve common economic objectives» (p. 122) : one imagines that his remarks would be *a fortiori* in the case of an international organization properly so-called. Again, no doubt our distinguished colleague can elaborate on this assumption.

68. The present writer concludes this section by saying that for the moment the writings seem sufficiently diffusely targeted (duties *inter se* ; liability to third parties ; fault ; type of liability) and written in sufficiently different organizational contexts, and sufficiently expressions of personal opinion, to make any consensus of principle unascertainable. This situation may of course change in the course of the preparation of our study.

IV. State practice

a) The specific exclusion or limitation of liability in the constitutive instruments of international organizations

69. Whereas the great majority of international organizations, including the United Nations and its specialized agencies, have no provisions at all in their constitutive instruments about any liability of the members, this is not true of the constitutions of all international organizations. About sixteen such treaty-constitutions (mostly providing for development activities or price stabilization techniques) make specific provision for the exclusion of liability of members. The practice is conveniently gathered and clearly explained in the judgment of Ralph Gibson LJ in the Court of Appeal judgment in the *Direct Actions* in tin :

> « ... in a number of instances, states are shown to have set up organizations, in which they are to be members by constituent treaties which provide not only that the organization shall have legal personality but also for exclusion of liability of the members. The clauses appear in two general forms ; first, in the provisions dealing with the subscription of capital, 'liability on shares shall be limited to the unpaid portion of the issue price of the shares' ; and, second, and also in the provisions dealing with membership and capital, 'no member shall be liable by reason of its membership for obligations of the organization'.

> In some instances both forms of clause appear together. In others there is a special provision about responsibility for borrowings».
>
> [1988] 3 *A.E.R.* at 354.

Subsequent detailed attention has also been given to this matter by Amerasinghe, in his article on the *ITC Case* in 85 *AJIL* (1991) 259.

70. Using this classification, we may note that limitation of 'liability on shares' is provided for in the International Bank for Reconstruction and Development 1945 and the African Development Bank[64]. Exclusion of liability by reason of membership is provided for in the International Finance Corporation 1955, International Development Association 1960, African Development Fund 1972, International Institute for Cotton 1966 and Common Fund for Commodities 1981[65].

---

[64] In express limitations in IBRD, the prototype of all financial institutions, see Articles 11(6), IV(9), III(3) and VI(5). As Amerasinghe observes, 85 AJIL (1992), these provide : (i) an explicit limitation of the liability of members to the unpaid portion of the issue price of shares ; (ii) a requirement that every security issued or guaranteed by the organization should have on its face a conspicuous statement that it was not an obligation of any government unless expressly stated on the security ; (iii) a ratio at any given time of 1 : 1 for outstanding loans and guarantees in relation to the equity of the organization ; and (iv) a provision that in the event of termination of the operations of the organization members were liable for uncalled subscriptions to capital stock and in respect of the depreciation of their own currencies until the claims of all creditors were discharged.

[65] For this broad exclusion of liability, see the list gathered by Amerasinghe, *op.cit.*, 85 *AJIL* (1991) at fn. 18 : «See Article 3(4) of the IFAD Agreement. Also the constituent instructions of the IFC (Article II(4)), IDA (Article II(3)), African Development Fund (ADF) (Article 10), ADB (Article 5(7)), Inter-American Investment Corporation (IIC) (Article II(6)), Caribbean Development Bank (CDB) (Article 6(8), Caribbean Investment Corporation (CIC) (Article 6(6), Common Fund for Commodities (Article 6), International Seabed Authority (ISA) (Article 174(4) and Article 3 of the Statute of the Enterprise), Arab Fund for Economic and Social Development (Article 8(1)), Arab Monetary Fund (Article 48(a)), Islamic Development Bank (Article 7(3)), Inter-Arab Investment Guarantee Corporation (Article 7(4)), BADEA (Article 5 III), East African Development Bank (EADB) (Article 4(9)), International Bank for Economic Cooperation (Article 2(3)), International Investment Bank (Article 3). Slightly different wording but with the same effect is used in the constituent instruments of the International Cocoa Organization (ICO) (1986) (Article 22(5)), International Sugar Organization (ISO) (1987) (Article 29), International Natural Rubber Organization (INRO) (1987) (Article 48 (44)). See also Article IV(4) of the Statute of the Fonds de Réétablissement du Conseil de l'Europe : Adam, 1 *Les organismes internationaux spécialisés* ... (1965) p. 275.

71. Both forms of clause together are provided for in Asian Development Bank 1965, Caribbean Development Bank 1969, East African Development Bank 1967 and Caribbean Food Corporation 1975.

72. Provisions that there should be no liability on members in respect of borrowing by the organization appear in the International Sugar Organization 1968 (provision inserted in agreement of 1977 when powers of borrowing were included and dropped in 1984 when the borrowing power was deleted) ; and the International Cocoa Organization 1972 (provision for no responsibility for repayment of buffer stock loans inserted in 1980 and omitted in 1986 when power to borrow was excluded). Provisions providing that there will be no liability with reference to borrowing appear also in the International Seabed Authority 1982 and International Atomic Energy Agency 1956[66].

73. Finally,[67] the International Natural Rubber Agreement of 1987 (concluded after the crash of the International Tin Council) provided in article 48(4) :

> «General obligations and liability of members : The liability of members arising from the operation of this agreement, whether to the organization or to third parties, shall be limited to the extent of their obligations regarding contributions to the administrative budget and to financing of the buffer stock».
> (See [1988] 3 *A.E.R.* at 306).

The existence of such provisions leads one to enquire whether they indicate an understanding among states that they are liable unless liability is specifically excluded. Neither Kerr LJ or Ralph Gibson LJ (who formed the majority in the Court of Appeal judgment on the *Direct Action* in tin) were prepared to deduce this conclusion. Kerr LJ was less than clear as to whether he thought such treaties showed that members accepted secondary liability as a matter of international law (he rather emphasized that it could not be assumed that there was any such acceptance by members «within the framework of municipal systems of law» (*op.cit.*, *supra*, p. 307). Ralph Gibson LJ put it in the following clear terms :

> «Such terms [exluding members' liability] are consistent with the acceptance by the states concerned that liability of members would arise if no such terms were included ; but they are also, as I think, consistent with a state of uncertainty as to the rules of public international law

66 See Szasz, *Legal Practices of the IAEA* (1970), Chapter 19 «Liability».

67 Going beyond this classification, we may also note the more general disclaimer by members in the ITU Convention, Article 21.

> and with a desire to declare what the states regarded as the consequences in international law of the existence of separate legal personality and of stated limits on members' contributions to the organization. There was, no doubt, further an intention to warn those dealing with the organization. I am unable to accept that the practice shown in these treaties can fairly be regarded as recognition by the states concerned of a rule of international law that absence of a non-liability clause results in direct liability, whether primary or secondary, to creditors of the organization in contrast to the obligation to provide funds to the organization to meet its liabilities. Nothing is shown of any practice of sates as to the acknowledgement or acceptance of direct liability by any states by reason of the absence of an exclusion clause. The only decision shown to us is the arbitration award in the *Westland Helicopters Case* which ... does not persuade me of the existence of a rule of international law ...»

74. Nourse LJ, while finding that the members of the ITC may be jointly and severally liable, directly and without limitation, for the debts of the ITC to the extent that they were not discharged by the ITC itself, did not rely on the provisions of these treaties in reaching this conclusion.

75. The *travaux préparatoires* of these organizations do not reveal with any clarity whether it was thought that liability would lie if such clauses were not included. There are more than twice as many constituent instruments in which there is no reference to liability or non-liability of members to third parties as there are instruments in which some form of non-liability clause is included (Amerasinghe). On the basis of all the elements above mentioned it cannot be inferred that the mere absence of a non-liability clause shows either a rule of general international law by which they would otherwise be liable, or an inference of intention under the constituent instrument so to be liable. This conclusion accords with the view of all Commission members[68], including those most closely associated with international organizations having exclusion clauses (Amerasinghe, Shihata).

b) The question of host state liability

76. Some of the same issues arise also from the fact that certain constitutive instruments (*e.g.* the IAEA) also make clear that the *host state* shall not be liable for any claims brought against the international organization. The same question arises as to whether the absence of such a provision would evidence an understanding that the host state would generally be liable. We have answered this below in the negative, by reference to the general law of state responsibility.

---

68 But see the somewhat different approach of Mann, for whom the private law analogy was critical, in his answer to Question 8.

77. By contrast, there are also various technical assistance treaties whereby the host state specifically accepts responsibility for the acts of the organization on their territory while providing such technical assistance. This takes the form of an acceptance of responsibility for dealing with claims from third parties and a promise to «hold harmless» the organization and its experts (save where it is agreed that the organization or its experts have acted with gross negligence or wilful misconduct). See, *e.g.*, Article 1, paragraph 6 of the Agreement of 21 May 1968 between Australia and the UN, ILO, FAO, UNESCO, ICAO, UNO, ITU, WMO, IAEA, UPU, IMCO and UNIDO, for the provision of technical assistance to Papua and New Guinea. In its Report to the General Assembly the International Law Commission correctly observed :

> « ... it is not at all a matter of attributing the conduct of others to the territorial state, but simply of that state assuming, by virtue of a special agreement, the consequences of conduct which is not its own but that of the organization». *YB ILC* 1975, Vol. II, p. 89[69].

c) The precedent of the League of Nations

78. We have examined the legal history of the dissolution of the League of Nations to see if it suggests any liability on the part of members for the obligations of the organization. It does not (Amerasinghe, Bowett, Crawford, Mann, Seyersted). The practice provides some evidence as to the distribution of the surplus funds once the League had discharges its liabilities :[70] nothing more.

79. When the East African Community was dissolved liabilities as well as assets were distributed among the members (Kenya, Tanzania, Uganda),

---

69 An interesting footnote, though strictly irrelevant for our present purposes, is the recent action of the United Nations itself in limiting its own liability. This was done by Resolution 41/210, 1986, concerning limitation of damages in respect of acts occurring within the Headquarters District ; and by the adoption of Regulation N° 4. It has been pointed out (Paul Szasz, 81 *AJIL* (1987) 739-744) that the UN has been able to do this because of specific provisions within the Headquarters Agreement between the United States and the United Nations. It has thus not been necessary to answer whether, as a general principle of international law, the United Nations can limit the assessment of liability. From the perspective of our topic, we may simply note that during the discussions leading to Resolution 41/210 and Regulation N° 4, there is no suggestion that any liability could be that of the member states. The clear implication was that the liability was that of the UN alone, which in the current circumstances of huge insurance premiums would need to seek a way to limit its liability.

70 See *Annex A* to Dr. Shihata's Reply to Question 10 of the Questionnaire for useful details.

in varying percentages. This was done, however, on the basis of recommendations made by a mediator which then formed the basis of an agreement between the partner states[71]. The sensible solutions reached flowed neither from the 1967 Treaty establishing the East African Community, nor from general international law.

80. Nor is the practice relating to Eurochemic conclusive. The constituent instrument was silent on the matter of liability. Upon winding up of the organization, its functions were transferred to Belgium and the members took responsibility for its debts. But this was on the basis of agreement *inter se* — and perhaps as an inducement to Belgium (Amerasinghe).

V. The question of *vires*

81. Although not central to our theme, a reference must be made to the legal consequences for member states regarding any liability they might have for the acts of international organizations, should those acts be *ultra vires*.

82. As has been pointed out in an important contribution to this topic (E. Lauterpacht, «The Legal Effect of Illegal Acts of International Organizations» in *Essays in Honour of Lord McNair* (1965) although the International Court in its Advisory Opinion on the *IMCO Case*, ICJ *Reports* 1960, p. 150, found that the Maritime Safety Committee was not constituted in accordance with the constitutive convention, it had no occasion (because of the form of the question put to it) to pronounce on the legal consequences of this finding. States members took different views (partly obfuscated by the fact that the Assembly was not legally obliged to accept the Opinion of the Court). Eventually the measures taken by the Maritime Safety Committee were «adopted and confirmed» by the Assembly, notwithstanding that the majority of the Assembly also accepted the Court's advice of the illegal constitution of the Committee. The legal basis is thus obscure and the response of the Assembly was no doubt conditioned by a desire to avoid the complications of an insistence on all acts of the Committee as null and void.

83. In the case of *Certain Expenses*, the pleadings revealed a wide measure of agreement (among states otherwise taking different positions) that there was no authority to apportion expenses arising out of *ultra vires* action (see, *e.g.*, the Soviet, Czech and United Kingdom views,

71 See *Annex B* to Dr. Shihata's Reply to Question 10, for further helpful information.

Pleadings, pp. 402, 242 and 336 respectively ; conveniently gathered and analysed in Lauterpacht, *op.cit., supra,* pp. 106-109). The United States, focusing on the implications for third parties, contended rather that the validity of the action was irrelevant : what was relevant was the fact that the expense had been incurred and that third parties dealing with the organization were entitled to rely on the resolution as valid (*Pleadings*, p. 416). As is well known, the court in its Advisory Opinion, linked the question of *vires* to that of purposes, stating :

> « ... when the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization». (ICJ *Reports*, p. 168).

The Court continued to state that if the act was *ultra vires* by reason of it having been taken by the wrong organ, it could still bind the UN to a third party. Although it is not entirely clear, the Court here appears to refer to an act that is *ultra vires* only by reason of being taken by the wrong organ. Presumably (though this can only be deduced from the Opinion as a whole, and is not made explicit), an act that is *ultra vires* by reason of being beyond the competence of the organization as a whole (and here the question of implied powers would need to be addressed) contrary to its purposes, would be without effect and thus not binding vis-à-vis third parties. Nevertheless, as has been correctly observed (Lauterpacht, p. 112), several judges giving separate or dissenting opinions took the view that lawful expenditures could only be incurred by *intra vires* action, in the sense of action validly taken by the appropriate organs. The refinement of these different views must be beyond the scope of our present examintation. But see Lauterpacht, *op.cit.* ; and Osieke, «Ultra Vires Acts in International Organizations», *BYIL* (1977) at 259 ; and generally, Jennings «Nullity and Effectiveness in International Law» in *Essays in Honour of Lord McNair.*

84. The question of presumption of *intra vires* was affirmed by the Court in the *Namibia Case*, ICJ *Reports* 1971 at 22.

85. We may conclude this briefest of résumés with the following conclusion : the question of *vires* is neutral so far as the question of legal consequences for members is concerned. But Salmon correctly observes that *vires* may be relevant to the general obligation of a state to contribute to the budget. The concept of *vires* goes to the validity of the act. If an act, by reference to the concept of *vires* as it applies to international organizations, is valid, and causes harm to a third party or entails a failure to meet an obligation made to a third party, it is an act which binds the organization vis-à-vis that third party. But that tells us nothing about the legal consequences for the liability of member states

of the organization. And if an act is *ultra vires* in the sense indicated by the Court in the *Expenses Case (i.e. ultra vires* on the internal place, but still in accordance with the purposes of the organization) then the position is the same. And if an act is fundamentally *ultra vires* (either by being beyond the purposes of the organization, or, in the view of certain dissenting and minority judges in the *Expenses Case*, by being invalidly adopted), then it will not bind the organization and no question of liability of members could even arise.

VI. Analogy to the problem raised for member states by the conclusion of treaties by an international organization to which they belong

86. It has been suggested in various quarters that the legal problem facing us is in essence the same as that concerning the effect of a treaty to which an international organization is party with respect to the member states of the organization. Assuming that the organization possesses full competence to enter into treaties *eo nomine*, the analogy is in my view precise ; and brief reference to the issue is appropriate.

87. The question was addressed in considerable detail by the International Law Commission in its consideration of the proposals of the Special Rapporteur on the Question of Treaties concluded between States and International Organizations. The original draft of the famous Article 36 bis provided (see *YB ILC* 1977, Vol. I at p. 134) :

> « 1. A treaty concluded by an international organization gives rise directly for member states of an international organization to rights and obligations in respect of other parties to that treaty if the constituent instrument of that organization expressly gives such effect to the treaty.
> 2. When, on account of the subjet matter of a treaty concluded by an international organization and the assignment of the area of competence involved in that subject-matter between the organization and its member states, it appears that such was indeed the intention of the parties to that treaty, the treaty gives rise for a member state for :
> (i) rights which the member state is presumed to accept, in the absence of any indication of intention to the contrary ;
> (ii) obligations when the member state accepts them, even implicitly».

88. This proposal was to go through various forms (conveniently summarised at *YB ILC* 1978, Vol. II, Pt. 2, p. 134 ; *YB ILC* 1981, Vol. I, p. 170 ; *YB ILC* 1982, Vol. II, p. 43) ; and, as the Commentary (1982, Vol. II, p. 43) observes, was the issue «that has aroused most comment, controversy and difficulty, both in and outside the Commission». However, certain brief comments may be made.

89. In none of the versions was it suggested that a treaty entered into by an international organization *ipso facto* binds members vis-à-vis third parties, whether for reasons of *res inter alios acta* or otherwise. The Special Rapporteur, Professor Reuter, clearly believed that the general rule was otherwise and at all times emphasised a distinction to be drawn between the obligations of members to the organization, and their obligation to third parties in respect of the treaty. With regard to the former, they would be under an obligation not to act in a manner so as to thwart the effectiveness of the treaty. In that sense they were «affected by» the treaty concluded by the organization — but this was a matter between the organization and the members. With regard to the latter, members would not be bound by a treaty made by the organization unless the constituent treaty so provided, or consent was expressly given, or the subject matter so dictated, and the states members impliedly agreed and the other parties negotiated on this basis. In order to meet the concerns of members of the ILC, the element of consent hardened, rather than weakened, in the drafting changes.

90. The reasons for rejection of the proposed Article 36 bis were clearly *not* that some members of the ILC believed that members incurred obligations under treaties made by international organizations of which they were members. Those members who opposed Article 36 bis simply felt that it had no place in the treaty being drafted ; that it dealt with «representational issues» beyond the scope of the proposed convention ; that it undercut the clear insistence on non-liability already clearly to be found in Articles ; and that its major purpose was to deal with the problem of a supranational organization, the EEC. There was a high degree of consensus on the basic principle (that in principle the conclusion of a treaty by an international organization incurs no obligation for the states members) ; but deep division on the desirability of including the issue and on drafting any qualification to the general principle.

91. The views of the Special Rapporteur were summarized thus :

> « ... if it is recognized that [an international organization has the right to negotiate], the organization commits itself alone, and its partners deal with it alone. This is indeed one of the more indisputable consequences of legal personality. It in no way prejudges the obligations that member states may incur under the constituent charter of the organization ...
>
> ... more often than not, the organization lacks the financial and human resources to ensure the effective performance of its own obligations. In the circumstances, it is fairly natural that both the partners of the organization and the member states should want member states to be associated with the obligations of the organization.

> There are technical mechanisms for obtaining this result. The simplest is the mechanism whereby the organization and its member states act side by side as parties to a treaty ...»
> [*YB ILC* 1977, Vol. II, Part One, p. 126].

92. Although the final decision in Article 74 of the 1986 Vienna Convention on the Law of Treaties between States and International organizations or between International Organizations was «not [to] prejudge any question that may arise in regard to the establishment of obligations and rights for states members of an international organization under a treaty to which that organization is a party» ; we may conclude both that this was arrived at for reasons indicated above, and that the general opinion was that member states did not in fact incur such obligations.

93. These provisional conclusions are not incompatible with the *Rapport définitif* prepared by Professor René-Jean Dupuy for the Institute, on «*L'Application des règles du droit international général des traités aux accords conclus par les organisations internationales*». The Report and the responses of Commission Members to the questionnaire are certainly pertinent to our present study. Professor Dupuy concluded that states members were not to be considered parties to treaties concluded by the organization[72] ; but that these treaties had legal consequences for them in the sense that, at least within the UN system, they could require members to participate in various activities within the remit of the UN ; and thus may have financial implications for the members. The legal personality of an organization does not result in members being «third parties» to such agreements ; agreements entered into by an international organization are opposable to states members. They may not act in a manner to thwart the execution of such treaties. Because Dupuy's report this study was not directed to the problem of non-fulfilment of obligations of international organizations, the proposed recommendations did not make a linkage between these findings and any legal consequences for members of non-fulfilment of obligations to third parties.

VII. Application of principles of state responsibility

94. There appears in the law of state responsibility to be no general concept whereby states retain a responsibility under international law for the acts of international organizations to which they belong, when those organizations have separate legal personality. There is no evidence that

---

72 Special considerations could apply when a treaty is entered into jointly by the organization and its members, as is the case concerning certain agreements of the EEC.

states continue in any general sense to retain legal responsibility for the bodies they have created ; nor that state responsibility arises through international organizations properly being perceived as the agents of the members.

95. Indeed, it is rather striking that from the earliest moment that the International Law Commission decided to include an article on international organizations[73], the question has been addressed in quite different terms. Draft Article 12(1) has remained essentially unchanged and uncontested over the years :

> «The conduct of an organ of another State or of an international organization acting in that capacity in the territory of a State shall be considered as an act of that State under international law».

96. This draft article is directed at the question of the responsibility of the host state for the conduct of an international organization on its territory. No special consideration has been given to the fact that the host state is also likely to be a member of the organization concerned. The problem was seen as potentially arising from a state's responsibility for certain acts occurring on its territory, not from its membership of an organization.

97. The discussion did however range rather more widely than the text suggests. Generally, members of the ILC made a connection between responsibility and international personality : if an organization had personality, conduct would be attributable to the organization itself, rather than to its member states. (See, *e.g.*, Reuter, *YB ILC* 1975, Vol. I, p. 45, paragraph 29 ; El Erian, *ibid.*, p. 46, paragraph 35 : «An international organization which had the capacity to enter into a contract or a treaty with a state in which its organ was to operate, would clearly be responsible for the acts of that organ»). Some, however, thought that the answer might not always be clear when the injurious act was that of an armed force of the organization composed of contingents of states (Ushakov, *ibid.*, p. 47, paragraphs 5-6). Members clearly wished to avoid getting deeply embroiled in definitions of either insurrectional movements (responsibility for which is also dealt with in draft Article 12) or international organizations (see *e.g.*, Vallat, *ibid.*, p. 51, paragraph 7) ; and the comment of Tammes, *ibid.*, p. 53 at paragraph 20, that «the conduct of an insurrectional movement was inherently foreign to the territorial state since, like an international organization, such a movement existed independently of the State»).

---

73 Special Rapporteur Garcia Amador initially thought that the question of responsibility for the acts of international organizations was not yet ripe for development. See *YB ILC*, Vol. I, 1956, p. 232.

98. The Special Rapporteur, Mr Ago, indicated that Article 12 was not meant to settle the question of «when the responsibility of an international organization or its member states could be engaged or what cases might possibly involve joint liability» (*ibid.*, 1315th meeting, p. 59, paragraph 37).

99. The Commentary made in the ILC's Report to the General Assembly went beyond the issue of host state responsibility in this comment :

> « ... it is not always sure that the action of an organ of an international organization acting in that capacity will be purely and simply attributable to the international organization as such rather than, in appropriate circumstances, to the states members of the organization ...»
> (*BY ILC* 1975, Vol. II, at p. 87).

However, the Commentary continues by drawing attention to the fact that, in relation to a variety of claims for compensation arising out of UN peacekeeping activities, it was the UN which accepted international responsibility, both in internal law and under international law. The Commentary concludes that there is no liability upon the host state (but does not return to the question, *obiter* to its consideration, of member states' liability).

100. We may conclude that the work to date on State responsibility deals only with the distribution of responsibility between international organizations and host states (who will not be responsible unless they failed to exercise due diligence) ; but that there was no inclination to suggest that a host state might still be responsible for the acts of an international organization through another route, viz. through membership thereof. One could either say that that possibility did not occur to those considering the issue or was regarded as irrelevant to the issue before them.

101. It seems clear, notwithstanding the caveat of Article 74 of the 1986 Vienna Convention (itself not widely ratified) that under international law the acts of an international organization with separate personality would not be attributable to the member states. This is so even if the acts are those of organs comprised of representatives of member states ; and *a fortiori* if the acts are those of international civil servants acting, within the authority of the constitutive treaty, in the name of the organization.

102. International organizations are not agents acting in service of their principals, who thus remain liable, unless the constitution makes provision for such an arrangement (Bowett, Zemanek : see Article 24 of UN Charter). But even then this does not connote liability in interntional law (Bowett). It might exceptionally be different if implied guarantees have been given (Seidl-Hohenveldern).

103. The concept of attributability in international law is to an extent matched by notions of what we may term «factual agency» in domestic legal systems (so far as contractual matters are concerned) or «directing, procuring or authorizing» certain acts to be done (so far as tortious liability is concerned). In the tin litigation these aspects (*i.e.* «factual agency» or «tortious liability») have been dealt with separately from the so-called *Direct Action*, in litigation before Evans J. Just as questions of state responsibility have not been at all addressed to the *Direct Action* (though to an international lawyer they would seem a relevant consideration), so attributability in international law receives small consideration in the judgment of Evans J. The plaintiffs (creditors) contended that each trading contract, though made by the Buffer Stock Manager, entailed a representation that the ITC's debts would be met as they became due ; and that, having authorized the representations, the member states were liable as tortfeasors insofar as the representations were false or reckless. The judgment addresses this by analogy between a limited company and its directors, and not by reference to international law. Because the trading contracts were made under English law, much of the argument revolved around English law concepts of fraud and recklessness. It was also claimed by the plaintiffs that «by their participation in the affairs of the Council» the states directed or procured the representations. The defendants denied that the individual member states could be said to have authorized any representations, merely by reason of membership of the ITC generally, or the Buffer Stock Committee specifically.

104. Evans J. held that the member states *did* authorise the implied representations made by or on behalf of the ITC to the plaintiffs «but their liability, apart from sovereign immunity, depends upon proof that through their representatives they acted fraudulently, whether knowingly or recklessly, in that regard».

105. All questions of representation and fraud and duty of care to third parties were pursued as a matter of English law. Evans J. concludes :

> «If the member states authorised the ITC to make the contracts which gave rise to the implied representations, and if the representations were false, then I can see no reason of policy or otherwise why the defendants should not be liable for the misrepresentation ...»

From the perspective of international law, however, it was not «the member states» which authorised the making of the contracts, but rather the appropriate organ of the ITC (which happened to be composed of member states). And this authorization is provided for in the structure of the treaty itself, and should be appreciated as a matter of international, rather than English, law — even though the substance of the contracts is governed by English law.

106. In determining whether member states are or are not liable for the defaults of international organizations, no distinction is to be made between the contracts of the international organizations with third parties, and any tortious harm done to third parties. In each case the organization, having its own legal personality, is in principle solely liable for its own acts (*cf.* Waelbroeck : «Liability results from the fact that the member states have set up the organization in their mutual interest and that they allow it to take some measures that may potentially cause injury to third parties»). Of course, a contract may have been entered into on the understanding that it was to be backed by the member states (Crawford). The question of presumed knowledge by a claimant of the constituent instrument is stronger in a contractual rather than tortious context.

107. Nor does the question of fault change the answer to the question of the liability of states. Any fault on their part may engage liability for *their own acts* ; but not for the acts of the organization itself.

B. A duty to put the organization in funds

108. Our brief survey of the international law relating to the conclusion of treaties by international organizations suggests that, while states are not parties to such treaties, neither are thy «third parties», in the sense that they may not engage in acts that run counter to the effective implementation of such treaties. If the obligation of an international organization is engaged through contract, or a duty of care, the legal consequences for a member state entail a requirement to put the organization in funds to meet such obligation.

109. The Receivership Actions in the Tin Case have been centred in this issue : see *Maclaine Watson & Co. Ltd. v. ITC* [1987] 3 *AER* 789 (Millett J.) and [1988] 3 *AER* 364 (Court of Appeal). There it was claimed that the High Court should appoint a Receiver to collect sums owing to the ITC, including sums allegedly due from member states under a duty to «make good» the ITC to meet its obligations. This necessarily entailed determining whether the ITC had such a cause of action against its members[74]. The judge of first instance (Millett J.) found that there was no arguable cause of action which the ITC might have against its members other than under the Sixth Tin Agreement (ITA6) which, being unincorporated, could not of itself have found a cause of action in English law. In the Court of Appeal the points of claim were amended so as to suggest a claim running from the ITC to its members, which was not

74 The ITC itself had never claimed such a cause of action. The claim on behalf of the ITC was formulated by the creditors.

based solely on ITA6. This was based on the right to contribution/indemnity in English law.

110. The Court of Appeal accepted the argument of the ITC that all the claims were non-justiciable - either because they emanated from ITA6 or because they involved transactions that were acts of state[75] or because «the object of appointing a receiver, and his task, would be the enforcement by him, in the name of the ITC, of any extant rights which the ITC may have against its members ... [but these are] contractual or similar rights derived from agreements made on the plane of international law[76].

111. The Court of Appeal has thus clearly not purported to make any determination on the substantive international law question facing us.

112. The view of the present writer is that, where a constitutive instrument requires members to pay their assessed share of «expenses» allocated for intra vires purposes, the members have a legal obligation to pay their share of expenses if a failure to pay such «extra» sums would entail a failure of an obligation to a third party (Case of Certain Expenses). But there is no principle of general international law beyond this. In respect of constitutive instruments not based on assessed share of expenses, it is necessary to look at the precise terms to see if such obligation is incumbent upon members, as a matter of treaty obligation rather than general international law.

C. The absence of a norm, burden of proof, and private law analogies

113. Our conclusion is that, by reference to the accepted sources of international law, there is no norm which stipulates that member states bear a legal liability to third parties for the non-fulfilment by international organizations of their obligations to third parties. This conclusion raises a series of further questions.

(1) Is the position that the absence of a specific norm (which some would term a positive rule) determining state liability means that there is no liability ? Or is the correct position that, unless states can be shown to have excluded or limited their liability, the liability must be presumed

75 This was the ground offered by Ralph Gibson LJ, who applied the English act of state doctrine under *Battes Gas and Oil Co. v. Hammer* [1982] A.C. 931.

76 Kerr LJ and Nourse LJ doubted the application of the act of state doctrine to the facts of the tin case, preferring to base their funding on non-justiciability on different grounds.

to exist ? The latter view can only be correct if international law will presume obligations to be incumbent upon states unless the contrary is proved. But this seems to run counter to well established principles : «The rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law» (*Lotus Case*, PCIJ Judgment N° 9, 1927, Series A, N° 10). Put differently, obligations resulting from norms of law (rather than from treaty or other agreement) must be shown to exist by reference to the normal sources of international law. The absence of a norm stipulating liability is, on this basis, determinative of the matter, in the sense that obligations will not be attributed to states in the absence of a clear requirement of international law.

(2) But should we look at the situation differently, and say rather than international law fails to address the issue, with the result that there is simply a *non liquet* which must be filled by reference to general principles ? This is closely related to the question of whether it is appropriate to rely on private law analogies to seek an answer to whether states are liable for the non-fulfilment by international organizations of their obligations. The tin litigation has been replete with efforts to rely on private law analogies (not so much as a permitted technique of international law, but rather because most counsel and judges in the case have been more familiar with institutions of domestic law rather than of international law[77]).

114. It is by now accepted that it is permissible to fill the jurisprudential gaps in regard to new situations by applying general principles of law. In turn, these general principles of law have frequently been general principles of private law. Such invoked general principles often have concerned what we may term ethnical considerations : good faith, the requirement of clean hands, the provision that no-one shall be judge in his own cause, the duty to make reparation (see *e.g.*, the *Chorzow Factory*

77 The international lawyers in this litigation have sat through very many days of argument whereby the International Tin Council was analogised variously to a company under English law, a *société en nom collectif*, a Scottish partnership, an English trade union, etc. Regardless of their varying professional interests in this case, international lawyers are in this context likely to welcome the comment of Kerr LJ [1988] 3 *AER* at 269 that ; «It would be inappropriate to consider [the legal issues] ... solely by reference to English law in isolation. They concern all international organizations operating in similar circumstances and require analysis on the plane of public international law and of the relationship between international law and the domestic law of this country». See also the Opinion of Advocate-General Darmon in *Maclaine Watson v. EC* (on which point Seidl-Hohenveldern specifically disagrees, however).

Case, PCIJ, Series A, N° 17, p. 29). A second grouping of general principles drawn from domestic law concerns essentially procedural issues admission, waiver, estoppel, prescription (see *e.g.*, the *Barcelona Traction Case*, ICJ *Reports* 1970 ; the *Russian Indemnity Case*, Scott, *Hague Reports* 297). Reliance on private law analogies have also been relevant, at a certain period, for the formulation of international law criteria on the measure of damages. But there have been occasional cases in which more substantive matters have been resolved by reliance on private law analogies (*e.g.* The *Fabioni Case,* La Fontaine, *Pasicrisie*, at 344-69, responsibility of the state for the acts of its agents ; *Venezuelan Preferential Claim Case*, issues of bankruptcy). For a general survey, see H. Lauterpacht, *Sources of Law in the International Community* at 115-9 ; and «Private Law Sources and Analogies» in E. Lauterpacht, *International Law, Collected Papers of Hersch Lauterpacht*, Vol. 2, Pt, I, esp. at 208-212).

115. But in a case such as the *Barcelona Traction Case*, where answers were required under international law in relation to a domestic phenomenon (a municipal law company), it might be thought appropriate to seek to discover general principles of municipal law. But in our study we have no domestic phenomenon : international organizations of the type under study are definitionally the creation of international law. Thus, second, we would need to find a private law analogy to the relevant legal phenomenon (international organization) and then seek to identify general private law principles in relation thereto. This not only seems too remote as a source of law, but also leads inexorably to the reality that there is no clear «correct»private law analogy to an international organization. Further, the evidence is that, in the nearest analogies known under the various legal systems (partnerships, companies, *sociétés en nom collectif*), different consequences flow under the various municipal systems for the liability of the members of such bodies. No 'general principle' could be found.

116. In most international organizations the relation between the organization and its states members is governed by public international law. Any claims between the states *inter se*, or between the states and the organization, will be governed by international law. The organization may, however, undertake obligations to private law third parties, and its liabilities will be governed by the municipal law concerned. Any claims by such third parties upon either the organization or, in case of default, upon the states members, will be made under a municipal law. And the municipal law will have its own perceptions as to the relations between international law and domestic law (Zemanek, Amerasinghe). That being said, even when a private claimant seeks redress against a state under a municipal law system, the issue of whether the state is liable for the

defaults of the organization concerns the legal relationships between those two subjects of international law, and thus is governed by international law. Most Commission members believe that private law analogies are simply irrelevant to this question or at best of limited value (Zemanek, Bowett, Salmon[78], Crawford, Seyersted, Amerasinghe, Waelbroeck). Our Confrère Seidl-Hohenveldern finds such analogies relevant, without precisely specifying why ; Francis Mann found them «vital». First, he notes that they are a proper source of international law. Second, he ties it to the question of the exclusion of liability being specified in the constituent instruments of certain international organizations. He finds that an appropriate analogy to the technique in private law of such words as «Limited, Inc., S.A., A.G., etc.». We address this aspect of the problem elsewhere.

117. Having given careful consideration to all opinions, my view remains that private law analogies are not relevant save to illuminate certain policy aspects (Mann, Waelbroeck).

118. It thus necessarily follows that one does not *assume* a liability unless it is shown to be excluded. There is no liability for states under general international law for the defaults of international organizations. Everything depends upon the intentions as expressed or implied in the founding instruments[79].

D. The future

119. If this is the current state of international law on the topic under discussion, can we regard it as satisfactory ? Commission members had different views. Amerasinghe thought that the sole liability of an international organization for its own defaults had worked well for the past half century and more. Others — whether they believed that the current law does already provide for secondary liability (Waelbroeck, Mann, Seidl-Hohenveldern), or whether it does not, emphasised the lack of certainty and clarity (Bowett). Yet others wanted to move to a law that made clear that member states could not avoid legal responsibility for organizations they established to serve their own purposes (Zemanek).

120. Would it be desirable that, in the future, international law should place a concurrent or secondary liability upon members ? No useful answer can be given by mere invocation of «equitable considerations». Without here analysing the usefulness or otherwise equity as a principle of

78 And see his views further in *Mélanges offerts à Charles Chaumont.*

79 An approach which reconciles the *Tin* and *Westland* (1991) findings.

customary law (but see, *e.g.*, Brownlie's critical view in *Recueil des Cours* 1979-I at 288), we may note that, especially in the matter of delimitation, the notion has been used of a result-oriented principle which emphasises the interest of the international community in finding a peaceful solution. It also serves to ensure that the full complexity and variety of circumstances are taken into account, rather than the strict application of a single rule ; and flexibility is thereby introduced. Insofar as it is a concept directed at ensuring that the peculiarity of each case be acknowledged, in all its relevant circumstances, it is unlikely to point the way to general answers to our problem.

121. The relevant policy factors are, on the one hand, the efficient and independent functioning of international organizations, and second, the protection of third parties from undue exposure to loss and damage, not of their own cause, in relationships with such organizations. It has been suggested from time to time in the tin litigation that the functional approach provides no contra-indication to secondary liability on the part of member states. This seems doubtful ; if members know that they are potentially liable for contractual damages or tortious harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations. It is hard to see how the degree of monitoring and intervention required would be compatible with the continuing status of the organization as truly independent, not only from the host state, but from its membership. If members were liable for the defaults of the organization, its independent personality would be likely to become increasingly a sham. Also, the more one reassures third parties of the liability of the states, the more in fact one puts in doubt the credit-worthiness of the organization (Salmon).

122. So far as the protection of third states is concerned, there was general agreement among Commission members that openness and knowledge of the situation are essential. Third parties should know exactly with whom they are contracting and from whom they can expect compensation in the case of breach of failure to perform. But this agreed perception of what is a required starting point does not necessarily lead in the direction of liability for the member states : «If ... knowledge exists, the market will presumably find its own remedies for the potential insolvency of international organizations, through demanding guarantees in one form or another or through other forms of dealing» (Crawford ; to same effect, Shihata). Insurance might also have a role to play.

123. The solution of required visibility without the direct liability of states — which to the Rapporteur seems the most attractive one, because it provides for the opportunity for third parties to protect themselves, while not inviting day to day interference by states in the work of international organizations — clearly works better for claims in contract

than for claims in tort. In many torts the injured party will have had no previous contact with the organization, and no occasion or need to familiarise himself with its constituent instrument. However, actions in tort are much less likely to cause a general insolvency of the international organization, and default is to that extent much less likely.

124. These diverse considerations are reflected in responses to other questions in the Questionnaire. Most members believed that any future liability of members should be towards the organization and not towards the third party. In other words, the obligation should be to put the organization in funds to honour its contracts and to meet its liabilities, rather than to compensate third parties direct. This would be in accordance with the duty incumbent upon the organization itself to meet its obligations (Shihata, Amerasinghe) ; and it would have the practical advantage of avoiding a profusion of legal actions against the various members (Salmon ; *cf.* Seidl-Hohenveldern, who takes the view that protection of third parties is best secured by direct liability of the states).

125. Most members felt that any liability to put the organization in funds should be proportionate to the members' share in the budget or capital, as the case might be. The inequity — and indeed impossibility — of requiring a very poor state to pay an equal share of a liability to third parties, was apparent. (Seidl-Hohenveldern made the interesting point, however, that the problem that certain states already have in paying high percentages of the budget when the budget is set by majority vote, would be exacerbated under this arrangement. See also the rejection by Vignes of the proportionality principle for liability, on different grounds).

126. Again, most members felt that states should be able to limit or exclude their liability, provided that — as is the practice with the international financial organizations —this is done clearly and explicitly (*Contra*, Amerasinghe and Waelbroeck, who would allow limitation for contractual liability but not — and one can understand the reasoning — for tortious liability).

127. With all these considerations of policy in mind, Part B of our [draft] Resolution reflects what appears to be the best way forward, to protect both the independence of international organizations with their own personality, and the position of third parties.

August 1993.

Draft Resolution

August 1993

Part A

Article 1

For the purposes of this resolution :

a) An «international organization» is an intergovernmental institution established by treaty under international law, and having international personality.

b) «Third parties» means parties other than the organization itself [and its states members], whether they are private parties or third states or organizations.

Article 2

a) An international organization possesses international legal personality [as a matter of customary international law], when its constituent instrument so provides or by necessary implication by reference to its powers and functions.

b) The existence of a *volonté distincte*, as well as capacity to enter into contracts, to own property and to sue and be sued, is evidence of international legal personality.

c) The international personality of an international organization is, as a matter of international law, opposable to third parties, and is not dependent upon any recognition by them.

Article 3

International organizations possessing their own international legal personality are liable for their own obligations towards third parties.

Article 4

a) The obligations that international organizations have to third parties may exist under international law or the domestic law of a particular state.

b) Whether or not member states have concurrent or secondary liability for the fulfilment of such obligations is a matter of international law.

This is so whether a claim by a third party occurs in a national court or in other international tribunals or fora.

Article 5

A third party having contractual dealings with an international organization is deemed to have familiarity with its constituent instruments. Any provisions in that instrument concerning the liability or otherwise of the states members are opposable to such a third party.

Article 6

a) There is no rule of international law whereby states members are liable, concurrently or secondarily, for the obligations of an international organization of which they are a member.

b) Without prejudice to the generality of this provision, no liability for a state arises :

- by virtue of having participated in the establishment of an international organization to serve its own purposes ;
- by virtue of the fact that the organization engages in commercial or trading activities [in contrast to political, defence or security activities] ;
- by virtue of its membership in an international organization ;
- by virtue of claims that the international organization acted as agent for the member(s), in law or in fact ;
- by virtue of the fact that the act of the organization giving rise to its liability to a third party is *ultra vires.*

c) No evidence of a general rule of international law providing for the liability of states is to be decuded from the existence of various constituent treaties which make specific provision for the limitation or exclusion of such liability.

d) No evidence of a general rule of international law providing for the liability of states is to be deduced from the practice relating to the dissolution of other international organizations.

Article 7

Any wrongful act by a state member of an international organization engages its own international responsibility but does not render it liable for the obligations of the organization to third parties.

Article 8

The question of the liability of the members of an international organization for its obligations is determined by reference to the provisions of its constituent instrument and the intentions there revealed.

Article 9

A state may also incur liability :

[a) if, notwithstanding the separate legal personality of an international organization, its *volonté distincte* does not exist in reality] ;

b) through unilateral undertakings of guarantee in a given case, extraneous to the constituent treaty.

Article 10

Unless the constituent instrument so determines the liability or otherwise of member states for the obligation of the international organization applies to contractual and tortious liability alike.

Part B

Article 1

Important considerations of policy, including support for the real independent functioning of international organizations militate against the development of a general and comprehensive rule of liability of states for their obligations to third parties.

Article 2

Every effort should be made for third parties to know with whom they are contracting, and where liability for any defaults will lie. Accordingly, in the future all constituent instruments of international organizations should be required to specify whether or not member states are liable for the obligations of the organization. A failure so to specify should in the future be taken as an implied acceptance of such liability by the states members.

Article 3

a) In order better to protect the position of third parties, while retaining the separate personality of the international organization and the principle of its own sole liability for its debts, unless the constituent instrument otherwise provides, constituent instruments should specify an obligation upon states members to put it in funds to meet all its obligations to third parties [incurred *intra vires*].

b) Any liability for the obligations of an international obligation should be an obligation to put the organization in funds and not a direct obligation to the third party.

Article 4

The obligation of a member state to put an international organization in funds to meet its obligations should be proportionate to its contribution to the regular budget or to its working capital, as the case may be.

Article 5

Member states should be allowed to exclude or to limit their liability for the activities of the organization, provided that such limitation is specified, in appropriate detail by reference to the nature of the organization, in the constituent instrument.

Article 6

Where liability of member states is provided for, the constituent instrument should provide for :

a) international arbitration to resolve any dispute arising between the organization and a member state over the liability of the latter to put the former in funds ;

b) international adjudication or international arbitration to resolve any dispute arising between states members over the liability of any or all of them to put the international organization in funds.

August 1993.

Réponses et observations des membres de la Commission

1. Réponse de M. Ibrahim Shihata

November 9, 1993

Dear Rosalyn,

...

I have meant for sometime to send you my comments on the draft resolution of the Fifth Commission of the Institute. These are basically the comments I made orally in our meeting in Milano which may be summarized as follows :

Part A

Article 1 (b)

I suggest deletion of the bracketed words (and its states members) as well as the word «third» in the last line (before the word «states»). The reason is based on my conviction that there are no general presumptions in international law that (a) state members are liable for the acts of the international organizations of which they are members or (b) that an international organization is not liable to its states members for the acts committed by the organization. As a result, member states cannot be excluded upfront from the definition of third states.

Article 2 (a)

The absolute wording of this provision gives the impression that the legal personality conferred by member states on an international organization applies *erga omnes*, whereas I believe that it would be more realistic to limit this to the member states and other states which recognize such personality, expressly or through dealings with the international organization as a separate entity.

Article 2 (c)

Based on the above comment, I suggest deletion of the last sentence of this paragraph, *i.e.*, «and is not dependent upon any recognition by them».

Article 5

I suggest the use of «instrument, including any amendment thereof», instead of «instruments».

Article 6 (b)

I do not see the reason for excluding state liability «by virtue of claims that the international organization acted as agent for the member(s), in law or in fact». If indeed this was the case, the state, in its capacity as the principal involved, would be liable.

Also, in case the organization acts *ultra vires* one may argue that there is room for state responsibility, *e.g.*, if a certain state plays an instrumental role in causing the organization to act in this manner. However, I believe this would fall under Article 7 which suggests that the state would in such a case be liable for its own action, not for the obligations of the international organization (unless, of course, the matter falls under Article 9 (a).

Part B

Article 2

I suggest that the last sentence read as follows :

«If the above is accepted as a general practice, a failure so to specify should in the future be taken as an implied acceptance of such liability by the states members, unless the context indicates otherwise».

Article 3

I would start this Article with present Section (b), then add the coverage of all obligations to third parties incurred *intra vires*. In this case, the Article would simply read :

«Any liability by a state member for the obligations of an international organization should be an obligation to put the organization in funds and not a direct obligation to third parties. Unless the constituent instrument of the organization otherwise provides, states members should be under the obligation to put it in fund to meet all its obligations to third parties incurred *intra vires*».

Article 5

I would change «limitation» to read «exclusion or limitation».

Article 6

I suggest the addition of «or other binding mechanisms» after «international arbitration» in paragraphs (a) and (b). For instance, the charters of international financial institutions give the executive board of the organization the power to rule on disputes between the organization and its members regarding the application and interpretation of the charter.

Hope that the above would not add to the difficulty of reconciling the different and conflicting views you are receiving from the members of the Commission.

Sincerely yours,

Ibrahim Shihata

Second Draft Resolution

May 1994

Part A

Article 1

For the purposes of this resolution :

a) An «international organization» is an intergovernmental institution established by treaty under international law, and having international personality.

b) «Third parties» means parties other than the organization itself of members acting in a capacity other than that as a constituent part of the organization, whether they are private parties or states or organizations.

Article 2

a) An international organization possesses international legal personality when its constituent instrument so provides or by necessary implication by reference to its powers and functions.

b) The existence of a *volonté distincte*, as well as capacity to enter into contracts, to own property and to sue and be sued, is evidence of international legal personality.

c) The international personality of an international organization is, as a matter of international law, opposable to third parties, and is not dependent upon any recognition by them.

Article 3

International organizations possessing their own international personality are liable for their own obligations towards third parties.

Article 4

a) The obligations that international organizations have to third parties may exist under international law or the domestic law of a particular state.

b) Whether or not member states have concurrent or secondary liability for the fulfilment of such obligations is a matter of international law.

This is so whether a claim by a third party occurs in a national court or in international tribunals

Article 5

A third party having contractual dealings with an international organization is deemed to have familiarity with its constituent instrument, including any amendment thereof. Any provisions in that organization's constituent instrument, or amendment thereto, concerning the liability or otherwise of the states members are opposable to such a third party.

Article 6

a) There is no rule of general international law whereby states members are liable, concurrently or secondarily, for the obligations of an international organization of which they are members.

b) Without prejudice to the generality of this provision, no liability for a state arises by virtue of :

- having participated in the establishment of an international organization to serve its own purposes ;
- membership in an international organization ;
- the fact that the organization engages in commercial or trading activities ;
- the fact that the act of the organization giving rise to its liability to a third party is *ultra vires.*

c) No evidence of a general rule of international law providing for liability of states is to be deduced from the fact that some constituent instruments make specific provision for the limitation or exclusion of such liability.

d) No evidence of a general rule of international law providing for the liability of states is to be deduced from the practice relating to the dissolution of international organizations.

Article 7

A wrongful act by a state member of an international organization engages its own international responsibility but does not render it liable for the obligations of the organization to third parties.

Article 8

The question of the liability of the members of an international organization for its obligations is determined by reference to the provisions of its constituent instrument and the intention there revealed.

Article 9

A state may also incur liability :

a) if, notwithstanding the separate legal personality of an international organization, its volonté distincte from that of the state concerned does not exist in reality ;

b) if the international organization has acted as its agent, in law or in fact.

c) through unilateral undertakings of guarantee in a given case.

Article 10

Any liability or otherwise of member states for the obligations of the international organization applies to contractual and tortious liability alike

Part B

Article 1 (Article 11)

Important considerations of policy, including support for the real independent functioning of international organizations, militate against the development of a general and comprehensive rule of liability of member states for the obligations of international organizations to third parties.

Article 2 (Article 12)

1) Important considerations of policy also entitle third parties to know, so that they may freely choose their course of action, whether in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the organization alone or of the members jointly or subsidiarily. Accordingly, international organizations established hereafter should specify the position regarding liability *either* :

a) In its constituent instrument, financial regulations, contracts, resolutions, etc.
or

b) In communications made to the third party prior to the event or transaction leading to liability ;
and

c) In response to any specific request to any third party for information on the matter.

2) Member states should be allowed to exclude or to limit their liability for the obligations of the organization, provided that such limitation or

exclusion is specified in appropriate detail, in accordance with the provisions of paragraph 1 above. This is without prejudice to the duty of member states at all times to pay their assessed and apportioned contributions, or share capital, as the case may be.

3) A failure so to specify should in the future be taken as an implied acceptance of such liability by the states members.

Article 4 (Article 14)

The obligation of a member state to put an international organization in funds to meet its obligations should be proportionate to its contribution to the regular budget or to its working capital, as the case may be.

Article 5 (Article 15)

All international organizations established hereafter should contain provisions in their constituent instruments for the discharging of outstanding liabilities upon their dissolution. Where the obligation is that of the organization alone, upon the extinction of its legal personality there should be a first call upon its assets for the purpose of discharging such obligation. A failure to specify arrangements in the constituent instrument should be taken as an implied acceptance by the states members that the duty to discharge outstanding obligations falls upon them.

Article 6 (Article 16)

Where liability of member states is provided for, the constituent instrument should provide for :

a) international arbitration or other binding mechanism to resolve any dispute arising between the organization and a member state over the liability of the latter to put the former in funds ;

b) international adjudication or international arbitration or other binding mechanisms to resolve any dispute arising between state members over the liability of any or all of them to put the international organization in funds.

May 1994

Réponses et observations des membres de la Commission

1. Réponse de M. Ignaz Seidl-Hohenveldern

June 1st, 1994

Dear Rosalyn,

Many thanks for your letter of 18 May, 1994. I have just received a review copy of a book by Matthias Hartwig, *Die Haftung der Mitgliedstaaten für Internationale Organisationen*. However, I believe you are interested in my first impression on your 2nd Draft of the Resolution, so I don't wait until I have reviewed the book. Reading it may prompt me to make some additional remarks but I promise you that I will not make another volte-face.

Unfortunately my duties as member of the Bureau did not enable me to participate fully in the meetings of our Commission. I therefore fail to understand what situation is referred to in Article 7. What link is there between the wrongful act of a State member (any act whatsoever ?) and its liability for the obligations of the organization to third parties. How can an act of a State create an obligation of the organization, which, in turn, would render that State liable for its share in this obligation of the organization ?

I would recommend to delete the two first items in Article 6 (b). The first item appears to be almost contradicted by Article 9 (a). Moreover, if the case is not covered by Article 9 (b), then I believe a claim may still be brought against the member State for having abused its rights. The *abus de droit* is a separate notion to be invoked irrespective of the general rules on liability which our Commission aims to set up. The second item merely repeats what is said in Article 6 (a).

I may be due to neophyte zeal that I have misgivings about Article 13 (3). To me, it appears to accept *de lege ferenda* State liability for acts of organizations in case of silence. What then becomes of the important reasons of policy mentioned in Article 11 ? These policy considerations had made me change my original views. However, I *could* accept Article

13 (3) if you simply delete Article 11, as some other members have asked you to do anyhow.

With best personal regards,

Yours,

Ignaz Seidl-Hohenveldern

2. *Réponse de M. C. F. Amerasinghe*

June 3, 1994

Dear Rosalyn,

Thank you for your letter dated May 18, 1994 which I received early this week. I am sending you my comments on your revised resolution. I am afraid I did not have the opportunity of really commenting on the first draft because I left Milan early. However, I hope you find my comments useful. I am looking forward to seeing your final report.

As you may infer from one of my comments, I have written an article on « International Personality » which I have submitted to the *ICLQ*. If it is not published there I shall certainly have it published elsewhere. If you are interested I can send you a copy of the typescript.

I hope to hear from you soon. Warm regards.

Yours sincerely,

C. F. Amerasinghe

Comments

1. I suggest that Article 1 which contains definitions should be separate from Parts A and B as it is relevant to both parts. Should there be three parts, A, B and C — with Part A containing only Article 1 ?

2. Article 2 (a) — I would prefer the last phrase to read :

> « or by necessary implication by reference to its structure, purposes, powers and functions «. I have elaborated my views in an article to be published shortly. See also Seyersted, Brownlie and Rama-Montaldo in their writings.

3. Article 2 (b) — The evidence referred to consists of acts at the *municipal law level* which should not be relevant as such to international personality. I wonder whether this is evidence in fact. I would say that

«the capacity to enter into treaties» is certainly evidence, but otherwise it is unnecessary to specify «contracts, etc. ...»

4. Article 6 (a) — should not this read «There is no rule of general international law whereby states members are *per se* ...» ?

5. Part B, Article 2 (Article 12) — I suggest we have a *chapeau* stating that the whole article applies to organizations *established hereafter.*

6. Part B, Artticle 2 (1) (b) and (c) — We have to be careful here. Such communications and responses will be given by individuals who are staff members of the organization. How far can *ultra vires* or fraudulent statements bind members ? There may be fraudulent and some *ultra vires* statements at least that do not. Is not this a problem or is it understood that this exception applies ?

7. Part B, Article 2 (Article 12) - paragraphs (2) and (3) — The reversal of the presumption of non-liability in paragraph (3) makes paragraphs (1) and (2) look awkward. I am not sure the presumption should be reversed. Perhaps paragraph (3) should be omitted or reformulated, if the presumption is not reversed. If the Commission decides to leave it in, then paragraph (1) should be formulated as requiring *non-liability* to be disclosed, failing which liability would exist. Then paragraph (2) would have to be looked at again —parts of it may be superfluous.

8. Part B - Article 4 (Article 14) — I would assume that this article does not purport to impose on member states obligations which are not contained (expressly or impliedly) in the constituent instrument but refers only to the apportionment of what they are under an obligation to pay. In any case should not this article also state clearly that in the absence of an indication to the contrary, in the constituent instrument, member states must keep the organization in funds so that it can discharge its obligations. Article 5 (Article 15) seems to contain such a provision but this covers only dissolution.

3. *Réponse de M. Karl Zemanek*

21 June 1994

Dear Professor Higgins,

Thank you for your circular letter of 18 May and the attached revised draft resolution. Congratulations on a splendid piece of work.

I have no problem with Part A, but following are a few comments on Part B.

Article 1 — I share your preference that the article should stay, if possible.

Article 2 — I wonder whether one should not be bolder and recommend that points (b) and (c) should also be adhered to by *existing* international organizations and not only by those which will be *established hereafter*. Paragraph 3 may perhaps be construed to suggest that but the second sentence of paragraph 1 seems to militate against it.

Article 3 — Since my copy of your new draft has no article 3, I interpret the slightly criptical phrase in your letter to mean that you dropped the article altogether.

That leaves paragraphs 2 and 3 of article 2 and article 4 somewhat dangling, because the *existence* of the obligation of member states to put the organization in funds for meeting its obligations, be it limited or unrestricted, may be deduced but is not explicitly stated. An appropriate indication, perhaps at the beginning of paragraph 2 of article 2, would be helpful.

Article 4 — No observation.

Article 5 — I wonder whether that last sentence should not indicate either that article 4 applies, or else how the duty should be shared.

Article 6 — No observation.

In case it should not yet have come your way, may I draw your attention to a book which appeared recently in German :

Matthias Hartwig : *Die Haftung der Mitgliedstaaten für Internationale Organisationen* (Responsibility of Member States for International Organizations). Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht ; Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 111. Springer Verlag, Berlin, etc. 1993 (with an English Summary). It comes, by and large, to the same conclusions as you did in your reports and draft resolutions.

With warmest regards,

Yours,

Karl Zemanek

4. *Réponse de M. Henry Schermers*

27 June 1994

Dear Rosalyn,

Thank you for your letter of 18 May. I hope this reply will reach you in time. I should have replied from Leiden but there I did not find the time because of examinations, three doctorates and all the usual end of the year business.

First I should make the following comments on the draft resolution.

Ad Article 1 — purely as a matter of logic. In Article 2 (a) you explain when an international organization possesses international legal personality. That suggests that there are (or at least can be) also international organizations that do not possess legal personality. Also the formulation of Article 3 suggests that there may be organizations without international legal personality. In fact, the European Union is an example. According to my Brussels spokesman the Union has no international legal personality (that remains with the three Communities). If — under Article 1 (a) — international personality is a requirement for being an international organization, then the system is inconsistent. Under Article 1 (a) all international organizations have international personality —otherwise they are not an «international organization» — under articles 2 and 3 there may exist international organizations which have no international legal personality. In your structure you should delete the words «and having international personality» from Article 1 (a) as that question is treated by Article 2. I would like to add another criterion to Article 1 (a) in order to exclude intergovernmental institutions of a purely commercial nature, something like : «and having a governmental task», or : «and acting *jure imperii*», but that might substantially change the scope of the text and I understand full well that you do not want to do that. Also, such a criterion would be unclear in practice and may lead to confusion.

Ad Article 3 — If you do not change the definition of Article 1 (a), then Article 3 should read : «(As they possess their own international personality) international organizations are liable for their own obligations towards third parties».

Ad Article 5 — Maybe it is superfluous, but in theory you should add : «provided that they have been duly published or expressly brought to the attention of that party».

Ad Article 6 — I find paragraph (a) tendentious. It is true, of course, but by writing it this way you suggest that under international law states members are *not* liable for obligations of the organization. As

a general rule that is not acceptable, nor true either. Especially when the organization performs a purely governmental task ; states cannot contract away their liability by attributing state functions to an international organization. Are not 6 (b), (c) and (d) enough for this article ?

I do not quite understand the purpose of *Article 7*. Is there anybody who submits that a wrongful act by a state would render that state liable for obligations of an international organization ? If the state commits the act on behalf of the organization then -indeed - the state is not rendered liable. If the state does not commit the act on behalf of the organization then there will be no obligations of the organization. Could you offer an example of the situation you had in mind ?

Article 12 (2) may lead to misunderstanding. Let us assume that under 12 (1) the organization has made known that its members are jointly liable for all its debts. On that presumption banks will be willing to lend money at a low rate of interest (they incur little risk). If then, at a later date, the US announces that it excludes its liability (under 12 (2)) then I see a problem. In other words, should we not say how and when that exclusion of 12 (2) is to take place ?

Article 15 does not fully cover the problem. When an organization becomes superfluous or undesirable, members may withdraw from it. If there are large debts many may withdraw fast. Finally two or a few members remain and they decide to dissolve the organization. Should there not be a provision that also the members which withdrew less than a year before the dissolution have to pay part of the debts if there are no specific provisions ?

I hope that these remarks are of any use to you and I wish you success in the final drafting.

With my best regards,

Yours ever,

Henry Schermers

5. *Réponse de M. Budislav Vukas*

30 June 1994

Dear Professor Higgins,

I hope that these remarks come still on time and that they can be of some help for your final touch of the Draft Resolution.

Please, excuse me for some comments I should have done earlier, but our meetings in Milan were my first contact with the Commission. It is only now — recalling our discussions in Milan and reading your revised draft — that I make the remarks other members of the Commission were in a position to make earlier.

Dear Colleague, I wish you a successful completion of your work — but without any harm for your summer holidays.

Yours sincerely,

Budislav Vukas

Part A :

Article 1

(a) I The task of the Commission is to analyse the legal consequences for member States of the non-fulfilment by international organizations of their obligations towards third parties. The term «member States» has been used throughout the Draft Resolution. Therefore, if the scope of the Resolution are organizations composed only of States, there is no valid reason for not defining an international organization as «an organization of States», as proposed by F. Seyersted in Milan.

The expression «intergovernmental institution» is vague and could cause different queries in the context of our Resolution. The word «intergovernmental» is satisfactory and useful only for making organizations we are dealing with distinguishable from non-governmental organizations. However, the distinction is not a topical issue in our present work. «Institution» is too broad an expression to be used as a quasi-synonym for «organization».

II. It could be argued in respect of every single element of the definition of an international organization that it is superfluous (*i.e.* establishment by treaty, international legal personality, etc.). Yet, I would support Professor Seyersted's proposal to say that an international organization «has its own organs».

III. There is an inconsistency in the present Draft regarding the international legal personality of international organizations. In Article 1 (a) international (legal !) personality is made an intrinsic element of the definition, *i.e.* of the notion of an international organization. On the other hand, Article 2 (a) leaves open the possibility that an international organization does not possess international legal personality. According to the Draft, this will be the case when neither the constituent instrument of the organization provides for its international legal personality, nor its personality is necessarily implied by reference to its powers and functions.

Here again (Article 1 (a)), I would prefer to have international legal personality expressly mentioned as an element of the definition of an international organization.

Article 2

(a) Having in mind the remarks under Article 1 (a) III, in my opinion Article 2 (a) is not necessary. If, for the sake of completeness a first provision is necessary in Article 2, the first part of the text proposed by the Rapporteur in Milan could be used. (An international organization possesses international legal personality as a matter of customary international law).

(b) In accordance with my basic position expressed above, all what has been enumerated in this provision is not «evidence» of international legal personality, but the consequence of the possession of personality or, even better, components of international legal personality.

Article 3

For reasons explained above, the words «possessing their own international personality» should be deleted.

Article 5

Is the constituent instrument (and amendments thereto) the only possible source of rules concerning the liability of States members ? If not, should not a third party having contractual dealings with an international organization be familiar with other constitutional provisions in the field, which are not necessarily contained in the constituent instrument ?

Article 7

The second part of this Article (but does not ...) leaves the impression of being the general (negative) answer to the question set out in the title of the Resolution and thus being contrary to the following Articles (8-10).

Article 8

In addition to the constituent instrument, the question of liability could be determined by other relevant constitutional rules of the organization or by instruments (treaties) accepted by the organization.

Article 10

The present formulation leaves the impression that the relevant constitutional provisions cannot regulate differently the contractual and tortious liability of member States.

Part B

Article 1 (11)

I have some doubts concerning the strong and general position taken in this Article. Why should for example the rule concerning subsidiary liability of member States be contrary to the independent functioning of international organizations ?

Article 2 (12)

(2) Why should the Resolution encourage the exclusion or limitation of the liability of (individual) member States ?

Article 5 (15)

As international organizations are established for an undetermined period of time —in the intention of their founders forever — it seems odd to ask States establishing new international organizations to regulate problems which could arise at the time of their dissolution.

Article 6 (16)

(a) and (b) — Instead of «other binding mechanisms» I would propose «other mechanisms (or procedures) entailing binding decisions». Namely, an instrument can provide for binding conciliation, but I suppose this would not in our case be an alternative for international adjudication or international arbitration.

6. *Réponse de M. Oscar Schachter*

July 5, 1994

Dear Rosalyn,

Thank you for your letter of May 18 and the enclosed draft of a resolution for the Fifth Commission of the Institute.

I agree with the basic legal conclusion that there is no general rule of liability of member States. I also concur generally with the substance of the revised draft. However, I have some doubts about a couple of substantive points as well as minor drafting changes.

The concept of *volonté distincte* as used in Articles 2 and 9 might easily give rise to some confusion about whether an organization has a separate «will» when it is dominated by one or a few members. I suggest dropping the somewhat metaphysical concept of «will» from Article 2, replacing the phrase «the existence of a *volonté distincte*» with «the adoption of organizational decisions».

The reference in Article 9 is even more troubling. As proposed, it could reasonably be read to mean that, if in a given case, the «will» (*i.e.* the position) of a member State is not «distinct» «in reality» from the will of the organization that State would incur liability notwithstanding the separate legal personality of the organization. I doubt that you mean to take that position. In my opinion, paragraph (a) of Article 9 should be deleted.

I have some minor drafting suggestions in the paragraphs in Part A.

Article 5, line 2 : I suggest replacing «familiarity with» by «knowledge of».

Line 4 — the expression «or otherwise» may be deleted since the phrase «concerning liability» would refer to the provisions negating as well as supporting liability.

(Article 10 raises a similar drafting point).

With respect to the articles in Part B, I have the following comments.

Article 1 : I wonder about a general policy of «support for the real independent functioning of international organizations». My reaction is «it depends». My suggestion would be to drop the phrase.

Article 2, paragraph 3. I think this goes too far in imposing liability based on the absence of a limitation or exclusion clause. Is it entirely consistent with the policy expressed in article 1 ?

I note the absence of an Article 3 of Part B.

Article 4 makes good sense as a general rule but when one considers the diversity of international organizations, it would be preferable to recognize that organizations may have different rules for assessing members to meet actual or potential defaults. I would suggest a phrase such as «In the absence of a contrary provision in the constituent instrument or rules of the Organization ...»

I note the expression in Article 4 (ans also in article 6) on the obligation of a member «to put the organization in funds». It is not a phrase found generally in international organization texts. An alternative in Article 4 would be «the obligation of a member State to make financial payments to an international organization to meet the latter's obligations should ...» etc.

In Article 6(a), the last phrase might be «the liability of the latter to make financial payments to the organization».

A similar change could be made in paragraph (b) of Article 9.

I look forward to your final report and the eventual adoption of a resolution at the Lisbon session.

With warm personal regards,

Sincerely,

Oscar Schachter

7. *Réponse de M. Riccardo Monaco*

13 juillet 1994

Chère Collègue,

Je vous prie de bien vouloir accepter mes plus vives excuses pour le retard avec lequel je réponds à votre lettre du 18 mai dernier.

Je suis heureux de constater que la Cinquième Commission de l'Institut affrontera cette fois sa tâche de façon définitive afin d'être prête pour la session de Lisbonne. Comme vous le savez, ma participation aux travaux de la Commission a été jusqu'à présent peu active. A la session de Milan par exemple, le fait que les réunions de la Cinquième Commission coïncidaient avec celles de la Commission des travaux m'a souvent empêché d'être présent. Vous voudrez bien m'en excuser.

Parmi les documents que j'ai reçus, le plus important est évidemment votre deuxième projet de résolution. Je vous livre à ce propos quelques-unes de mes réflexions.

Article 4

En ce qui concerne l'article 4 (b) du projet en vertu duquel la détermination de la responsabilité concurrente ou secondaire de l'organisation internationale pour l'accomplissement de ses obligations est une question de droit international, j'ai quelques doutes. En effet, si la question est soulevée devant un tribunal national, les juges pourraient estimer que, sous cet aspect, un problème déterminé peut être résolu sur la base du droit national.

Article 5

Je suis tout à fait d'accord avec la solution retenue dans cet article, en ce sens que l'on puisse opposer à un tiers toute disposition à caractère institutionnel qui sanctionne ladite opposabilité.

Article 6

Je suis en partie d'accord avec les dispositions de cet article.

Par ailleurs, on préfère la lettre d) de cet article à la pratique en matière de dissolution ou cessation d'organisations internationales. Pour autant que je sache, l'on peut douter qu'une pratique se soit formée à cet égard et puisse donc éventuellement être suivie ; mais, si tel est le cas, on ne pourrait pas en faire abstraction. D'autre part, dans un domaine comme celui-ci où les normes expresses sont rares, il me semble inopportun de nier une quelconque importance à une telle pratique.

Article 8

On préfère cet article à l'hypothèse dans laquelle il existe, dans l'acte constitutif de l'organisation, des règles en matière de responsabilité des Etats membres ; dans ce cas il est évident que, à des fins d'interprétation, il faut tenir compte de la volonté qui ressort de l'acte constitutif.

J'ai l'impression que l'idée sous-jacente de cet article est de vouloir réglementer la matière de façon complète.

Articles 9 et 10

Je suis tout à fait d'accord avec le texte des articles 9 et 10.

Article 11

La référence aux considérations importantes de politique est peut-être nécessaire, bien que cet article dépasse le cadre d'une réglementation strictement juridique à laquelle il semblerait opportun de se tenir.

Article 12

Je suis tout à fait d'accord sur l'utilité des alinéas a), b) et c).

Article 14

Le critère de la proportion en ce qui concerne les contributions des Etats membres au fonds de l'organisation pour faire face à leurs propres obligations me semble tout à fait acceptable.

Article 16

Je partage pleinement le fait d'indiquer des systèmes visant à résoudre les controverses relatives aux allocations des Etats membres des fonds pour répondre à la détermination du montant pécuniaire de la responsabilité.

Voici mes premières réactions face à ce nouveau projet de résolution. Il est clair que j'espère pouvoir donner des réponses plus pertinentes et plus approfondies après avoir pris connaissance des réponses des autres membres de la Cinquième Commission.

En vous priant à nouveau de bien vouloir excuser mon retard, je vous prie de recevoir, chère Collègue, mes hommages respectueux.

Riccardo Monaco

8. Réponse de M. Ibrahim Shihata

July 25, 1994

Dear Rosalyn,

I wish to thank you for your letter of May 18 and to apologize for my delay in answering it.

The second draft goes a long way in meeting the concerns expressed by me and other members with respect to the first draft.

My comment on Article 2 (a) and (c) of Part A remains the same. I do not believe that any two States have the power to confer an international legal personality which is oposable to all States as a matter of international law. For instance, if two riparian States establish an international organization to deal with international law issues regarding a river which passes by the territories of ten States, the international legal personality of that organization would in my view be opposable only to the other riparians which recognize such personality, expressly or implicitly, and not to all riparians. I note our disagreement on this point, however.

As a drafting point, I would delete « also « from the first line of Article 9 (Part A).

As far as Part B is concerned, I am in full agreement with the new draft except for Article 2 (3). In its absolute language, this position renders a State liable in the future for the acts of the organization if the organization (not the State) fails to specify the position on State liability. In other words, State liability will be based on the failure of the organization to specify, and not on any failure on the part of the State. This would have been acceptable if it were reasonable to assume that all States are cognizant of our resolution and accept it as law. As this cannot in my view be a valid assumption, a provision creating State liability only on the basis of the failure of the organization to specify the situation strikes me as indefensible. As you know, I proposed a redraft of that

provision in my letter of November 9, 1993[80]. As you found that redraft unacceptable because it « would again introduce uncertainty «, I hope you may find another way of addressing the point.

With my best wishes and warm personal regards.

Ibrahim Shihata

9. *Réponse de M. Michel Waelbroeck*

August 10, 1994

Dear Colleague,

Please find herewith my reaction to your letter of 18 May 1994. I am sorry I did not send it to you earlier.

As a general matter, I wonder whether it is advisable to try to resolve the question of whether there is a rule of international law whereby states members are liable for the obligations of the international organization to which they belong. I am afraid that this will provoke endless discussions between those who, like you (and possibly a majority of the members of our Commission), give a negative answer and those (like our colleagues Schermers and Seidl-Hohenveldern, as well as myself), who believe that the answer is in principle positive. Moreover, there is no way in which an authoritative answer can be given. It is a question of «intimate conviction». It may be begging the question, as you say on page 29[81] of your Report, to say that in the absence of any provision of international law excluding the liability of states members, this liability subsists. However, I am afraid that the absence of a rule of international law providing that states members are liable shows that they must be considered not to be liable is equally question-begging.

Another reason for refraining from attempting to resolve the point of principle in the first part of the resolution is that, in the second part, and espacially in Article 2 (Article 12), it is stated that a failure to exclude or limit liability in the constituent instrument should be taken as an implied acceptance of such liability by the states members. It seems to me that it would be contradictory to maintain that position if we consider that, as a matter of principle, there is no rule of general international law providing for such liability. True, the statement in

80 Voir *supra*, p. 425.
81 Voir *supra* p. 392.

Article 2 (12) is qualified by the words «in the future». Nevertheless, I wonder whether this is sufficient to remove the contradiction.

Another general remark I have concerns the meaning of the words «concurrent» and «secondary» liability in Article 4 (b). These are nowhere defined. In the Report, you speak (on page 14)[82] of «concurrent or residual liability» : is this the same thing ? Am I right in interpreting these words as meaning :

- (as regards «concurrent») : that third parties having a claim against the international organization may direct their claim, at their choice, either against the organization or against its members, and
- (as regards «subsidiary» or «secondary») : that third parties must, as long as the organization is able and willing to discharge its obligations, direct their claim against the organization, and have a remedy against the states members only in case of default by the organization.

I believe that clarification of these two concepts would be useful. Indeed, I believe that all would agree that there is no «concurrent» liability (within the meaning thus defined) of states members, although there may be «subsidiary» or «secondary» liability.

So much for those of my remarks that have a general character. I also have a few more detailed comments on the articles of your new draft.

Article 1 (b)

I believe this would be clearer if the words «or members acting in a capacity other than that as a constituent part of the organization» were put in brackets. Indeed, with the current drafting, it is not clear from a grammatical point of view what the word «they» refers to : I believe it must be to «parties other than the organization itself» (and not to «members»).

Article 2 (b)

I am not convinced that the capacity to enter into contracts, to own property and to sue and be sued is evidence of *international* legal personality. Moreover, I wonder whether the notion of *volonté distincte* should not be defined.

82 Voir *supra* p. 382.

Article 4 (b)

I suggest (see above) that the concepts of «concurrent» and «secondary» liability should be defined.

Article 5

Is it really necessary to add the words «including any amendment thereof» ? Does not this go without saying ? (If it does not, then we should add these words also in Articles 6 (c), 8, etc., which would make the drafting rather cumbersome).

Article 6 (a)

For the reasons indicated above, I suggest saying : «General international law does not establish clearly whether states members are...».

If that change is accepted, paragraph (b) should start as follows : «In particular, no presumption of liability for a state arises by virtue of...».

Paragraph (c) would then be drafted as follows : «No evidence of a general rule of international law providing either for liability of states or for exclusion of such liability is to be deduced ...»

A similar amendment would be made to paragraph d).

Article 7

I suggest inserting the words «by itself» in the second line, after «but does not» and before «render it liable». Indeed, it is possible that a wrongful act of a state could be an element which, together with others, could render it liable for the obligations of the organization.

Article 8

Since several members (including myself) consider that liability of states members may result from other elements than the provisions of the constituent instrument, I suggest drafting this as follows :

«The liability (whether concurrent or secondary) of the members of an international organization for its obligations may result from the provisions of its constituent instrument and the intention there revealed».

Article 9

Should we not clarify whether the liability we are referring to here is concurrent, secondary or possibly both ?

Article 10

What is meant by «Any liability *or otherwise*» ?

Article 1 (Article 11)

I would agree with this if it were specified that the liability to which we are referring is «concurrent» liability.

Article 2 (Article 12) paragraph 1

In the fifth line, maybe the text would be clearer if the words «also those» were inserted between «alone or» and «of the members».

Paragraphs 2 and 3

I have already alluded to the apparent contradiction between those provisions and that of Article 6.

Article 3 (Article 13)

I understand from your letter that it has been decided to drop the reference to an obligation imposed by international law on states members to put the international organization in funds to meet its obligations to third parties. I find this regrettable.

Article 5 (Article 15)

You refer in the second sentence to a «first call» upon the organization's assets. Does this imply that there can be a «second call» on the states members ? Or is this only so (as the third sentence seems to imply) where the constituent instrument is silent on the question ? Or is the third sentence to be interpreted as meaning that, where the constituent instrument is silent, third parties have a first call on states members ? Personally, I would not go so far as this last possibility. Perhaps the text could be clarified.

With kind personal regards,

Yours sincerely,

Michel Waelbroeck

10. Réponse de M. James Crawford

September 14, 1994

Thanks for your letter of 18 May 1994. I am sorry for the dreadful delay in replying.

I have a number of verbal comments in relation to the draft Resolution. The substantial points are as follows.

Part A

Article 2

I do not think it is the task of our Commission to define when an international organization has legal personality. That is an important issue, but for our purposes it is sufficient to assert that some international organizations do have international legal personality which is opposable to third parties. Can the substance of Article 2 to in a commentary ?

Article 5

The language «deemed to have familiarity with» raises a number of difficulties. First of all there is always the problem whether a deeming clause creates a rebuttable or irrebuttasble presumption. If the former it should say «presumed» ; if the latter it should state what the consequences of the situation are without using the word «deemed». An irrebuttable presumption is simply a rule, and should be framed as such.

I am firmly of the view that this ought to be a rebuttable presumption, not a rule. I do not see why members of the public should have automatic notice of the provisions of the constituent arrangement of an international organization, for example where it has not been published and may even be secret. So in my view the first sentence should read «is presumed to have notice of».

I also think that the rule in the second paragraph is stated too categorically. It seems to me it is a matter for the proper law of the contract to determine what the consequences are of the notice which third parties may have of the constituent instrument of the organization. I realize you do not accept a proper law analysis of the problem, so I doubt that this second suggestion will be acceptable. But if we are not to introduce a proper law approach, my second preference would be to see the second sentence in the commentary, as a corollary of the first sentence which would stay in the Article.

I agree with the formulation of Article 5 in terms of parties «having contractual dealings with» an organization, so that the rule is not formulated exclusively in terms of concluded contracts. That seems to me to reinforce the view that Article 5 should state a presumption and not a rule.

If the Commission concludes that it should be a rule, it should read «A third party having contractual dealings with an international organization has notice of ...».

Article 6

I like your negative formulation in paragraph (a).

In paragraph (b), I would prefer to say that «No liability for a state arises *merely* by virtue of ...» I would not in all circumstances (*e.g.* fraud) exclude the possibility of liability of member states, and the facts referred to might be relevant, with others, in establishing such liability.

It seems to me that paragraph (c) should be deleted as it is one of the reasons for affirming paragraph (a) and not a separate proposition. It should go in the commentary. Similarly with paragraph (d).

Article 8

In my view it only makes sense if it is dealing with the position of the liability of the members in international organizations as between themselves. Otherwise the tendency is for Article 8 to contradict the other provisions, or at least to state a parallel rule.

Article 9

It is obviously a crucial Article. First of all I notice that you state the rule in respect of states generally and not just member states. On balance I think that is right, certainly for paragraph (b) and (c) and probably also for (a). However we do not say to whom the state may incur liability, and in order to separate the issue of the position of third parties (which is after all what we are dealing with) from the question of liabilities *inter se* I think it should read : «incur liability to a third party».

The *chapeau* uses the word «also», but I do not see why. This seems to me to be a primary rule which follows on a series of propositions of a largely negative character. It is true that from the combination of Articles 5 and 8 (should these be more closely related to each other ?), one may be able to derive liability in a given case. But I think the word «also» without explanation tends to confuse. Perhaps we should say that this form of liability is secondary to liability arising under Articles 5 and 8. But in fact I think the liability is simply independent and for that reason also the word «also» should be deleted.

As to paragraph (a), I agree that there should be an exception not based either on agency or guarantee, but I am not sure about its formulation. Is paragraph (a) intended to deal with the situation where in fact a single state is the «directing mind and will» of an international organization, and if so what does this cover ? In the case of many international organizations one or another state is the «key player», but does that mean that the organization does not have a *volonté distincte* ?

Can we find an English word to express *volonté distincte* (which would of course appear in the French text) ? This paragraph needs some further elaboration : at present it indicates that there is an exception without making clear the scope of the exception.

I agree with the other two exceptions. But I would delete the words «in law or in fact» from paragraph (b), as we want to avoid reintroducing the whole debate under the aegis of the «constitutional agency» argument. One can only be an agent of another as a result both of the facts *and* of the law.

Article 10

I thought initially that the earlier Articles were dealing with contractual liability but I see from a more careful reading that this is not the case : Article 5 is concerned with «contractual dealings», which is equally consistent with the subsequent claim being brought in contract or delict, and indeed with there not being a concluded contract at all.

However there is still a slight problem with Article 10 in that it might be thought to imply that there is no difference between contractual and delictual liability of member states for the acts of international organizations, which is not necessarily the case. As a result of Article 5, wherever a claim (whether in contract or delict) arises from a contractual dealing, the likelihood is that under these rules the member states will not be secondarily liable. The position with respect to torts not arising out of contractual dealings may be different. I wonder whether some other way of formulating Article 10 might be found ? For example, could we say : «these articles apply both to contractual and delictual claims». (The word «delictual» is preferable to «tortious», which is a common law term).

Part B

I agree entirely with *Article 11.*

Article 12

The structure of Article 12 (either (a) or (b) and (c) is rather awkward. In either event I would apply paragraphs (b) and (c) to existing international organizations and not limit them to new ones.

Paragraph (2) should read : «Member states may, in accordance with the constituent instrument of the organization, exclude or limit ...»

Paragraph (3) does not say what «such liability» is. Presumably we mean secondary liability for the contractual and tortious obligations of the organization towards third parties, in which case we should say so. We should also make it clear that this liability is secondary : it is only where

the organization fails to meet its obligations that the issue of the liability of member states to third parties should arise. This means, *inter alia*, that third parties should be under an obligation to exhaust available remedies against the organization.

Article 14.

This provision should be stated to be subject to any provision to the contrary in the constituent instrument of the organization.

The final words of *Article 15* should state : «will fall upon them in the event of the dissolution of the organization».

Article 16

This does not deal with the position of third parties at all, which is curious having regard to the title of the Commission and its primary focus on third parties. No doubt there would be difficulties in requiring international organizations, or the parties to such organizations, to provide a form of mixed international arbitration with respect to claims of third parties. But Part B is, apparently, all *de lege ferenda*, and therefore we should consider the issue of remedies for third parties. One possibility is to introduce a rule that the immunity of an international organization from the jurisdiction of national courts should be conditional upon the availability to third parties of an appropriate alternative means for the settlement of disputes with respect to the contractual and tortious liabilities of the organization.

I look forward to the debate on the Resolution.

With best wishes,

Yours sincerely,

James Crawford

11. Réponse de M. Jean Salmon

6 octobre 1994

Article A 1(a)

Je crois comprendre que toute la résolution repose sur l'existence dans le chef de l'organisation internationale d'une personnalité juridique distincte de celle de ses membres. Mais ceci se réalise que la personnalité juridique distincte soit internationale ou interne, c'est-à-dire se situe dans

l'ordre international ou dans l'ordre juridique interne d'un Etat quelconque (en ce sens l'article A4).

En conséquence ne serait-il pas préférable d'écrire, à la fin du paragraphe, « ayant une personnalité juridique distincte de celle de ses membres» plutôt que «ayant une personnalité internationale» ?

Article A 1(b)

Ce paragraphe appelle de ma part deux observations.

En premier lieu, je ne suis pas convaincu que les mots «ou les membres agissant en qualité autre que celle de partie constituante de l'organisation», dont l'addition a été proposée par M. Schermers, répondent entièrement aux préoccupations de ce dernier. Dans l'exemple donné par lui, on ne peut traiter différemment un affrètement de navires par l'ONU en vue d'une opération de maintien de la paix, qu'il soit effectué avec l'Italie (Etat membre) ou qu'il soit effectué avec la Suisse. Si l'Italie répond à un appel de coopération lancé aux Etats membres comme aux Etats tiers n'agit-elle pas cependant comme « partie constituante de l'organisation» ? La préoccupation de M. Schermers ne serait-elle pas mieux rencontrée par les mots « n'agissant pas à titre d'organes de l'organisation». Lorsqu'ils agissent comme organes, les Etats membres ne sont pas tiers ; ils sont l'organisation elle-même.

En second lieu, les relations entre ce paragraphe et l'article A9 sont difficiles àarticuler. Un Etat membre, agissant comme organe, peut néanmoins être tenu des actes de l'organisation dans les hypothèses envisagées à l'article A9.

Dès lors ne serait-il pas plus heureux de rédiger l'article A1 (b) de la manière suivante :

> « l'expression «tiers» signifie une personne juridique autre que l'organisation elle-même, qu'il s'agisse de personnes privées, d'Etats ou d'organisations.
>
> Les Etats membres d'une organisation internationale sont tiers par rapport à celle-ci, sauf lorsqu'ils agissent comme organes de celle-ci, sans préjudice des dispositions de l'article A9 ci-dessous».

Je propose incidemment — pour le texte français — le remplacement du mot «partie» (*party* utilisé seul) par «personne juridique», en effet le mot «partie» ne convient, en français, que dans une relation contractuelle ou juridictionnelle. Il ne convient pas dans une relation quasi-délictuelle. L'expression «*third party*» se traduit par «tiers». «*Third party liability*» = «responsabilité à l'égard des tiers».

Article A 2

Dans son état actuel cet article traite en réalité de deux personnalités juridiques distinctes de l'organisation : la personnalité juridique internationale et la personnalité juridique interne.

Le paragraphe (a), qui traite de la personnalité internationale, n'appelle pas d'observation de ma part.

Le paragraphe (b) propose des présomptions de personnalité juridique propre de l'organisation. Toutefois, contrairement à ce que prétend le texte, j'ai le sentiment que les caractéristiques proposées sont plutôt des présomptions de personnalité juridique interne (*municipal*) que des présomptions de personnalité juridique internationale. Ce qui serait une présomption de personnalité juridique internationale, c'est le fait d'être titulaire de droits et d'obligations, de compétences et de pouvoirs au sein de l'ordre international et les moyens de les mettre en oeuvre dans cet ordre (par exemple par des traités ou en ayant accès à des modes de règlement pacifique des différends de l'ordre international).

La source de ces deux personnalités peut certes être identique : le traité international qui a constitué l'organisation, ou une convention ou protocole sur les privilèges et immunités, ou encore un accord de siège. Ces traités prévoient souvent les éléments de la personnalité juridique interne : capacité de contracter, d'acquérir et de vendre des biens immobiliers et mobiliers et faculté d'ester en justice.

Le paragraphe (b) me semblerait donc plus correct si on remplaçait le qualificatif «international» par celui d'interne (*municipal*). Si vous estimez que ces capacités sont aussi des présomptions de personnalité internationale — ce dont je ne suis pas convaincu — le mieux serait alors de ne pas qualifier du tout de quelle personnalité il s'agit, comme le fait, par exemple, la convention sur les privilèges et immunités des Nations Unies (article premier, section 1).

S'agissant de l'opposabilité de la personnalité juridique d'une organisation internationale, j'estime qu'il convient de distinguer selon qu'il s'agit de personnalité de droit international ou de personnalité de droit interne.

Envisageons d'abord la personnalité juridique internationale, c'est-à-dire la capacité d'agir dans l'ordre international. Pour les Etats qui ne sont pas parties aux traités susvisés (traité constitutif, convention de privilège et immunités, accords de siège), je persiste àpenser que l'opposabilité de la personnalité ne peut être présumée. Sans doute une telle personnalité est le plus souvent reconnue implicitement par les Etats tiers, lorsque ceux-ci entrent en relation avec l'organisation en question ; mais il n'en va pas toujours ainsi. Qu'il s'agisse d'éloignement

géographique des Etats qui ont créé l'organisation, de localisation extrême des fonctions de l'organisation ou de marginalisation politique des Etats qui ont constitué l'organisation, il est des organisations qui ne sont pas reconnues par des tiers et avec lesquelles ces derniers refusent d'avoir des contacts.

Dans une telle situation — qui n'est pas sans précédent — je ne vois pas pourquoi un Etat tiers ne pourrait pas prétendre que les Etats membres de ladite organisation sont seuls responsables des actes de cette dernière dans l'ordre international (pour ses actes contraires au droit des gens). L'article A5 — à propos duquel je n'ai pas d'objection, car il traite de situations ou un tiers entre en relation contractuelle avec une organisation et, par conséquent le reconnaît — implique *a contratio* combien l'opposabilité de l'organisation aux tiers est une condition préalable indispensable à tout déclinatoire de responsabilité par les Etats membres. Supposons que des Etats organisent, par le truchement d'une organisation régionale non généralement reconnue, des lancements d'engins spatiaux ou la construction d'une centrale nucléaire ou d'un barrage, en prévoyant dans l'instrument constitutif la responsabilité exclusive de l'organisation en cas d'accident. Pourquoi les Etats tiers, victimes d'un accident, ne pourraient-ils pas se retourner contre les Etats membres de cette organisation s'ils ne reconnaissent pas cette dernière et en particulier si elle ne peut faire face à l'ampleur des dommages ?

Pour la personnalité de droit interne, le raisonnement est quelque peu différent. Pour déterminer la capacité de l'organisation, je pense qu'à défaut d'accord international liant l'Etat du for, le juge de celui-ci appliquera les règles de droit international privé sur la reconnaissance des personnes morales étrangères et se référera à la loi de l'Etat de constitution ou du siège de l'organisation. Comme cette loi sera normalement le reflet des traités susvisés (traité constitutif, convention de privilège et immunités, accords de siège) y compris leurs dispositions sur la capacité, la personnalité de droit interne sera en quelque sorte toujours acquise. Les exceptions admises par le droit international privé lui-même (double nationalité ou nationalité de l'Etat du for) semblent sans pertinence dans l'hypothèse qui nous occupe.

Concrètement cette distinction entre les deux personnalités n'est pas sans incidence sur la matière de la responsabilité. Il convient en effet de distinguer la responsabilité internationale (violation d'une obligation internationale) et la responsabilité de droit interne (responsabilité contractuelle ou quasi délictuelle [*tortious liability*]). Si la première ne dépend que du droit international, la seconde peut dépendre du droit interne d'un Etat particulier selon les règles du droit international privé, ou du droit interne de l'organisation ou d'accords internationaux particuliers.

Pour l'ensemble de ces raisons, j'avoue devoir maintenir mes réserves à l'égard du paragraphe (c) de l'article A2 que vous proposez.

Article A 4

L'article A 4 (a) reconnaît la dualité des sources : droit international et droit interne. Encore ignore-t-il le droit interne de l'organisation qui peut se trouver applicable dans certains cas, sauf si vous incluez ce dernier dans le droit international. Si telle est bien votre opinion, il serait utile de le préciser dans le rapport.

L'article A 4(b), tel qu'il est rédigé, me semble trop absolu. Il ne peut être exclu que le droit interne de l'Etat du for puisse prévoir une responsabilité subsidiaire de cet Etat. Ainsi, en matière de responsabilité en cas d'accident de roulage, certaines législations prévoient qu'au cas où la victime de l'accident ne peut être indemnisée par le responsable, un fonds étatique assurera automatiquement l'indemnisation de la victime. Cette hypothèse pourrait se réaliser dans le cas d'une organisation internationale non couverte par une assurance ou inadéquatement assurée et qui invoquerait son immunité de juridiction.

Si les mots «du fait de leur seule qualité d'Etat membre» étaient placés avant les mots «est une question de droit international», la phrase ne soulèverait plus cette objection.

Article A 6

Le paragraphe (d), s'il doit rester sous cette forme, devrait au moins être complété par l'idée inverse. Aucune preuve d'une règle générale de droit international prévoyant l'absence de responsabilité des Etats ne peut être déduite de la pratique relative à la dissolution d'une organisation internationale. A vrai dire, la pratique étant rare et indécise, on se trouve dans une situation de neutralité juridique, c'est-à-dire où un principe de succession n'est ni assuré ni controuvé.

Au surplus, ce n'est pas parce que la pratique est rare et indécise que, pour autant, on ne peut pas considérer que certaines règles juridiques *de lege lata* ne peuvent pas s'appliquer à la matière.

Il est incontestable que lorsque la personnalité de l'organisation internationale disparaît, la personnalité des Etats membres réapparaît, ne fut-ce que pour se partager l'actif selon des modalités à déterminer. Si l'actif demeure, il n'y a aucune raison de considérer que le passif s'éteigne du seul fait de la dissolution de l'organisation. Son sort devra aussi être décidé par les Etats membres.

Différents exemples peuvent être proposés à cet égard. Supposons un fonds de pension appartenant à l'organisation, mais créé au profit des

fonctionnaires de celle-ci ; est-il imaginable que ce fonds soit distribué aux Etats et que ceux-ci ne soient tenus d'aucune obligation à l'égard du personnel ? Supposons qu'une réclamation existe à propos d'un droit réel grevant un immeuble de l'organisation. Est-il pensable que cette réclamation s'éteigne, l'immeuble devenant la propriété de l'Etat sur le territoire duquel se trouve le bien ?

D'une manière générale, si les Etats membres recueillent un actif, ils ne peuvent guère échapper à l'obligation de contribuer à l'indemnisation des créanciers au moins au *pro rata* de cet actif, sous peine d'enrichissement sans cause.

Je n'ai pas poussé plus avant l'examen de cette passionnante question mais je pense que l'on ne peut se contenter, *de lege lata,* du texte qui apparaît pour le moment au paragraphe (d). Personnellement je serais disposé à considérer qu'en vertu de principes généraux du droit, il existe une présomption réfragable, admettant donc la preuve contraire, qu'à la dissolution d'une organisation, les Etats membres succèdent conjointement à l'actif et au passif. La preuve contraire résulterait essentiellement des textes constitutifs.

Si le point de vue que je défends ici, selon lequel certaines règles du droit international en vigueur peuvent impliquer le transfert aux Etats membres des obligations des organisations lors de la dissolution de celle-ci, il faudrait ajouter à la fin du paragraphe (a) du même article les mots «tant que la personnalité de l'organisation subsiste».

Article A 7

Cet article est obscur dans la mesure où il n'indique pas la relation qui pourrait exister entre l'acte illicite de l'Etat membre et les obligations de l'organisation internationale à l'égard des tiers. Prenons un exemple. Supposons un Etat membre de l'ONU qui viole une obligation internationale en matière de protection de l'environnement : cela ne le rend évidemment pas responsable pour les obligations de l'ONU à l'égard de tiers (au demeurant desquelles et pour quelles raisons cette question se poserait-elle ?).

Article A 10

Pour introduire un parallélisme entre le présent article et l'article A 4, ne conviendrait-il pas d'indiquer ici outre les obligations de droit interne (*contractual and tortious liability*), les obligations de droit international ?

Le texte de l'article pourrait être le suivant :

> «La responsabilité ou l'absence de responsabilité des Etats membres pour les obligations de l'organisation internationale se pose aussi bien

> à l'égard des obligations internationales de l'organisation qu'à l'égard de ses obligations de droit interne (responsabilité contractuelle ou quasi-délictuelle)».

On peut se demander si un tel article ne serait pas mieux placé directement après l'article A 4 (a).

Article B 2(3)

J'avoue ne pas comprendre la logique de ce paragraphe dans le contexte. La partie A ayant montré que *de lege lata* les Etats membres n'encourent aucune responsabilité pour les obligations de l'organisation internationale et l'article B 1 ayant posé *de lege ferenda* qu'il n'est pas souhaitable qu'il en soit autrement, pourquoi établir ici une présomption dans le sens contraire ? Je pense qu'il faut purement et simplement supprimer ce paragraphe.

En revanche, je me demande si on ne donnerait pas plus de poids à la seconde phrase de l'article B 2(2) en la transformant en un paragraphe, voire en un article nouveau du genre :

> «En toutes circonstances les Etats membres ont le devoir de payer les contributions qui ont été déterminées et réparties entre eux ou, selon le cas, leur part du capital appelé».

Un tel article offrirait une bonne transition à l'article B 4.

Article B 3

Le texte du projet que vous nous avez transmis ne contient plus d'article B 3. Ne s'agit-il pas d'un oubli ? J'ai en effet le sentiment qu'il y a dans le texte de l'article B 3 de la première version de la résolution deux idées à retenir. S'agissant du paragraphe b), il me semble adéquat comme tel. S'agissant du paragraphe a), je préférerais une présomption en sens inverse : sauf indication contraire dans les statuts les Etats membres devraient censés être obligés de fournir à l'organisation les moyens de remplir ses obligations.

Je me demande, en outre, s'il ne serait pas justifié d'ajouter que les Etats membres d'une organisation internationale ont un devoir général de diligence due à veiller à ce que l'organisation ne s'engage pas sans moyens. Ceci fonderait mieux l'idée que les Etats membres ont une obligation résiduaire de contribuer au budget de celle-ci pour combler le déficit éventuel.

Article B 5

Cet article me semble curieusement construit. La première phrase est neutre. Elle se borne à demander une clarification de la situation dans l'acte constitutif sans prendre position sur la question de l'existence ou non d'une succession. La troisième phrase, que j'approuve, établit une présomption de succession en cas de silence de l'acte constitutif. La seconde phrase qui parle de «*first call*» n'est pas une conséquence logique de la première phrase ; elle ne s'explique que par la présomption établie par la troisième. Ne pensez-vous pas qu'il conviendrait de revoir la rédaction ?

Jean Salmon

Final Report

October 1994

At the Milan session of the Institute, Fifth Commission members had before them the Provisional Report of August 1993, together with a proposed Draft Resolution. The Commission held two fruitful and well attended meetings in Milan. Some colleagues offered written drafting amendments to the Draft Resolution. Others made oral proposals during the meetings.

In May 1994 a revised Draft Resolution, which sought to benefit from the Milan session, was prepared and circulated to Commission members. Detailed and specific further observations were then sent to the Rapporteur by Messrs. Amerasinghe, Crawford, Monaco, Salmon, Schachter, Schermers, Seidl-Hohenveldern, Shihata, Vukas, Waelbroeck and Zemanek. The Resolution proposed for the Lisbon session reflects both the growing consensus emerging in the Commission and the last round of suggestions made.

Since the conclusion of the Provisional Report certain legal developments may be noted in the field under study. Final Award of the Arbitral Tribunal in *Westland Helicopters v. AOI* was issued on 28 June 1992. That Award had established that AOI, and subsidiarily (by virtue of the particular instruments concerned) its member states, were liable to Westland for specified sums. Westland in 1994 recovered certain sums in garnishee proceedings in the United States and in France. In garnisheee proceedings in the United Kingdom in July 1994 the Court also found in Westland's favour. In August 1994 the long running litigation was at last concluded, with a settlement being reached between Westland and all the member states of the AOI.

We may note also the publication during this period of Mattias Hartwig : *Die Haftung der Mitgliedstaaten für Internationale Organisationen*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht ; Beiträge zum ausländischen öffentlichen Recht und Völkerrecht III. Springer Verlag Berlin 1993.

The meetings at the Milan session, and to an extent the exchanges during the summer months of 1994, were in part an occasion for returning to fundamental problems underlying the topic. A majority of members shared the view reflected in the Initial and Provisional Reports that there

was no rule of international law providing for the liability of states members for the defaults of international organizations. Any liability could only be determined by reference to the particular provisions governing the operation of specific international organizations. But the reality was that there was also no rule saying that there was *not* liability. One was therefore thrown back on where that paucity of persuasive international legal authority left one. For some colleagues the answer was to be found in looking to the *functions* of particular international organizations. If the functions were «governmental», *e.g.* the provision of safe transport system, then equity required that, in assigning these governmental functions to an international organization, states retained a financial responsibility (Schermers).

In some the starting point was rather that liability was to be assumed unless precluded (Waelbroeck). All agreed that in determining this metaphysical question there were two key issues : the first was whether private law analogies were useful to illustrate members' responsibility in other corporate manifestations. The second was the analysis of relevant policy considerations. The overwhelming majority of Commission members regarded domestic law analogies, to corporate forms different from international organizations, as of limited relevance. On the second point there were differing views expressed. Confrères Schermers, Vukas, Salmon and Waelbroeck thought that protection of innocent third parties, and other factors, pointed in the direction of liability. Mr Seidl-Hohenveldern came to accept the argument, expressed by the Rapporteur in her Initial Report, that state liability would inevitably lead to encroachments upon the independence of international organizations. And Mr Shihata observed that the third parties involved were usually knowledgeable and capable of taking appropriate legal advice. A liability rule, in his view, would draw a line between rich and poor states - the latter already found membership in international organizations a difficult financial burden and would be unable to participate if exposed to liability.

The Commission decided that the way forward was for the Resolution to express the majority view *de lege lata* ; but for unanimity to be sought in clauses *de lege ferenda,* in which an appropriate code of conduct for international organizations in this matter should be specified for the future. The Resolution reflects this decision, Part B reflecting the current international law and Part C containing proposals for the future. (Part A deals with Definitions).

The element around which the formulation *de lege ferenda* coalesced was agreed without difficulty. There must henceforth be transparency on the question of liability. Third parties were entitled to know with whom they were dealing (Bowett) and legal consequences could be drawn from a failure to make that apparent. The constitutional instruments were the

vehicle for this required transparency. A choice could be made therein for the acceptance of liability, or the exclusion or limitation of liability. It if was felt that exclusion or limitation was unfair, then a third party knows that parties could choose to avoid dealings with the organization concerned.

The Resolution seeks to address systematically all the issues that have come up in various courts and tribunals concerning the liability of state members, as well as those arising in the practice of international organizations (on which well placed Commission members were particularly helpful in providing information to the Rapporteur that was not readily available in the public domain). In addition, we have thought it right to address the problem of liability upon the formal dissolution of an international organization, though recent practice has tended to focus on *de facto* bankruptcy.

It remains for the Rapporteur to thank all her colleagues on the Commission for the immense amount of work they have done and the tremendous benefits they have brought to the work assigned to us by the Institute. The experience of common effort, in a difficult subject, has been a pleasure and a privilege.

Draft Resolution

October 1994

Part A

Definitions

Article 1

For the purposes of this resolution :

a) an «international organization» is an intergovernmental institution established by treaty under international law, having its own organs and possessing an international personality distinct from that of its members.

b) «third parties» means legal persons other than the organization itself, whether they are private parties, states or organizations. It includes state members of an organization acting in a capacity other than as a constituent part of the organization.

c) «liability» means both liability that allows third parties having a legal claim against an international organization to bring their claim, at their choice, against either the organization or its members («concurrent liability») ; and liability by which third parties having a claim against the international organization will have a remedy against states members only if and when the organization defaults («seondary» or «subsidiary liability»).

Article 2

a) An international organization possesses international legal personality when its constituent instrument so provides or by necessary implication by reference to its structure, powers, purposes and functions.

b) The existence of a *volonté distincte*, as well as capacity to enter into contracts, to own property and to sue and be sued, is evidence of international legal personality.

c) The international personality of an international organization is, as a matter of international law, opposable to third parties, and is not dependent upon any recognition by them.

Part B

Article 3

As they possess their own legal personality, international organizations are liable for their own obligations towards third parties.

Article 4

a) The obligations that international organizations have to third parties may exist under international law or under the law of a particular state.

b) Whether or not states have concurrent or secondary liability for the fulfilment of such obligations due solely to their membership of an international organization is a matter of international law. This is so whether a claim by a third party is made in a national court or in international tribunals.

Article 5

A third party having contractual dealings with an international organization is deemed to have notice of its constituent instrument, including any amendment thereof. Any provisions in that organization's constituent instrument, or amendment thereto, concerning the liability or otherwise of the states members are opposable to such a third party, provided they have been duly published or expressly brought to the attention of that party.

Article 6

a) There is no rule of general international law whereby states members are *per se* liable, concurrently or secondarily, for the obligations of an international organization of which they are members.

b) Without prejudice to the generality of paragraph (a), no liability for a state arises merely by virtue of :

- having participated in the establishment of an international organization to serve its own purposes ;

- the fact that the organization engages in commercial or trading activities ;

- the fact that the act of the organization giving rise to its liability to a third party is *ultra vires*.

c) No evidence of a general rule of international law providing for liability of states is to be deduced from the fact that some constituent

instruments make specific provision for the limitation or exclusion of such liability.

d) No evidence of a general rule of international law providing for the liability of states is to be deduced from the existing practice relating to the dissolution of international organizations.

Article 7

The question of the liability of the members of an international organization for its obligations is determined by reference to the provisions of its constituent instrument and the intention there revealed.

Article 8

In addition to any liability indicated in the constituent instrument, a member state may incur liability to a third party.

a) if, notwithstanding the separate legal personality of an international organization, its *volonté distincte* from that of the state concerned does not exist in reality ;

b) if the international organization has acted as its agent, in law or in fact ;

c) through unilateral undertakings of guarantee by the state in a given case.

Article 9

Unless the constituent instrument, and the intention there revealed, directs otherwise, no distinction is to be made between claims in contract and claims in delict for purposes of determining whether any liability exists for member states for the obligations of an international organization.

Article 10

Important considerations of policy, including support for the real independent functioning of international organizations, militate against the development of a general and comprehensive rule of liability of member states for the obligations of international organizations to third parties.

Part C

Article 11

1) Important considerations of policy also entitle third parties to know, so that they may freely choose their course of action, whether in relation to any particular transaction or to dealings generally with an international organization, the financial liabilities that may ensue are those of the

organization alone or also of the members jointly or subsidiarily. Accordingly, international organizations established hereafter, (and, to the extent possible, existing international organizations) should specify the position regarding liability either :

a) In their constituent instruments, financial regulations, contracts, resolutions, etc.
or

b) In communications made to the third party prior to the event or transaction leading to liability ;
and

c) In response to any specific request to any third party for information on the matter.

2) A failure so to specify should in the future be taken as an implied acceptance of such liability by the states members.

3) Member states may exclude or limit their liability for the obligations of the organization, provided that they do so before any relevant dealings with third parties and provided that such limitation or exclusion is specified in appropriate detail, in accordance with the provisions of paragraph 1 above. This is without prejudice to the duty of member states at all times to pay their assessed and apportioned contributions, or share capital, as the case may be.

Article 12

If, pursuant to its constitution or rules, member states have an obligation to put an international organization in funds to meet its obligations, this obligation should (unless the constitution or rules make different provision) be proportionate to its contribution of the regular budget or to its working capital, as the case may be.

Article 13

a) International organizations established hereafter should contain provisions in their constituent instruments for the discharging of outstanding liabilities upon their dissolution where the obligation to third parties is that of the organization alone, upon the extinction of its legal personality there should be a first call upon its assets for the purpose of discharging such obligation. A failure to specify arrangements in the constituent instrument should be taken as an implied acceptance by the states members that the duty to discharge outstanding obligations, not met by the remaining assets of the dissolved organization, will fall upon them. In this last case, the principles of Article 12 will apply.

b) The liability of members withdrawing from an international organization less than a year before its dissolution shall be determined as if they were still members upon its dissolution.

Article 14

Where liability of member states is provided for, the constituent instrument should provide for :

a) international arbitration or other binding mechanism to resolve any dispute arising between the organization and a member state or between member states over the liability of the latter *inter se* or to put the former in funds ;

b) international adjudication or international arbitration or other binding mechanisms to resolve any dispute arising between state members over the liability of any or all of them to put the international organization in funds.

La valeur internationale des jugements relatifs à la garde des enfants

The authority on the international level of judgments concerning the guardianship of children

Treizième Commission *

Rapporteur : *Franz Matscher*

* La Treizième Commission comprenait, au 15 avril 1994, M. Franz Matscher, *Rapporteur*, MM. El-Kosheri, Gannagé, Gonzalez Campos, van Hecke, Mme de Magalhaes Collaço, MM. Mbaye, North, von Overbeck, Parra Aranguren, Mme Pérez Vera, MM. Riad, Schwind.

Rapport explicatif

Octobre 1994

1. La Commission des travaux avait suggéré à l'Institut de traiter le sujet suivant : «La valeur internationale des jugements relatifs à la garde des enfants».

Lors de sa session de Saint-Jacques-de-Compostelle (1989) l'Institut a accepté cette suggestion en l'inscrivant dans le programme de ses travaux et une Treizième Commission a été créée, avec la tâche d'étudier le problème.

Dans le commentaire qui avait accompagné la proposition de la Commission des travaux, la tâche confiée à la Treizième Commission a été définie comme suit :

«Le problème de la garde des enfants de ménages désunis dont les parents sont de nationalité différente et résident dans des pays différents s'est depuis quelques années imposé à l'attention.

Deux conventions ont récemment été conclues à ce sujet : à Luxembourg le 20 mai 1980 dans le cadre du Conseil de l'Europe et à La Haye le 25 octobre 1980 dans le cadre de la Conférence de La Haye de droit international privé.

Ces deux conventions ne sont efficaces que dans un cadre géographique restreint.

Il paraît souhaitable de les analyser, de les comparer et de tenter d'en dégager des principes susceptibles d'acceptation plus large».

2. L'actualité du problème résulte du grand nombre de relations familiales en souffrance dans le monde d'aujourd'hui et dont les principales victimes sont les enfants, issus de ces relations et, très souvent, tiraillés entre leurs parents dont chacun veut s'assurer la garde.

Vu la mobilité des personnes d'un pays à l'autre, qui caractérise notre temps — les mouvements d'émigration et d'immigration à but économique et/ou politique, les déplacements des personnes en quête de travail ou dus à d'autres motifs —, le problème dépasse de loin le cadre national. C'est donc à juste titre que l'Institut de Droit international s'occupe, lui aussi, du problème.

Bien que le juriste doive être conscient du fait qu'il n'est pas le détenteur du monopole des solutions aptes à résoudre ce problème, sa tâche reste néanmoins de proposer des instruments dans le cadre desquels les intérêts opposés peuvent trouver un règlement objectif, effectif et — dans la mesure du possible — également juste.

3. Le problème sous étude se situe dans un contexte plus large : la prise en considération, par la société internationale, des situations du droit de la famille (au sens large du mot) en souffrance.

Tandis que jusqu'aux dernières décennies, le principal «moteur» de la coopération judiciaire internationale en matière de droit privé tenait aux nécessités du commerce international, on a, depuis lors, pris conscience également des intérêts de la famille, en particulier des mineurs. Dans cette optique, principalement en ce qui concerne le deuxième des aspects mentionnés, on a préconisé des instruments internationaux, adoptant des solutions — de droit matériel et procédural — qui n'auraient guère été concevables en d'autres matières.

A cet égard, plusieurs conventions ont été conclues soit en matière d'aliments, soit concernant la protection d'autres intérêts des mineurs et de leurs parents. Les principales conventions rentrant dans l'une ou l'autre de ces catégories, sont mentionnées à l'annexe I.

4. Dans le même contexte se situent plusieurs initiatives récentes tendant à faciliter la reconnaissance et l'exécution des jugements en matière de garde des enfants et le rétablissement effectif du droit de garde en cas de rétention «sans titre» et d'enlèvement.

L'une, oeuvre du Conseil de l'Europe, est la Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, du 20 mai 1980, entrée en vigueur le 1er septembre 1983, et à présent (1er avril 1995) en vigueur dans les pays suivants : Autriche, Belgique, Chypre, Danemark, Espagne, Finlande, France, Grèce, Irlande, Luxembourg, Norvège, Pays-Bas, Portugal, Allemagne, Suisse, Royaume-Uni, Suède (la «Convention du Conseil de l'Europe»).

L'autre est la Convention sur les aspects civils de l'enlèvement international d'enfants, du 25 octobre 1980, élaborée au sein de la Conférence de La Haye, entrée en vigueur, elle aussi, le 1er septembre 1983 et actuellement (1er avril 1995) en vigueur dans les pays suivants : Allemagne, Argentine, Australie, Autriche, Bahamas, Belize, Bosnie-Herzégovine, Burkina Faso, Canada, Chili, Croatie, Chypre, Danemark, Equateur, Espagne, Etats-Unis, Finlande, France, Honduras, Hongrie, Irlande, Israël, Italie, Luxembourg, Macédoine, Ile Maurice, Mexique, Monaco, Norvège, Nouvelle-Zélande, Panama, Pays-Bas, Pologne, Portugal, Roumanie,

Royaume-Uni, Slovénie, Suède, St. Christopher and Nevis, Suisse, «Yougoslavie» («la Convention de La Haye»).

Au même problème se réfèrent plusieurs conventions bilatérales (et une convention trilatérale), soit entre les Etats qui ne sont pas tous (ou dont l'un n'est pas) partie(s) aux deux conventions multilatérales, soit entre des Etats qui sont bien liés par les conventions multilatérales citées auparavant, mais qui ont voulu mettre en place, dans les relations entre eux, un mécanisme de coopération encore plus souple que celui desdites conventions (voir également Annexe I).

Une autre initiative récente, prise dans le cadre de l'Organisation des Etats américains, est la Convention interaméricaine sur le retour des enfants, signée à Montevideo le 15 juillet 1989 («la Convention interaméricaine»). Cette convention suit avant tout le modèle de la Convention de La Haye de 1980. Pourtant, elle n'est pas encore entrée en vigueur ; il serait pourtant souhaitable que cela se fasse le plus tôt possible.

5. Les deux conventions mentionnées dans le mandat de la Treizième Commission visent un but différent et suivent une approche différente.

Le but que la Convention du Conseil de l'Europe se propose est d'assurer la reconnaissance et l'exécution des décisions en matière de garde des enfants et d'entamer une collaboration étroite entre les autorités des Etats contractants en vue d'un rétablissement de la garde en cas de rétention ou de déplacement «sans titre», c'est-à-dire illégales, d'un enfant dans un ou vers un autre pays, indépendamment du fait qu'il y ait eu ou qu'il n'y ait pas eu enlèvement.

Il s'agit donc en premier lieu d'une convention sur la reconnaissance et l'exécution des décisions étrangères adaptée à une situation spéciale, son leitmotiv étant la prise en considération de l'intérêt de l'enfant.

La Convention de La Haye n'est pas une convention sur la reconnaissance et l'exécution des décisions étrangères dans le sens traditionnel du terme ; en effet, elle ne présuppose pas l'existence d'une décision — judiciaire ou autre — sur le droit de garde. Son but énoncé explicitement à l'art. 1 est d'assurer le retour immédiat de l'enfant déplacé ou retenu illicitement dans un autre Etat contractant et de faire respecter dans les autres Etats contractants le droit de garde et de visite existant dans un Etat contractant.

Il faut souligner que le but des deux conventions est avant tout l'établissement d'un mécanisme procédural de coopération internationale (à travers des autorités centrales) en vue d'assurer le retour immédiat (ou dans les meilleurs délais) d'un enfant déplacé ou retenu «sans titre» dans un autre pays, les problèmes de droit international privé que les ques-

tions du droit de garde peuvent soulever dans les relations internationales ne faisant pas l'objet spécifique des conventions en question.

Les deux conventions — celle du Conseil de l'Europe et celle de La Haye — sont en vigueur depuis dix ans (exactement depuis le 1er septembre 1983) et, au sujet des deux, il existe déjà une jurisprudence abondante, plus riche encore en ce qui concerne la dernière. Il y a aussi plusieurs oeuvres doctrinales qui traitent le sujet des deux conventions, soit spécifiquement, soit dans le cadre plus large des problèmes relatifs à la garde des enfants ou soulevés par l'enlèvement international d'enfants (voir la liste bibliographique — Annexe II).

D'après l'opinion de divers auteurs, la Convention de La Haye donnerait plus souvent des résultats positifs que celle du Conseil de l'Europe. Cela serait dû à son caractère plus souple et moins formaliste. En effet, elle aborde le problème du rétablissement du droit de garde et de la réglementation du droit de visite d'une manière beaucoup plus pratique, en traduisant des conceptions et en adoptant des solutions innovatrices qui vont au-delà de ce qui correspond à la manière traditionnelle de voir et de traiter le problème en question. Dans ce sens, on pourrait la comparer à la Convention de New York pour le recouvrement des aliments à l'étranger, tandis que celle du Conseil de l'Europe correspond plutôt aux Conventions de La Haye sur la reconnaissance et l'exécution des décisions étrangères relatives aux obligations alimentaires.

Chacune des deux conventions prévoit une «autorité centrale» — institution qui, depuis longtemps, a fait ses preuves dans maintes conventions de La Haye et du Conseil de l'Europe ; elle sert d'«office de liaison» entre les autorités compétentes des Etats en cause et d'«adresse de référence» pour les citoyens qui veulent se prévaloir du mécanisme de protection offert par la convention.

A cet égard, la Treizième Commission est convaincue — et la pratique le confirme — que le bon fonctionnement du régime établi par les deux conventions dépend dans une large mesure du travail rapide et efficace des autorités centrales, qui devraient être dotées des moyens budgétaires et du personnel adéquats.

La Convention du Conseil de l'Europe prévoit des réunions périodiques des représentants des autorités centrales auxquelles peuvent s'associer, à titre d'observateurs, les représentants des autres Etats membres du Conseil de l'Europe qui ne sont pas parties à la Convention. Le but de ces réunions est d'étudier et de faciliter le fonctionnement de la Convention en échangeant des informations et en formulant des suggestions à l'adresse des Etats contractants. Sept réunions ont eu lieu, dont la dernière au mois de mai de 1994.

Un système analogue de réunions périodiques — bien que plus échelonnées — vaut pour la Convention de La Haye. A leur origine se trouve une suggestion de la Seizième session de la Conférence (1988). Deux réunions ont eu lieu jusqu'à aujourd'hui ; la première en octobre 1989, la deuxième en janvier 1993.

A noter qu'en règle générale, les autorités centrales sont établies auprès des ministères de la justice et sont communes aux deux conventions. En principe, ce sont aussi les fonctionnaires travaillant pour les autorités centrales qui représentent les Etats ou participent aux réunions périodiques au sens de l'une et de l'autre convention, de sorte que les problèmes que soulève l'application des deux conventions se dégagent très bien des procès-verbaux et des conclusions de ces réunions.

Les documents en question ont été mis à la disposition du rapporteur de la Treizième Commission. Ils fournissent la base du projet de résolution que la Commission soumet à l'Institut de Droit international.

6. En vue de cette situation, la Treizième Commission pense que la préparation d'une nouvelle Convention ne s'impose pas, les conventions existantes, en particulier celle de La Haye, offrant un cadre approprié pour résoudre de façon efficace les problèmes juridiques et pratiques du rétablissement de la garde en cas de rétention «sans titre» ou d'enlèvement d'enfants.

Néanmoins, une série de questions restent ouvertes ; elles ont trait :

- au fait que — vu à l'échelle mondiale — seulement un nombre limité d'Etats a ratifié les conventions existantes ;
- à la présence de réserves qui restreignent l'applicabilité de certaines clauses des deux conventions ;
- à la pratique de leur application.

7. D'autres problèmes résultent du fait que l'enlèvement d'un enfant ou le refus de son renvoi au parent qui est titulaire du droit de garde ont souvent leur origine dans l'écart culturel, religieux ou social qui sépare les parents, un écart dont ces derniers se rendent compte en particulier lors de la rupture du lien conjugal.

Les problèmes délicats qui en découlent et qui se répercutent en particulier sur le bien-être de l'enfant doivent être traités avec soin par les autorités compétentes des Etats contractants, sans se laisser influencer par des sentiments de supériorité de culture sur celles des autres Etats contractants ; voir à cet égard en particulier l'article 29 de la Convention des Nations Unies sur les Droits de l'Enfant qui souligne notamment la nécessité d'éduquer l'enfant dans le respect des cultures et des civilisations dont relèvent les deux parents.

En outre, la Treizième Commission tient à souligner le fait suivant : le retour d'un enfant qui a été enlevé ou retenu dans un autre pays donne souvent lieu à des problèmes psychologiques fort délicats, en particulier pour l'enfant, mais aussi pour ses parents ; en traitant des cas de ce genre, les autorités compétentes des Etats contractants devraient faire de leur mieux afin d'arriver à une solution qui soit la plus satisfaisante possible du point de vue humain, dans le respect des droits — y compris les droits de l'homme — de toutes les personnes concernées.

8. D'ailleurs, la Treizième Commission est de l'opinion que les principes qui sont à la base des deux conventions, et les techniques conçues pour l'application de celles-ci paraissent être susceptibles d'une acception plus large de sorte qu'il serait souhaitable que les Etats qui n'estiment pas pouvoir adhérer à ces conventions soient invités à s'en inspirer dans leur législation et leur pratique administrative internes.

9. Vu ce qui précède, la Treizième Commission est de l'avis qu'une résolution de l'Institut de Droit international serait recommandable.

10. Lors de la session de Bâle (1991), une réunion des membres de la Treizième Commission avait eu lieu, précédée (et suivie) d'un échange d'informations entre le rapporteur et ceux-ci. Il s'en dégagea l'opportunité de suggérer à l'Institut une interprétation de son mandat. Cette suggestion a été acceptée par l'Institut lors de sa session de Bâle. Une deuxième réunion des membres de la Treizième Commission se tint lors de la session de Milan (1993) où un avant-projet de résolution et d'un rapport explicatif ont été discutés.

En tenant compte des résultats de ces discussions et d'un échange ultérieur d'opinions par correspondance, le rapporteur a établi les présents projets de rapport explicatif et de résolution, qui ont été adoptés par la Treizième Commission.

La Treizième Commission croit qu'en soumettant, pour acceptation par l'Institut de Droit international, le présent projet de résolution accompagné de son rapport explicatif, elle s'est acquittée de sa tâche.

Octobre 1994

Annexe I

Conventions en matière d'aliments,

conventions concernant la protection d'autres intérêts des mineurs et de leurs parents

a) En matière d'aliments :

- Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger ;

- Convention de La Haye du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants, élargie par la Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires (en général, les obligations alimentaires concernant les enfants y étant incluses) ;

- Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants, élargie par la Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires (en général, l'exécution des décisions relatives aux obligations alimentaires concernant les enfants y étant incluse) ;

- Convention nordique du 23 mars 1962 sur le recouvrement de créances alimentaires ;

- Convention interaméricaine du 15 juillet 1989 sur les obligations alimentaires ;

- au-delà de ces instruments multilatéraux, il y a eu nombre de conventions bilatérales ainsi que des dispositions particulières, insérées dans des conventions générales de reconnaissance et d'exécution des jugements, tendant, elles aussi, à faciliter la reconnaissance et l'exécution des décisions étrangères en matière d'aliments.

b) Concernant la protection d'autres intérêts des mineurs et de leurs parents :

- Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection de mineurs (faisant suite à l'ancienne Convention de La Haye du 12 juin 1902 pour régler la tutelle des mineurs) ; la Convention de 1961 est en cours de révision au sein de la Conférence de La Haye ;
- Convention de La Haye du 15 novembre 1965 concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption ;
- Convention européenne du 24 avril 1967 en matière d'adoption des enfants ;
- Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale ;
- Convention européenne du 24 avril 1967 en matière d'adoption des enfants ;
- Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale ;
- Convention interaméricaine du 24 mai 1984 sur les conflits de lois concernant l'adoption des mineurs ;
- Convention interaméricaine du 18 mars 1994 sur le trafic des mineurs ;
- Conventions bilatérales (relatives au statut des personnes et de la famille et à la coopération internationale en matière de la protection des mineurs, au droit de garde des enfants, au droit de visite et d'obligations alimentaires) : France-Maroc 10 août 1981 ; France-Egypte : 15 mars 1982 ; France-Tunisie : 18 mars 1982 ; France-Portugal : 20 juillet 1983 ; France-Algérie : 21 juin 1988 ;
- Convention trilatérale (relative à la protection des mineurs Belgique-France-Luxembourg du 20 avril 1987) ;

Enfin, il faut mentionner une autre initiative de ces dernières années, prise dans le cadre du Conseil de l'Europe, et qui vise un objet similaire, bien que différent [Mise en oeuvre de la CEDH àl'égard des jeunes personnes et des enfants faisant l'objet d'une mesure de placement, y compris dans les institutions, à la suite d'une décision des autorités administratives ou judiciaires, H (86) 1].

Et, pour terminer, il échoit de faire référence également à la Convention des Nations Unies sur les Droits de l'Enfant du 26 janvier 1990 (faisant suite à la Déclaration homonyme de 1959).

Annexe II

Bibliographie

- Ancel, B. La réaction du droit international privé français face à l'enlèvement international d'enfants ; *Aspectos civiles de la sustracción international de menores, Jornadas de derecho internacional privado,* Tolède 1990.

- Anton, A. E. The Hague Convention on International Child abduction ; *International and Comparative Law Quarterly,* vol. 30, part 3, 1981, p. 537.

- Baer, I. Legal Kidnapping — Zwei internationale Abkommen werden demnchst von der Bundesrepublik ratifiziert ; *Zeitschrift für Rechtspolitik,* 1990, p. 209.

- Benvenuti, P. I lavori della conferenza dell'Aja di diritto internazionale privato in materia di «rapimento internazionale dei bambini da parte dei propri genitori» ; *Rivista di diritto internazionale privato e processuale,* Vol. 15, 1979, p. 597.

- Blynn, E. L. In re : International Child Abduction v. Best Interests of the Child : Comity Should Control ; *The University of Miami Inter-American Law Review,* Vol. 18, N° 2 (Winter 1986-87).

- Bodenheimer, B. The Hague Convention on International Child Abduction ; *Family Law Quarterly,* Vol. XIV, N° 2, 1980, p. 99.

- Baudoun, J.-M. La protection du mineur étranger par le juge des enfants ; *Rev. crit. de droit international privé,* 1994, p. 483.

- Bogdan, M. Internationella barnarov ur svensk rtts synvinkel ; *Tidskrift, utgaven av Juridiska Foreiningen i Finland,* 1982, p. 97.

- Böhmer, C. Die 14. Haager Konferenz über internationales Privatrecht 1980 ; Rabels *Zeitschrift für auslndisches und internationales Privatrecht,* 1982, p. 644.

- Borras, A. Comisión especial de octubre de 1989 sobre el funcionamiento del Convenvio de La Haya de 25 de octubre de 1980 sobre los aspectos civiles de la sustracción internacional de menores ; *Revista Española de Derecho Internacional,* 1990, p. 189.

- Chatin, L. Les conflits relatifs à la garde des enfants et au droit de visite en droit international privé : *Travaux du Comité français de*

droit international privé, Séance du 12 mai 1982, Publication du Ministère de la Justice. Comment prévenir les déplacements ou les rétentions illicites d'enfants à l'étranger ; Gazette du Palais, 1982, Nos 171 à 173, p. 2.

- Crawford, E. International child abduction, *Journal of the Scottish Law Society*, 1990, p. 277.

- Curtis, L. The Hague Convention on the Civil Aspects of International Child Abduction : the Australian Experience ; *Commonwealth Law Bulletin*, 1989, p. 627.

- Dehart, G.F. Briefing on the Hague International Child Abduction Convention and Related Federal Legislation — Report ; 1989.

- (ed.) International Child Abductions : A Guide to Applying the 1980 Hague Convention, with Forms ; Section of Family Law, American Bar Association, 1989.

- Department of State. Hague International Child Abduction Convention ; Text and Legal Analysis (*Federal Register*, Vol. 51, N° 58, March 26, 1986, pp. 10494-10516) [United States of America].

- International Parental Child Abduction, 3rd ed., March 1989.

- Deschenaux, B. La Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants, du 25 octobre 1980 ; *Annuaire suisse de droit international*, Vol. 37, 1981, p. 119.

- Internationale Kindesentführungen und Mittel, ihnen zu begegnen ; *Zeitschrift für Vormundschaftswesen*, 1985, p. 41.

- Dyer, A. International child abduction by parents ; *Recueil des Cours de l'Académie de droit international de La Haye*, Vol. 168, 1980, p. 231.

- Eekelaar, J. M. The Hague Convention on the Civil Aspects of International Child Abduction ; *Explanatory Documentation prepared for Commonwealth Jurisdictions*, Commonwealth Secretariat, 1981.

- Farquhar, K. B. The Hague Convention on International Child Abduction Comes to Canada, *Canadian Journal of Family Law*, Vol. 4, 1983, p. 5.

- Frank, R. J. American and International Responses to International Child Abduction ; *New York University Journal of International Law and Politics*, 1984, Vol. 16, p. 415.

- Frohn, E. N. Kinderontvoeringsverdragen ; *Tijdschrift voor Familie & Jeugdrecht*, 1990, p. 122.

- Haines, D. M. International Abduction of Children ; 1987.

- Helzick, C. S. Returning United States children abducted to foreign countries : the need to implement the Hague Convention on the civil aspects of international child abductions ; *Boston University International Law Journal*, 1987, p. 119.

- Henrich, D. Wechsel der effektiven Staatsangehörigkeit in Fllen einer Kindesentführung ; *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 1981, p. 125.

- Hoff, P., Schulman, J. & Volenik, A. Interstate Child Custody Disputes and Parental Kidnapping : Policy, Practice and Law, American Bar Association, 1982.

- Horvers, M. J. Civielrechtelijke aspecten van internationale kinderontvoeringen door een van de ouders ; 1979.

- Hüsstege, R. Internationale Kindesentführungen und Landesverfassungsrecht ; *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 1982, p. 95.

- Der Uniform Child Custody Jurisdiction Act -rechtsvergleichende Betrachtungen zu internationalen Kindesentführungen, Verlag für Standesamtswesen, Frankfurt am Main, 1982.

- Instituto Interamericano del Niño — Reunión de expertos sobre secuestro y restitución de menores y obliganciones de alimentos, 22 al 26 de Mayo de 1989, San José - Costa Rica, Informe final (Unidad de Asuntos Jurídicos, Montevideo, Uruguay, 1989).

- Jenard, P. Les enlèvements internationaux d'enfants et l'administration ; *Revue belge de droit international*, 1988, N° 1, p. 36-59.

- Katz, S. N. Child Snatching — The Legal Response to the Abduction of Children, American Bar Association, 1981.

- Kearney, R. D. Developments in Private International Law ; *American Journal of International Law*, 1987, p. 724.

- Kindall, M. P. Casenote on Re C (a Minor), Lexis UK Library, 139 *New Law Journal* 226 (1988). UK Court of Appeal (Civil Division), December 14, 1988 also reported as C. V. C. in [1989] 1 W.L.R. 654 (C.A.) (casenote published in *American Journal of International Law*), vol. 83, N° 3, July 1989, p. 586.

- Knoepfler, F. L'intérêt de l'enfant et le droit international privé, Rec. offert au Tribunal fédéral à l'occasion de son centenaire par les Facultés de droit suisses, 1975, p. 467.

- Lasarte Alvarez, C. La Convención de la Conferencia de La Haya sobre Aspectos Civiles del Secuestro Internacional de Niños ; *Boletín de Información del Ministerio de Justicia*, N° 1301, 1983, p. 4.

- Law Reform Commission. Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related Matters, *LRC* 12-1985, Dublin, June 1985.

- Legette, C. International Child Abduction and The Hague Convention : Emerging Practice and Interpretation of the Discretionary Exception ; *Texas International Law Journal,* 1990, Vol. 25, N° 2, p. 287.

- Lequette, Y. Note sous Cour d'appel d'Aix-en-Provence (6° CH). 23 mars 1989 : *Revue critique de droit international privé,* 1990, p. 529.

- Long. J. V Case law under the Hague Convention on International Child Abduction ; *Fairshare,* Vol. 10, N° 4, April 1990, p. 16.

- Martindale / Hubbell Law Digest. Treaty text and annual annotations by the Legal Adviser's Office of the Department of State ; *Canadian and International Digest,* 1991, edition, Part VI : Selected international conventions to which the United States is a party.

- McLachlan, C. Reforming New Zealand's conflicts process : the case for internationalization ; *Victoria University of Wellington Law Review,* Vol. 14, N° 4, 1989, p. 457.

- Miralles Sangro, P.-P. El secuestro internacional de menores y su incidencia en Espana. Especial consideración del Convenio de La Haya de 1980, Ministerio de Asuntos Sociales, Madrid 1989.

- Menhofer, B. Das grenzüberschreitende Besuchsrecht in europisch-islamischen Kindschaftsfllen. Der algerisch-französische Staatsvertrag als Modell ; *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 1991, p. 353.

- Monin-Hersant, P. & Sturlese, B. Note sous Tribunal de Grande Instance de Toulouse (2e Ch.), 20 mars 1987 ; *Gazette du Palais,* 9-10 octobre 1987, p. 17 ; voir aussi *Revue critique de droit international privé,* 1988, p. 67.

- Mosconi, F. & Rinoldi, D. La sottrazione internazionale di minori da parte di un genitore ; *Studi e documenti sul «Kidnaping» internazionale* ; Padova 1988.

- Strumenti internazionali vecchi e nuovi per la tutela dell' interesse del minore ; *Il Foro Padano Rivista di Giurisprudenza e di Dottrina,* 1989, p. 195.

- Müller-Freienfels, W. Deutscher Partikularismus im Internationalen Kindesentführungsrecht — Dezentralisation der «Zentralen Behörde ?» ; *Juristen Zeitung* 1988, pp. 120-132.

- North, P. M. Reform but not Revolution — General Course on Private International Law ; *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 220, 1990, I, p.141.

- Operti Badan, D. Restitución internacional de menores, aspectos civiles, Instituto Interamericano del Niño, Unidad de Asuntos Jurídicos, Montevideo, 1989.

- Oschinski, S. L'enlèvement international d'enfants ; *Journal des tribunaux*, Vol. 97, 1982, p. 437.

- Parra Aranguren, La restitución internacional de menores en el derecho convencional americano, *Mélanges Diez de Velasco* (1993), p. 1401.

- Pfund, P. H. The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for all Petitioners ; *Family Law Quarterly*, Vol. 24, 1990, p. 35.

- Quebec. Interprovincial Child Abduction — Report of the Quebec Representatives ; Uniform Law Conference of Canada, Proceedings of the Sixty-Seventh Annual Meeting held at Halifax, Nova Scotia, August 1985, p. 336.

- Reymond, Ph. Convention de La Haye et Convention de Strasbourg. Aspects comparatifs des conventions concernant l'enlèvement d'un enfant par l'un de ses parents ; *Revue de droit suisse,* 1981, p. 329.

- Ristau, B. International Judicial Assistance (Civil and Commercial), International Law Institute, Georgetown University Law Centre, Washington, D.C.

- Rivers, D. R. The Hague International Child Abduction Convention and the International Child Abduction Remedies Act : closing doors to the parent abductor ; *The Transnational Lawyer,* 1989, p. 389.

- Sachs, C. Child Abduction ; Guide and Practice Series, Jordan & Sons Ltd., Bristol 1987, p. 39.

- Savolainen, M. Haag ja Strasbourg — kaksi rathaisumallia kansainvlisesta luvattomasta lapsen haltuunotosta (The Hague and Strasbourg - Two solution models on international child abduction) ; *JFT*, published by Juridiska Föreningen, Finland, Vol. 3, 1982, p. 267.

- Lapsen huolto ja tapaamisoikeus (Child's Right to Custody and Access), Helsinki 1984, p. 38-74, 84-85.

- Scottish Law Commission. Child Abduction (Consultative Memorandum N° 67, August 1985), p. 35.

- Servizio Sociale Internazionale, Sezione italiana. La protezione dei minori nelle convenzioni internazionali (Roma, 1982).

- Siehr, K. Kindesentführung und Minderjhrigenschutz ; *Das Standesamt,* 1990, p. 330.

Art. 19 EGBGB Anhang II, Haager Übereinkommen über die zivilrechtlichen Aspekte internationaler Kindesentführung vom 25.10.1980 ; Münchner Kommentar zum Bürgerlichen Gesetzbuch, 2. Aufl., München, Ergnzungsband zur 2. Aufl. (1991).

Internationales Kindesrecht ; *Revue suisse de jurisprudence,* Vol. 78, 1982, p. 173.

- Sijthoff-Stray, A. L. Internasjonal barnebortforing, in : *Lov og Ret, Norsk Juridisk Tidsskrift,* 1983, p. 225.

- Silva-Ruiz, P.F. Child Abduction / Civil Kidnapping : Domestic and International Law, paper presented to the Berlin Conference on the Law of the World, July, 1985.

- Stotter, L. H. The Light at the End of the Tunnel : The Hague Convention on International Child Abduction has reached Capitol Hill ; *Hastings International and Comparative Law Review,* 1986, at p. 306.

- Sturm, F. Neue Abkommen zum Schutz entführter Kinder ; *Festschrift für Heinrich Nagel,* 1987, p. 457.

- Tellechea Bergman, E. Derecho internacional privado de familia y minoridad. Prestación internacional de alimentos. Restitución internacional de menores. Bases para futuras convenciones interamericanas, Instituto interamericano del Niño, Unidad de Asuntos Jurídicos, Montevideo, 1988.

- Toledo Conference Proceedings. Jornadas sobre Aspectos Civiles de la Sustraccion Internacional de Menores, Toledo, 26 y 27 Enero 1990.

- Tomaz Ortis de la Torre, J. A. Conferencia de La Haya de Derecho internacional privado : las convenciones XXVIII y XXIX ; *Revista General de Legislacion y Jurisprudencia,* Vol. 82, 1981, p. 115, 343.

- Veraart, L. Internationale kinderontvoering ; doctoraalscriptie, Groningen 1986.

- Vink, E. L. M. Enkele civielrechtelijke aspecten van de internationale ontvoeringen van kinderen door een van de ouders ; Leiden, mai 1981.

- Van Overbeck, A. L'image de l'enfant en droit international privé conventionnel, dans : «L'image de l'homme en droit» (1990), 383.

- Voulgaris, J. La Convention de La Haye de 1980 «sur les aspects civils de l'enlèvement international et de garde des enfants» ; *Nomikon Vima,* tome 38, 1990, p. 14 (en grec).

- Watte, N. Les nouvelles Conventions de La Haye et de Luxembourg en matière d'enlèvement international et de garde des enfants ; *Revue trimestrielle de droit familial,* 1983, p. 5.

- Westbrook, G. R. Law and treaty responses to international child abductions ; *Virginia Journal of International Law,* Vol. 20, 1980, p. 669.

- Zambora Cabot, F. J. El Proyecto de Convención de La Haya sobre los aspectos civiles del secuestro international de niños ; primeras impresiones : *La Ley,* Madrid, 1981, p. 938.

- Sans indication d'auteur - no author indicated. Internationale kinderontvoering door een van de ouders. Ervaringen en perspectieven in verband met de kommende bekrachtiging van de verdragen van Luxemburg en 's-Gravenhage ; Kluwer, Deventer 1986.

Projet de résolution

Octobre 1994

L'Institut de Droit international,

Sensible aux problèmes humains et juridiques qui résultent du grand nombre de relations familiales en difficulté dans le monde d'aujourd'hui et dont les principales victimes sont les enfants issus de ces relations et souvent tiraillés entre leurs parents, dont chacun veut s'assurer la garde ;

Eu égard au fait que les problèmes en question se révèlent encore plus aigus lorsque les parents résident dans des pays différents, ou lorsque l'un des deux s'est déplacé à l'étranger en y emmenant son ou ses enfants ;

Conscient du fait que le juriste, bien que n'étant pas le détenteur du monopole des solutions aptes à résoudre ces problèmes, a néanmoins pour tâche de proposer des instruments dans le cadre desquels les intérêts opposés puissent trouver un règlement objectif, effectif et, dans la mesure du possible également juste ;

Tenant compte du fait que plusieurs conventions internationales ont été conclues à ce sujet, notamment :

- la Convention européenne sur la reconnaissance et l'exécution des décisions en matière de garde des enfants et le rétablissement de la garde des enfants, du 20 mai 1980 (élaborée au sein du Conseil de l'Europe),
- la Convention sur les aspects civils de l'enlèvement international d'enfants, du 25 octobre 1980 (élaborée dans le cadre de la Conférence de La Haye de Droit International Privé),
- la Convention interaméricaine sur le retour des enfants, signée à Montevideo le 15 juillet 1989 (élaborée au sein de l'Organisation des Etats américains ; elle n'est pas encore entrée en vigueur ; il serait pourtant souhaitable que cela se fasse le plus tôt possible).

Considérant que ces conventions permettent de résoudre de façon efficace les problèmes juridiques et pratiques du rétablissement de la garde en cas de rétention «sans titre» ou d'enlèvement d'enfants ;

Considérant que, comme cela résulte de l'examen périodique des Conventions du Conseil de l'Europe et de La Haye, opéré par les hauts

fonctionnaires nationaux responsables de l'application des conventions en cause, une série de questions restent néanmoins ouvertes, celles-ci ayant trait en particulier :

- au fait qu'un nombre insuffisant d'Etats a ratifié les deux conventions,
- à la pratique de leur application :

Rappelant la Résolution adoptée par l'Institut de Droit international lors de la session de Helsinki (1985) sur «La loi applicable à certains effets de mariages dissous» ;

Prenant acte de la Convention des Nations Unies du 20 novembre 1989 sur les Droits de l'Enfant ;

Prenant acte également des diverses initiatives prises par la Conférence de La Haye de Droit international privé, par le Conseil de l'Europe et par d'autres organismes internationaux, tels que l'Organisation des Etats américains, relatives à la protection des intérêts des mineurs ;

Désireux d'apporter sa contribution à une meilleure solution juridique du problème de la garde des enfants issus de mariages désunis dans le cadre des relations internationales,

Adopte la résolution suivante :

1. Le réseau d'application de la Convention du Conseil de l'Europe (d'ailleurs restreinte aux Etats membres du Conseil) et surtout de la Convention de La Haye devrait être le plus étendu possible pour faire face aux problèmes qui sont au coeur de celles-ci et qui — vu la mobilité des personnes — peuvent se présenter dans tous les pays du monde. En conséquence, les Etats qui ne l'ont pas fait jusqu'à présent, sont invités à procéder dans les meilleurs délais à la ratification de la (ou des) convention(s) en question et à accepter que ces conventions qui visent à mieux protéger les enfants — s'appliquent aussi à des faits antérieurs à leur entrée en vigueur.

2. L'expérience de différentes conventions de La Haye ayant démontré l'utilité de la conclusion de conventions particulières entre des Etats membres de la «Convention de base», en vue de faciliter son application entre les Etats qui entretiennent des relations intenses dans le domaine couvert par la convention en cause, les Etats en question sont invités à étudier l'opportunité de conclure entre eux de telles conventions particulières.

3. Les autorités centrales prévues dans les deux conventions citées à l'alinéa 4 du préambule constituant la clé du bon fonctionnement de ces conventions, les Etats contractants devraient les doter des moyens (en per-

sonnel et en ressources budgétaires) nécessaires pour les mettre en mesure d'accomplir leur tâche avec dynamisme, efficacité et célérité.

4. En outre, les Etats parties aux deux conventions devraient encourager les activités des secrétariats respectifs du Conseil de l'Europe et de la Conférence de La Haye de Droit international privé dans le domaine de la coordination des activités des autorités centrales, de la formation d'un corps de jurisprudence relative à l'application des conventions respectives et de l'organisation de réunions périodiques des hauts fonctionnaires travaillant pour les autorités centrales des Etats membres, afin de permettre un échange continu d'informations et d'expériences et l'établissement de contacts personnels entre eux, lesquels se sont montrés extrêmement utiles pour le bon déroulement du travail quotidien des autorités centrales.

5. Le bon fonctionnement et l'efficacité des conventions dépendent dans une grande mesure de la connaissance et de la compréhension de celles-ci de la part de toutes les autorités, compétentes pour leur application ; aussi leur effet dissuasif, qui contribue à dissuader les parents d'enlever ou de retenir sans titre un enfant, présuppose qu'elles soient largement connues des justiciables. Dès lors, les Etats devraient s'efforcer de promouvoir la connaissance des conventions auprès des autorités et dans le grand public.

6. Dans leur ordre interne, les Etats devraient créer les structures et organiser les procédures nécessaires au bon fonctionnement de la convention applicable :

- les procédures en question devraient être souples et facilement accessibles à tout intéressé, ce qui commande, dans l'intérêt des personnes dépourvues des moyens nécessaires, l'établissement de systèmes d'aide judiciaire gratuite,

- tout en tenant dûment compte des droits et des intérêts des personnes concernées, les possibilités de recours devraient être limitées et les délais abrégés,

- la possibilité d'une exécution provisoire des décisions ou d'une adoption de mesures provisoires, en attendant que les décisions en question deviennent définitives, devrait être sérieusement étudiée afin de les doter d'une efficacité réelle,

- en général, les autorités centrales devraient agir avec la rapidité requise, soit dans leurs contacts avec les autorités centrales des autres pays, soit avec les autorités administratives et judiciaires de leur propre pays,

- pareillement, les autorités compétentes — administratives et judiciaires — requises devraient procéder avec célérité dans l'accomplissement des tâches que la convention en question leur confie.

7. Conformément à la tendance moderne en droit international privé, les réserves d'ordre public et les autres clauses restreignant le jeu normal des conventions prévues dans les deux conventions devraient être interprétées d'une manière restrictive et leur application limitée aux cas où la reconnaissance et l'exécution d'une décision étrangère — ou l'acceptation d'une demande provenant de l'autorité compétente d'un autre Etat contractant — se heurteraient aux principes fondamentaux de l'ordre juridique de l'Etat requis «sur la sauvegarde des droits de l'homme et des libertés fondamentales».

8. La portée réelle d'une convention internationale multilatérale pouvant souffrir du fait que certains Etats contractants, au moment de la ratification, acceptation, approbation ou adhésion, ont fait des réserves, ces Etats sont invités à reconsidérer celles-ci et à les retirer dans la mesure du possible.

9. Les Etats contractants devraient attirer l'attention de leurs autorités administratives compétentes pour la délivrance des passeports au fait que, lorsqu'elles délivrent un passeport à un enfant mineur ou qu'elles l'inscrivent dans le passeport d'un parent, elles s'assurent que le demandeur du passeport ou de l'inscription jouisse de l'autorisation nécessaire.

10. Bien que les frais occasionnés par la recherche d'un enfant, par la procédure dans l'Etat requis et par l'organisation du voyage de retour devraient être mis à la charge de celui des parents qui a enlevé ou retenu illicitement l'enfant, les démarches nécessaires au retour de l'enfant ne devraient pas être retardées du fait que les problèmes financiers n'ont pas encore été réglés ; à titre provisoire, les frais en question devraient être avancés par l'Etat requis.

11. Les Etats contractants sont invités à charger leurs autorités de police et autres de traiter avec soin les demandes de recherche du lieu de séjour d'un enfant enlevé, qui peuvent leur être adressées par les autorités centrales ou par les services d'Interpol.

12. Les cas d'enlèvement ou de refus de retour d'un enfant sont souvent la conséquence — bien qu'inacceptable — de la réglementation et du fonctionnement insatisfaisants du droit de garde et du droit de visite, convenu entre les parents ou déterminé par le tribunal lors de la dissolution du mariage. Dès lors, dans la réglementation du droit de garde et de visite, les tribunaux doivent chercher à aménager un juste équilibre entre l'un et l'autre, d'une manière à rendre possible les contacts de l'enfant avec les milieux et les cultures dont relèvent ses deux parents ; dans ce but, les tribunaux devraient limiter au minimum nécessaire les

restrictions territoriales aux droits de garde et de visite. En outre, les autorités compétentes des Etats contractants devraient s'employer à ce que les termes des droits de garde et de visite soient respectés.

13. Les principes qui sont à la base des deux conventions, et les techniques conçues pour l'application de celles-ci paraissant être susceptibles d'une acception plus large, les Etats qui n'estiment pas pouvoir adhérer à ces conventions sont invités à s'en inspirer dans leur législation et leur pratique administrative internes ; ils pourraient également s'en inspirer lors de la conclusion entre eux de conventions bilatérales en la matière, une telle procédure étant particulièrement indiquée dans les relations entre des Etats attachés à des conceptions culturelles très diverses et éloignées.

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

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

*Quinzième Commission**

Rapporteur : *M. Andreas Lowenfeld*

* La Quinzième Commission comprenait, au 15 avril 1994 : M. Andreas Lowenfeld, *Rapporteur*, MM. Collins, Crawford, El-Kosheri, Feliciano, Gannagé, van Hecke, Pierre Lalive, Loussouarn, Madl, von Mehren, Rigaux, Seidl-Hohenveldern, Shihata, Sucharitkul, Waelbroeck.

Supplemental Report

December 1994

The Commission was created following the Santiago session of the Institute. A preliminary report was discussed by the Commission during the Basel session, and a Final Report, together with correspondence and comments, was published in Volume 65-I, presented to the Milan session. The Report was discussed during portions of three plenary sessions in Milan, but time ran out on Saturday afternoon before the resolution proposed by the Commission, as amended during the Session, could be put to a vote. It was agreed that the Report would be resubmitted to the Sixtysixth Session, with a view to resuming the debate and placing the proposed resolution, as it might be revised, before the full membership for a vote.

The doctrinal and historical discussion on which the principal report was based, as well as the six case studies, may be reviewed in Volume 65-I at pages 244-303 (substantive issues), and 306-310 (procedural issues). The principal conclusions of the Report were as follows :

On the substantive issues

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 ; it can be overcome when the shareholder is another corporation holding all or substantially 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.

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. However, the effect of 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. 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 least if the activity sought to be regulated is centred 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.

On the procedural issues

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 insurance policies ; and the situs of immovable property in actions concerning that property.

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.

The discussion during the plenary session revealed general agreement on the conclusions set out in the Report and reflected in the accompanying draft resolution. In particular, a broad consensus supported the distinction made in the Report between obligations resulting from contractual relations, in which creditors had the opportunity to make inquiries and to protect themselves against an undercapitalized counterparty, and obligations arising out of accidents and other kinds of unplanned events, in which limitations of liability through use of separate incorporation could result in injustice. A number of members of the Institute urged that the resolution contain definitions of the principal concepts, and the Commission accepted this suggestion. A set of definitions adapted from the Report was introduced in a revised resolution presented at the plenary session, and these have been slightly refined in the interval[1].

1 In particular, the revised resolution adopts the formula «the power to exercise decisive influence» for the definition of control, as used in documents of the European Community (Union) ; also it uses the term «company» rather than «corporation» or «firm».

The suggestion was made in the discussion that the resolution state explicitly that the imputation of responsibility in the circumstances stated may be ordered by an arbitral tribunal as well as by a court, and this suggestion was accepted. Correspondingly, the Commission accepted the suggestion that provisions concerning recognition by one state of judgments of another state imposing responsibility in the circumstances stated be expressly made applicable to arbitral awards as well.

The question was raised whether responsibility in the circumstances stated should be imputable only to the parent company (controlling entity) or also to another member of the corporate group. The consensus, accepted by the Commission, seemed to favor retaining the possibility of imputing responsibility in the circumstances stated to the controlling entity or another member of the corporate group.

A question was raised during the debates about the substantive law to be applied by a court or arbitral tribunal asked to impose liability on a controlling entity or another member of a corporate group in accordance with the proposed Guidelines. The Guidelines do not undertake to answer that question ordinarily where jurisdiction is exercised upon the basis of activity by or on behalf of a multinational enterprise in a given state, the law of the state would be applicable, but that law would include the state's rules of conflict of laws, which in a given instance might point to the law of another state.

The greatest amount of controversy concerned Principle 3, addressed to judicial jurisdiction. The initial draft of the resolution had listed a number of acceptable bases of jurisdiction of courts that might be applicable with respect to multinational enterprises. A consensus, accepted by the Commission, preferred to focus only on jurisdiction over branches, subsidiaries or activities of multinational enterprises, «in addition to such other bases of judicial jurisdiction as a state may provide over persons not established in its territory», which are mentioned only by way of illustration. That left open the question whether the resolution should be limited to *specific jurisdiction*, *i.e.*, to claims that arise out of or are closely related to the activities of, or on behalf of, the multinational enterprise in the forum state, or alternatively, whether the resolutions should contemplate *general jurisdiction* as well, by omitting the requirement of a link between the forum state and the activity giving rise to the claim. The revised draft resolution submitted with the present Supplemental Report, in a change from the position taken by the Rapporteur during the debates in Milan, opts for focus on specific jurisdiction, on the ground that activity-based jurisdiction over non-resident persons (including corporations) commands almost universal support while general jurisdiction remains divi-

sive within the Institute and among the profession generally[2]. It is important to stress that nothing in the resolution purports[3] to preclude exercise of judicial jurisdiction on bases not expressly stated.

Finally, several persons raised the question during the Milan session how the Report and proposed resolution fit in to the overall mission of the Institute to state and develop international law. The subject of multinational enterprises, in the submission of the Commission, has in the past fallen between public and private international law. Rather than attempting a rigid and inevitably artificial classification of the subject, the Report and resolution set forth Guidelines consistent with international law as understood and accepted by the Institute. The Principles stated in the resolution do not define obligations or mandates, and do not undertake to establish uniform law, but set out parameters within which, in the view of the Institute, national courts and legislatures, as well as arbitral tribunals, may exercise jurisdiction consistently with international law.

2 For further discussion of this subject by the Rapporteur, see A. Lowenfeld *International Litigation and the Quest for Reasonableness*, General Course in Private International Law, Chapter IV (Hague Academy, *Recueil des Cours* 1994-I).

3 Thus, in contrast to some earlier drafts, Principle 3 does not place the word «only» before the list of permissible bases of judicial jurisdiction.

Draft Resolution

December 1994

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 companies established under the law of a given State, but that it is desirable to give guidance to States and to multinational enterprises concerning the consistency of such rules with international law ;

Proposes the following Guidelines concerning the responsibility of multinational enterprises :

I.
Definitions

For purposes of these Guidelines :

1. A *multinational enterprise* is a group of companies incorporated under the laws of more than one State operating under common ownership or control. Generally, the members of the group of companies operate under common (or related) trade marks or trade names and produce or distribute common or related products or services, but the absence of such integrated activity does not, by itself, deprive a group of companies of the character of a multinational enterprise. A multinational enterprise may, but need not, be identified with a particular State in which the parent company has its headquarters ; and the multinational enterprise may

be operated under a hierarchical or under a decentralized system of management. While some outside holding of shares of companies forming part of the multinational enterprise is not excluded, an essential characteristic of a multinational enterprise is that shares of companies that are members of the group are not dispersed, and that management of the companies constituting the multinational enterprise is exercised by the parent company, whether through controlling shareholding (direct or indirect) or by other means.

2(a) *Control* is the power to exercise decisive influence over the activities of a company, whether by appointment of the directors or principal managers of a company or otherwise ; a *controlling entity* is a company or other entity that has or exercises control over another member of the group of companies that constitute the multinational enterprise. A controlling company may, but need not, be the parent company of the multinational enterprise.

(b) If the parent company, another controlling entity, or several members of the group of companies constituting the multinational enterprise taken together hold a majority of the voting shares of the company in question, control by the parent company or the group of companies is assumed ; control meeting the test of paragraph (a) may also rest in an entity holding less than a majority of the shares of a company, if by virtue of management contracts, conditions in credit arrangements, voting trusts, license or franchise agreements, or other elements, it has the power to exercise decisive influence over the activities of the company in question.

3(a) A *parent company* is a company (or other entity) that directly or indirectly owns a majority of the shares of, or otherwise exercises control over, other companies that constitute a multinational enterprise. A parent company may, but need not, be an operating enterprise engaged in the production or distribution of goods or services. Ownership of a parent company may be confined to a small group or even an individual ; more commonly, ownership of a parent company is dispersed through shares held by the public and traded on securities markets.

(b) A *subsidiary* is a company that is owned or controlled by another company belonging to the same group of companies. Usually, a subsidiary is incorporated under the laws of the State in which it is established.

(c) A *branch* is a unit of a larger entity not separately incorporated in the State where it is established or engaged in operation.

II.
Principles

1. As a general rule, shareholders of a company or similar entity are presumed not to be liable for the obligations of the company whose shares they hold. However, it is open to States, in limited circumstances as illustrated in the following paragraphs, to apply their law (including their conflict of laws) to impose liability for the obligations of a company on an entity that alone (or as a member of a group of companies constituting the multinational enterprise) holds all or substantially all of the shares of the company in question or that exercises control over it.

2(a) Liability for claims arising out of contractual relations between a company and a third party may be imputed by a court or arbitral tribunal to the controlling entity or other member of a multinational enterprise when

(i) the controlling entity or other member of the multinational enterprise has taken part in the negotiation, performance, or termination of the contract on which the claim is based in such manner as to lead the claimant reasonably to rely on its responsibility ; or

(ii) either the company in question or the controlling entity (or another member company of the multinational enterprise) has engaged in fraud or deceptive practice in respect of responsibility for the obligation on which the claim is based.

(b) 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 member of a multinational enterprise), in addition to the member of the multinational enterprise directly responsible.

3. In addition to such other bases of judicial jurisdiction as a State may provide over persons not established in its territory, including jurisdiction based on injury sustained or contracts made or breached in the State, it is open to a State to provide that a parent company or a controlling entity of a multinational enterprise is subject to the jurisdiction of its courts on the basis

(i) of the permanent presence in the State of a branch or comparable establishment of the multinational enterprise ;

(ii) of the permanent presence in the State of a subsidiary so closely linked to the multinational enterprise by common ownership, control, personnel, management, or activity as to be fairly regarded as a mere department or *alter ego* of the multinational enterprise ; or

(iii) of assertion of liability of the parent company or controlling entity in accordance with Paragraph 2 of these Principles,

when the claim for which jurisdiction is asserted arises out of or is closely related to the activities of, or on behalf of, the multinational enterprise in the State.

4. A judgment or arbitral award that has imposed liability on a parent company, controlling entity, or other member company of a multinational enterprise — if otherwise entitled to recognition and enforcement under the rules in effect in the State where recognition and enforcement are sought — should not be refused in that State if liability has been imposed consistently with these Guidelines.

5. A State may impose reasonable requirements on a multinational enterprise and its member companies to disclose information, submit financial statements, and comply with economic regulations having direct effect in the regulating State, if a subsidiary is established in that State and regularly maintains economic relations with the parent company or other members of the multinational enterprise.

6(a) A State may impose reasonable regulations on a multinational enterprise whose parent company 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.

(b) In the event of a conflict between regulations imposed by two or more States on a multinational enterprise or its component units,

(i) each State is required to evaluate the interests of the other State in the regulation in question ;

(ii) where accommodation between or among the conflicting regulations is not possible, the greatest weight is generally to be given to the law of the State where the activity to be regulated takes place or the member company of the multinational enterprise whose activity is sought to be regulated is incorporated or established.

Projet de résolution
Décembre 1994

L'Institut de Droit international,

Reconnaissant que le pouvoir de réglementer les entreprises opérant sous la forme de sociétés est un attribut nécessaire de la souveraineté nationale ;

Reconnaissant que les principes du droit des sociétés, tels qu'ils se sont développés dans les Etats d'Europe occidentale et d'Amérique au XIX[e] siècle, ne couvrent pas le phénomène moderne des groupes de sociétés, constituées dans différents Etats mais fonctionnant sous un régime de propriété commune, sous des raisons sociales communes ou liées et sous une direction ou un contrôle communs ;

Conscient que les Etats ont adopté des législations différentes et parfois contradictoires quant à l'exercice de leur compétence sur les groupes de sociétés ;

Persuadé qu'une règle unique ne peut régir toutes les situations où l'on met en cause la responsabilité des entreprises multinationales pour des actes accomplis par des sociétés membres établies sous le régime de la loi d'un Etat déterminé, mais qu'il est souhaitable de donner aux Etats et aux entreprises multinationales une orientation au sujet de l'harmonie de telles règles avec le droit international ;

Propose les lignes directrices suivantes en matière de responsabilité des entreprises multinationales :

I.
Définitions

Aux fins des présentes lignes directrices :

1. Une *entreprise multinationale* est un groupe de sociétés constituées conformément à la loi de plus d'un Etat et opérant sous un régime de propriété ou de contrôle commun. De façon générale, les membres du groupe de sociétés opèrent sous des marques de commerce ou des raisons sociales communes (ou liées) et produisent ou distribuent des produits ou des services communs ou liés, mais l'absence d'une telle inté-

gration des activités ne prive pas, par elle-même, un groupe de sociétés du caractère d'entreprise multinationale. Une entreprise multinationale peut, sans que ce soit nécessaire, être identifiée à un Etat déterminé dans lequel la société mère a son siège ; la direction de l'entreprise multinationale peut être hiérarchique ou décentralisée. S'il n'est pas exclu que des actions de sociétés faisant partie de l'entreprise multinationale puissent appartenir à des détenteurs extérieurs à celle-ci, il reste qu'une caractéristique essentielle d'une entreprise multinationale réside dans la non-dispersion des actions des sociétés membres du groupe et dans l'exercice de la direction des sociétés constituant l'entreprise multinationale par la société-mère, soit au moyen d'un contrôle (direct ou indirect) des actions détenues, soit par un autre moyen.

2. a) Le *contrôle* est le pouvoir d'exercer une influence décisive sur l'activité d'une société, soit en nommant les directeurs ou les principaux gérants d'une société, soit par tout autre moyen ; l'*entité de contrôle* est une société ou une entité qui détient ou exerce le contrôle sur un autre membre du groupe de sociétés qui constitue l'entreprise multinationale. L'entité de contrôle n'est pas nécessairement la société-mère de l'entreprise multinationale.

b) Si la société-mère, une autre entité de contrôle ou plusieurs membres du groupe de sociétés qui constitue l'entreprise multinationale, considérés ensemble, détiennent la majorité des actions de l'entreprise en question assorties d'un droit de vote, le contrôle par la société-mère ou par le groupe de sociétés est présumé ; le contrôle répondant au critère du paragraphe a) peut également être assuré par une entité qui détient moins de la majorité des actions de l'entreprise en question, mais qui, en fonction des contrats de direction, des conditions des accords de crédit, des accords fiduciaires de vote, des accords de licence ou de franchise, ou d'autres éléments de preuve, a le pouvoir d'exercer une influence décisive sur les activités de la compagnie en question.

3. a) Une *société-mère* est une société ou une autre entité qui possède, directement ou indirectement, la majorité des actions d'autres sociétés constituant une entreprise multinationale ou qui contrôle sous une autre forme, directement ou indirectement, de telles sociétés. Une société-mère peut, sans que ce soit nécessaire, être une entreprise exploitante qui se livre à la production ou à la distribution de biens ou de services. La propriété d'une société-mère peut être limitée à un petit groupe ou même à un individu ; plus couramment, il y a dispersion de la propriété d'une société-mère à travers des actions détenues par le public et traitées dans les bourses de valeurs.

b) Une *filiale* est une société qui appartient à une autre société faisant partie du même groupe de sociétés ou qui est contrôlée par une

telle société. D'habitude, une filiale est constituée conformément à la loi de l'Etat dans lequel elle est établie.

c) Une *succursale* est une unité d'une société dont elle n'est pas séparée par un acte de constitution distinct dans l'Etat dans lequel elle est établie ou exerce ses activités.

II.
Principes

1. En règle générale, les actionnaires d'une société ou d'une entité similaire sont présumés non responsables des obligations de la société dont ils détiennent des actions. Toutefois, les Etats peuvent, dans les conditions limitatives exposées aux paragraphes suivants, appliquer leur loi (y compris leurs règles de conflit) pour imputer la responsabilité découlant des obligations d'une société à une entité qui détient seule (ou en qualité de membre d'un groupe de sociétés qui constitue l'entreprise multinationale) la totalité ou la quasi-totalité des actions de la société en question ou qui exerce sur elle un contrôle effectif.

2. a) La responsabilité découlant des relations contractuelles entre une société et un tiers peut être imputée par une juridiction ou un tribunal arbitral à l'entité de contrôle ou à une autre société membre d'une entreprise multinationale lorsque

i) l'entité de contrôle ou une autre société membre de l'entreprise multinationale a participé à la négociation, à l'exécution ou à la terminaison du contrat sur lequel se fonde l'action en responsabilité d'une manière telle que le demandeur puisse être raisonnablement induit à présumer cette responsabilité ; ou

ii) soit la société en question, soit l'entité de contrôle, ou une autre société membre de l'entreprise multinationale, s'est livrée à une fraude ou à une pratique trompeuse à propos de l'obligation sur laquelle se fonde l'action en responsabilité.

b) La responsabilité délictuelle civile, notamment lorsqu'elle porte sur des catastrophes, peut, dans des circonstances appropriées, être imputée à l'entité de contrôle ou à une autre société membre d'une entreprise multinationale, en plus de la société membre directement responsable.

3. En plus de toute autre compétence des juridictions d'un Etat à l'égard de personnes non établies sur son territoire, y compris celle qui dérive du lieu où un fait dommageable s'est produit ou du lieu où un contrat a été conclu ou n'a pas été exécuté, un Etat peut prévoir la compétence de ses juridictions à l'égard d'une société-mère ou d'une entité de contrôle d'une entreprise multinationale

i) en raison de la présence permanente sur son territoire d'une succursale ou d'un établissement comparable de l'entreprise multinationale ;

ii) en raison de la présence permanente sur son territoire d'une filiale si étroitement liée à l'entreprise multinationale par une communauté de propriété, de contrôle, de personnel, de direction ou d'activité que cette filiale peut être justement considérée comme un simple département ou un *alter ego* de l'entreprise multinationale ; ou

iii) en raison d'une réclamation de responsabilité de la société-mère ou de l'entité de contrôle en conformité avec le paragraphe 2 de ces Principes, lorsque l'obligation qui sert de base à l'action a pour source des activités conduites dans cet Etat par l'entreprise multinationale, ou pour son compte, ou est étroitement liée à ces activités.

4. La reconnaissance ou l'exécution d'une décision judiciaire ou d'une sentence arbitrale — remplissant par ailleurs les conditions de reconnaissance ou d'exécution selon les règles en vigueur dans l'Etat où est demandée la reconnaissance ou l'exécution — qui a imputé la responsabilité à une société-mère, à une entité de contrôle, ou à une autre société membre de l'entreprise multinationale, ne devrait pas être refusée par cet Etat si la responsabilité a été imputée en conformité avec les présentes lignes directrices.

5. Un Etat peut exiger d'une entreprise multinationale et des sociétés qui en sont membres, à des conditions raisonnables, qu'elles fournissent des informations, présentent des déclarations financières et se conforment aux réglementations économiques qui ont un effet direct dans l'Etat de réglementation, si une filiale est établie sur son territoire et entretient des relations économiques régulières avec la société-mère ou avec d'autres sociétés membres de l'entreprise multinationale.

6. a) Un Etat peut soumettre une entreprise multinationale dont la société-mère est établie sur son territoire à une réglementation raisonnable pour ce qui concerne l'activité de ses filiales établies dans d'autres Etats, pour autant que cette réglementation fasse partie d'un programme réglementaire d'application générale et qu'elle n'entre pas en conflit avec les lois ou les réglementations des Etats dans lesquels sont établies les filiales.

b) En cas de conflit entre les réglementations instituées par deux ou plusieurs Etats à l'égard d'une entreprise multinationale ou des sociétés qui la constituent,

i) chaque Etat est tenu d'évaluer les intérêts de l'autre Etat par rapport à la réglementation en question ;

ii) lorsqu'aucun accommodement n'est possible entre les réglementations en conflit, le poids le plus important devrait généralement être donné à la loi de l'Etat dans lequel se déroule l'activité à réglementer ou dans lequel est constituée et établie la société membre de l'entreprise multinationale dont on cherche à réglementer l'activité.

ACHEVÉ D'IMPRIMER SUR LES PRESSES
DE L'IMPRIMERIE BOSC FRÈRES
69600 - OULLINS

DÉPÔT LÉGAL N° 9392
JUIN 1995