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### Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988)

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## ABBREVIATIONS

ECE	Economic Commission for Europe
EEC	European Economic Community
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
INTAL	Institute for Latin American Integration
ITU	International Telecommunication Union
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNDRO	Office of the United Nations Disaster Relief Co-ordinator
UNEP	United Nations Environment Programme
UNHCR	Office of the United Nations High Commissioner for Refugees
UNITAR	United Nations Institute for Training and Research
UPU	Universal Postal Union
World Bank	International Bank for Reconstruction and Development

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\* \*

*I.C.J. Reports*      ICJ, *Reports of Judgments, Advisory Opinions and Orders*  
*P.C.I.J., Series A/B*   PCIJ, *Judgments, Orders and Advisory Opinions* (Nos. 40-80: beginning in 1931)

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text.

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

## Chapter I

### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its statute annexed thereto, as subsequently amended, held its fortieth session at its permanent seat at the United Nations Office at Geneva from 9 May to 29 July 1988. The session was opened by the Chairman of the thirty-ninth session, Mr. Stephen C. McCaffrey.

#### A. Membership

2. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria);  
Mr. Husain AL-BAHARNA (Bahrain);  
Mr. Awn AL-KHASAWNEH (Jordan);  
Mr. Riyadh Mahmoud Sami AL-QAYSI (Iraq);  
Mr. Gaetano ARANGIO-RUIZ (Italy);  
Mr. Julio BARBOZA (Argentina);  
Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics);  
Mr. John Alan BEESLEY (Canada);  
Mr. Mohamed BENNOUNA (Morocco);  
Mr. Boutros BOUTROS-GHALI (Egypt);  
Mr. Carlos CALERO RODRIGUES (Brazil);  
Mr. Leonardo DÍAZ GONZÁLEZ (Venezuela);  
Mr. Gudmundur EIRIKSSON (Iceland);  
Mr. Laurel B. FRANCIS (Jamaica);  
Mr. Bernhard GRAEFRATH (German Democratic Republic);  
Mr. Francis Mahon HAYES (Ireland);  
Mr. Jorge E. ILLUECA (Panama);  
Mr. Andreas J. JACOVIDES (Cyprus);  
Mr. Abdul G. KOROMA (Sierra Leone);  
Mr. Ahmed MAHIOU (Algeria);  
Mr. Stephen C. MCCAFFREY (United States of America);  
Mr. Frank X. NJENGA (Kenya);  
Mr. Motoo OGISO (Japan);  
Mr. Stanislaw PAWLAK (Poland);  
Mr. Pemmaraju Sreenivasa RAO (India);  
Mr. Edilbert RAZAFINDRALAMBO (Madagascar);  
Mr. Paul REUTER (France);  
Mr. Emmanuel J. ROUCOUNAS (Greece);  
Mr. César SEPÚLVEDA GUTIÉRREZ (Mexico);  
Mr. Jiuyong SHI (China);  
Mr. Luis SOLARI TUDELA (Peru);  
Mr. Doudou THIAM (Senegal);  
Mr. Christian TOMUSCHAT (Federal Republic of Germany);  
Mr. Alexander YANKOV (Bulgaria).

#### B. Officers

3. At its 2042nd meeting, on 9 May 1988, the Commission elected the following officers:

*Chairman:* Mr. Leonardo Díaz González;  
*First Vice-Chairman:* Mr. Bernhard Graefrath;  
*Second Vice-Chairman:* Mr. Ahmed Mahiou;  
*Chairman of the Drafting Committee:* Mr. Christian Tomuschat;  
*Rapporteur:* Mr. Jiuyong Shi.

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairman of the Commission<sup>1</sup> and the special rapporteurs.<sup>2</sup> The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 2044th meeting, on 11 May 1988, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission, and its documentation, and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Bernhard Graefrath (Chairman), Prince Bola Adesumbo Ajibola, Mr. Riyadh Mahmoud Sami Al-Qaysi, Mr. Julio Barboza, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Andreas J. Jacovides, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Frank X. Njenga, Mr. Jiuyong Shi, Mr. Luis Solari Tudela, Mr. Doudou Thiam and Mr. Alexander Yankov. The Group was not restricted and other members of the Commission attended its meetings.

#### C. Drafting Committee

5. At its 2043rd meeting, on 10 May 1988, the Commission appointed a Drafting Committee composed of the following members: Mr. Christian Tomuschat (Chairman), Mr. Awn Al-Khasawneh, Mr. Juri G. Barsegov, Mr. Mohamed Bennouna, Mr. Carlos Calero Rodrigues, Mr. Francis Mahon Hayes, Mr. Abdul G. Koroma, Mr. Motoo Ogiso, Mr. Stanislaw Pawlak, Mr. Pemmaraju Sreenivasa Rao, Mr. Edilbert Razafindralambo, Mr. Paul Reuter, Mr. Emmanuel J. Roucounas and Mr. César

<sup>1</sup> Namely Mr. Laurel B. Francis, Mr. Paul Reuter, Mr. Doudou Thiam, Mr. Alexander Yankov and Mr. Stephen C. McCaffrey.

<sup>2</sup> Namely Mr. Gaetano Arangio-Ruiz, Mr. Julio Barboza, Mr. Leonardo Díaz González, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Doudou Thiam and Mr. Alexander Yankov.

Sepúlveda Gutiérrez. Mr. Jiuyong Shi also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. Secretariat

6. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Mr. Manuel Rama-Montaldo, Senior Legal Officer, served as Senior Assistant Secretary to the Commission and Ms. Mahnoush H. Arsanjani and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

#### E. Agenda

7. At its 2044th meeting, on 11 May 1988, the Commission adopted the following agenda for its fortieth session:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
5. Draft Code of Crimes against the Peace and Security of Mankind.
6. The law of the non-navigational uses of international watercourses.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme, procedures and working methods of the Commission, and its documentation.
10. Co-operation with other bodies.
11. Date and place of the forty-first session.
12. Other business.

8. The Commission did not consider agenda item 8, "Relations between States and international organizations (second part of the topic)"; it took note of the intention of the Special Rapporteur, Mr. Leonardo Díaz González, to submit a report at the Commission's next session. The Commission held 53 public meetings (2042nd to 2094th meetings). In addition, the Drafting Committee of the Commission held 41 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 5 meetings.

#### F. General description of the work of the Commission at its fortieth session

9. The Commission devoted seven meetings to consideration of the topic "International liability for injurious

consequences arising out of acts not prohibited by international law" (see chapter II).<sup>3</sup> The discussions were held on the basis of the fourth report (A/CN.4/413) submitted by the Special Rapporteur, Mr. Julio Barboza, which contained in particular 10 draft articles entitled "Scope of the present articles" (art. 1), "Use of terms" (art. 2), "Attribution" (art. 3), "Relationship between the present articles and other international agreements" (art. 4), "Absence of effect upon other rules of international law" (art. 5), "Freedom of action and the limits thereto" (art. 6), "Co-operation" (art. 7), "Participation" (art. 8), "Prevention" (art. 9) and "Reparation" (art. 10). At the conclusion of its discussions, the Commission referred draft articles 1 to 10 to the Drafting Committee.

10. The Commission devoted 16 meetings to consideration of the topic "The law of the non-navigational uses of international watercourses" (see chapter III).<sup>4</sup> The discussions were held on the basis of the fourth report (A/CN.4/412 and Add.1 and 2) submitted by the Special Rapporteur, Mr. Stephen C. McCaffrey, which contained in particular four draft articles entitled "Regular exchange of data and information" (art. 15[16]), "Pollution of international watercourse[s] [systems]" (art. 16[17]), "Protection of the environment of international watercourse[s] [systems]" (art. 17[18]) and "Pollution or environmental emergencies" (art. 18[19]). At the conclusion of its discussions, the Commission referred the four draft articles to the Drafting Committee. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, 14 draft articles on the topic, with commentaries thereto, namely article 8 (Obligation not to cause appreciable harm), article 9 (General obligation to co-operate), article 10 (Regular exchange of data and information), article 11 (Information concerning planned measures), article 12 (Notification concerning planned measures with possible adverse effects), article 13 (Period for reply to notification), article 14 (Obligations of the notifying State during the period for reply), article 15 (Reply to notification), article 16 (Absence of reply to notification), article 17 (Consultations and negotiations concerning planned measures), article 18 (Procedures in the absence of notification), article 19 (Urgent implementation of planned measures), article 20 (Data and information vital to national defence or security) and article 21 (Indirect procedures).

11. The Commission devoted 13 meetings to consideration of the topic "Draft Code of Crimes against the Peace and Security of Mankind" (see chapter IV).<sup>5</sup> The discussions were held on the basis of the sixth report

<sup>3</sup> The topic was considered at the 2044th, 2045th, 2047th to 2049th, 2074th and 2075th meetings, held between 11 and 20 May and on 6 and 7 July 1988.

<sup>4</sup> The topic was considered at the 2050th to 2052nd, 2062nd to 2073rd and 2076th meetings, held between 24 and 27 May, between 15 June and 5 July and on 8 July 1988.

<sup>5</sup> The topic was considered at the 2053rd to 2061st and 2082nd to 2085th meetings, held on 31 May, between 1 and 14 June and between 20 and 22 July 1988.

(A/CN.4/411) submitted by the Special Rapporteur, Mr. Doudou Thiam, which contained in particular draft article 11 entitled "Acts constituting crimes against peace". At the conclusion of its discussions, the Commission referred draft article 11 to the Drafting Committee. The Commission furthermore provisionally adopted, on the recommendation of the Drafting Committee, six draft articles on the topic, with commentaries thereto, namely article 4 (Obligation to try or extradite), article 7 (*Non bis in idem*), article 8 (Non-retroactivity), article 10 (Responsibility of the superior), article 11 (Official position and criminal responsibility) and article 12 (Aggression).

12. The Commission devoted eight meetings to consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" (see chapter V).<sup>6</sup> The discussions were held on the basis of the eighth report (A/CN.4/417) submitted by the Special Rapporteur, Mr. Alexander Yankov, which contained an analytical survey of the comments and observations received from Governments (A/CN.4/409 and Add.1-5) on the draft articles on the topic provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986, as well as revised texts proposed by the Special Rapporteur for consideration by the Commission on second reading. At the conclusion of its discussions, the Commission referred the draft articles, including the texts revised by the Special Rapporteur, to the Drafting Committee.

13. The Commission devoted one meeting to the topic "Jurisdictional immunities of States and their property" (see chapter VI). It heard a presentation by the Special

<sup>6</sup> The topic was considered at the 2069th, 2070th, 2072nd and 2076th to 2080th meetings, held on 28 and 29 June, on 1 July and between 8 and 15 July 1988.

Rapporteur, Mr. Motoo Ogiso, of his preliminary report (A/CN.4/415),<sup>7</sup> which contained an analytical survey of the comments and observations received from Governments (A/CN.4/410 and Add.1-5) on the draft articles on the topic provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986, as well as revised texts proposed by the Special Rapporteur for consideration by the Commission on second reading. The preliminary report was not discussed by the Commission due to lack of time.

14. The Commission devoted two meetings to the topic "State responsibility" (see chapter VII). It heard a presentation by the Special Rapporteur, Mr. Gaetano Arangio-Ruiz, of his preliminary report (A/CN.4/416 and Add.1),<sup>8</sup> which contained in particular two draft articles entitled "Cessation of an internationally wrongful act of a continuing character" (art. 6) and "Restitution in kind" (art. 7). The preliminary report was not discussed by the Commission due to lack of time.

15. Matters relating to the programme, procedures and working methods of the Commission, and its documentation were mostly discussed in the Planning Group of the Enlarged Bureau and in the Enlarged Bureau itself. The relevant observations and recommendations of the Commission are to be found in chapter VIII of the present report, which also deals with co-operation with other bodies and with certain administrative and other matters.

<sup>7</sup> The preliminary report was introduced at the 2081st meeting, on 19 July 1988.

<sup>8</sup> The preliminary report was introduced at the 2081st and 2082nd meetings, on 19 and 20 July 1988. The Commission also had before it comments and observations received from one Government (A/CN.4/414) on chapters I to V of part 1 of the draft articles on State responsibility.

## Chapter II

### INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

#### A. Introduction

16. At its thirtieth session, in 1978, the Commission included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Robert Q. Quentin-Baxter Special Rapporteur for the topic.

17. From its thirty-second session (1980) to its thirty-sixth session (1984), the Commission considered the five reports submitted by the Special Rapporteur.<sup>9</sup> The reports sought to develop a conceptual basis for the topic and included a schematic outline and five draft articles. The schematic outline was contained in the Special Rapporteur's third report, submitted to the Commission at its thirty-fourth session, in 1982.<sup>10</sup> The five draft articles were contained in the Special Rapporteur's fifth report, submitted to the Commission at its thirty-sixth session, in 1984,<sup>11</sup> and were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

18. At its thirty-sixth session, in 1984, the Commission also had before it the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain, among other matters, whether obligations which States owed to each other and discharged as members of international organizations could, to that extent, fulfil or replace some of the procedures referred to in the

<sup>9</sup> The five reports of the previous Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 201, document A/CN.4/373;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

<sup>10</sup> The text of the schematic outline is reproduced in the Commission's report on its thirty-fourth session: *Yearbook ... 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline by the previous Special Rapporteur are indicated in the Commission's report on its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

<sup>11</sup> The texts of draft articles 1 to 5 as submitted by the previous Special Rapporteur are reproduced in the Commission's report on its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

schematic outline;<sup>12</sup> and the "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law", prepared by the Secretariat.<sup>13</sup>

19. At its thirty-seventh session, in 1985, the Commission appointed Mr. Julio Barboza Special Rapporteur, following the death of Robert Q. Quentin-Baxter. At the same session, the Special Rapporteur submitted a preliminary report,<sup>14</sup> followed by a second report<sup>15</sup> submitted at the thirty-eighth session, in 1986.

20. At its thirty-ninth session, in 1987, the Commission had before it the Special Rapporteur's second report, held over from the previous session for further consideration, and his third report.<sup>16</sup> The third report contained six draft articles,<sup>17</sup> broadly corresponding to section 1 of the schematic outline,<sup>18</sup> and also discussed some issues important to the approach to the topic. At the end of the debate at the thirty-ninth session, the Special Rapporteur drew the following conclusions:

(a) The Commission must endeavour to fulfil its mandate from the General Assembly on the present topic by regulating activities which have or may have transboundary physical consequences adversely affecting persons or objects;

(b) The draft articles on the topic should not discourage the development of science and technology, which are essential for the improvement of conditions of life in national communities;

(c) The topic deals with both prevention and reparation. The régime of prevention must be linked to reparation in order to preserve the unity of the topic and enhance its usefulness;

(d) Certain general principles should apply in this area, in particular:

(i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;

(ii) States must respect the sovereignty and equality of other States;

<sup>12</sup> The replies to the questionnaire, prepared by the previous Special Rapporteur with the assistance of the Secretariat, appear in *Yearbook ... 1984*, vol. II (Part One), p. 129, document A/CN.4/378.

<sup>13</sup> *Yearbook ... 1985*, vol. II (Part One)/Add.I, p. 1, document A/CN.4/384.

<sup>14</sup> *Yearbook ... 1985*, vol. II (Part One), p. 97, document A/CN.4/394.

<sup>15</sup> *Yearbook ... 1986*, vol. II (Part One), p. 145, document A/CN.4/402.

<sup>16</sup> *Yearbook ... 1987*, vol. II (Part One), p. 47, document A/CN.4/405.

<sup>17</sup> The texts of draft articles 1 to 6 as submitted by the Special Rapporteur in his third report are reproduced in *Yearbook ... 1987*, vol. II (Part Two), pp. 39-40, para. 124.

<sup>18</sup> See footnote 10 above.

- (iii) An innocent victim of transboundary injurious effects should not be left to bear his loss.<sup>19</sup>

## B. Consideration of the topic at the present session

21. At the present session, the Commission had before it the Special Rapporteur's fourth report (A/CN.4/413). The Commission considered the topic at its 2044th, 2045th, 2047th to 2049th, 2074th and 2075th meetings, from 11 to 20 May and on 6 and 7 July 1988.

### 1. DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

22. In his fourth report, the Special Rapporteur submitted the following 10 draft articles contained in two chapters entitled "General provisions" (chap. I) and "Principles" (chap. II):

#### CHAPTER I. GENERAL PROVISIONS

##### *Article 1. Scope of the present articles*

The present articles shall apply with respect to activities carried on under the jurisdiction of a State as vested in it by international law, or, in the absence of such jurisdiction, under the effective control of the State, when such activities create an appreciable risk of causing transboundary injury.

##### *Article 2. Use of terms*

For the purposes of the present articles:

(a) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them highly likely to cause transboundary injury throughout the process;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved;

(b) "Activities involving risk" means the activities referred to in article 1;

(c) "Transboundary injury" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in spheres where another State exercises jurisdiction under international law, is appreciably detrimental to persons or objects, or to the use or enjoyment of areas, whether or not the States concerned have a common border;

(d) "State of origin" means the State which exercises the jurisdiction or the control referred to in article 1;

(e) "Affected State" means the State under whose jurisdiction persons or objects, or the use or enjoyment of areas, are or may be affected.

##### *Article 3. Attribution*

The State of origin shall have the obligations imposed on it by the present articles provided that it knew or had means of knowing that an activity involving risk was being, or was about to be, carried on in areas under its jurisdiction or control.

##### *Article 4. Relationship between the present articles and other international agreements*

Where States Parties to the present articles are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

##### *Article 5. Absence of effect upon other rules of international law*

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law.

#### CHAPTER II. PRINCIPLES

##### *Article 6. Freedom of action and the limits thereto*

States are free to carry on or permit in their territory any human activity considered appropriate. However, with regard to activities involving risk, that freedom must be compatible with the protection of the rights emanating from the sovereignty of other States.

##### *Article 7. Co-operation*

1. States shall co-operate in good faith in preventing or minimizing the risk of transboundary injury or, if injury has occurred, in minimizing its effects both in affected States and in States of origin.

2. In accordance with the above provision, the duty to co-operate applies to States of origin in relation to affected States, and vice versa.

##### *Article 8. Participation*

By virtue of their duty to co-operate, States of origin shall permit participation under the present articles by States likely to be affected, so that they might jointly consider the nature of the activity and its potential risks, and determine whether a régime needs to be jointly developed in this area.

##### *Article 9. Prevention*

States of origin shall take all reasonable preventive measures to prevent or minimize injury that may result from an activity which presumably involves risk and for which no régime has been established.

##### *Article 10. Reparation*

To the extent compatible with the provisions of the present articles, injury caused by an activity involving risk must not affect the innocent victim alone. In such cases, there must be reparation for the appreciable injury suffered, the question of reparation being settled by negotiation between the parties and in accordance with the criteria laid down in the present articles.

#### 2. GENERAL CONSIDERATIONS

23. Introducing his fourth report, the Special Rapporteur pointed out that the general debate on the topic was over, and that it was time to concentrate on specific articles. He referred to two questions outstanding from the debate at the thirty-ninth session which merited attention. The first was whether the draft articles should include a list of activities covered by the topic, and the second whether activities causing pollution should be brought within the scope of the articles. The first question, he believed, raised some concern on the grounds that such a list would quickly become obsolete owing to the rapid pace of technological progress. Besides, the danger arising from activities was relative, depending on many factors of time, space and conduct. For example, an activity that was dangerous in certain circumstances might not be dangerous in others: thus a chemical plant might be dangerous if located near a border, or if the prevalent winds in the area carried its fumes to a neighbouring State, but innocuous in other circumstances. It was hardly feasible to draw up a list of activities that would have any practical usefulness. Instead he had recommended certain criteria by which activities involving risk could be identified.

<sup>19</sup> *Yearbook* ... 1987, vol. II (Part Two), p. 49, para. 194.

24. The Special Rapporteur referred to the modest object of the draft articles, namely to oblige States involved in the conduct of activities involving risk of extraterritorial harm to inform other States which might be affected and to take preventive measures. If damage occurred, no specified level of compensation was prescribed in the articles; instead there was an obligation to negotiate in good faith with a view to making reparation for harm caused, taking into account factors such as those set out in sections 6 and 7 of the schematic outline.<sup>20</sup> He believed that there was at present a gap in international law as to what principles governed relations between States regarding activities involving risk, as far as prevention and compensation were concerned. The purpose of the draft articles was therefore to fill that gap. The Special Rapporteur stressed that this was the topic of the future and therefore required creativity and foresight on the part of the Commission.

25. With regard to activities causing pollution, the Special Rapporteur said that creeping pollution—i.e. pollution having cumulative effects so that the appreciable harm appeared only after a certain period of time—posed two problems. The first was whether pollution which caused appreciable harm was prohibited in general international law. The second was to prove which State among several States was the State of origin. If the answer to the first question was in the affirmative, activities causing pollution might very well not be considered as part of the present topic, since the breach of a prohibition was wrongful, and therefore those activities might not be considered as “not prohibited” by international law. There existed treaty régimes prohibiting some such activities. It seemed clear that general international law was not indifferent to that type of appreciable harm, and there were some principles—such as *sic utere tuo ut alienum non laedas*—which could apply to that kind of activity. But the Special Rapporteur wondered whether the Commission would accept that such a prohibition existed at an *operative* level in international law. He therefore felt that it would be prudent to assume that such activities were an integral part of the topic.

26. As to the problem of identifying the State of origin from among several States, the Special Rapporteur believed that this should not discourage the Commission from dealing with continuous pollution. It was better, in his view, to have a régime of responsibility than to have no juridical structure or concepts to protect the affected State. Moreover, the issues of evidence and proof were more relevant to reparation, and reparation was not the primary concern in such cases, where a régime such as that contemplated under the present topic did not allow the harm to go too far. Instead of obtaining reparation for the harm, it would perhaps be better for the affected State to have the situation examined through the procedures provided for in the articles so as to reach agreements with the polluting States to eliminate or reduce the pollution. Proof was important to reparation in the case of accidents suddenly causing a great amount

of pollution. However, such cases did not pose any serious difficulties as regards establishing causal relationship. He therefore recommended that the Commission adopt the position of not excluding activities causing pollution from the topic.

27. The Special Rapporteur recalled that the present topic had been under consideration by the Commission for several years and that its potential had been thoroughly explored. He believed that the time had come to make some hard choices and to decide how to limit the topic, since that alone would make the Commission begin to see the draft articles at an operative level and within a workable system.

28. Some members of the Commission observed that the Special Rapporteur had proposed that the scope of the topic be limited to activities involving appreciable risk, excluding those situations where appreciable harm occurred although the risk of harm had not been considered appreciable or foreseeable. However, they were of the view that, while the concept of risk might play an important role with regard to prevention, it would limit the topic unduly to base the entire régime of liability on appreciability of risk. In the opinion of some other members, the elimination of risk from the chain leading to liability undermined the concept of the topic.

29. For some members, the apparent characterization of the topic by the Special Rapporteur as progressive development of international law was a useful one. In their view such an approach paved the way for a consensus, since it precluded any argument as to whether or not the rules and principles drafted by the Commission on the topic already formed part of the existing law, something which, according to those members, many States would be unable to accept.

30. Some members considered that the statement by the Special Rapporteur to the effect that there was no norm in general international law under which there must be compensation for every harm was of fundamental importance and opened prospects for the development of international law in the present field through the formation of new rules.

31. Some members favoured the attempts by the Special Rapporteur not to adopt the principle of strict liability in an automatic fashion that would not allow for any flexibility. Thus, under such an approach, there would not be liability for every transboundary harm. While they viewed this premise as a correct one, they were not sure that the proposed criteria were clear enough to define the necessary threshold between compensable harm and negligible harm.

32. Many members agreed with the Special Rapporteur that the draft articles should serve as an incentive to States to conclude agreements establishing specific régimes to regulate activities in order to minimize potential damage. A view was expressed that this purpose did not, however, exclude drawing up a list of dangerous activities. It was stated that many international instruments used lists of toxic and dangerous materials to

<sup>20</sup> See footnote 10 above.

define their scope clearly, and the inevitable defects in such lists were cured by means of a periodic review procedure. Such lists, it was remarked, could also be useful to determine necessary preventive measures. For many members, however, the Special Rapporteur's decision not to draw up a list was sound. They found it impractical in a convention of a general nature to list specific activities or things, since such a list would never be exhaustive: due to the rapid progress in technology, it would almost always be out of date. The Special Rapporteur's approach of providing criteria to identify such activities was considered preferable. In that connection, however, it was pointed out that the Special Rapporteur should not attempt, as he had indicated in his fourth report (A/CN.4/413, para. 7), to provide "the most complete definition possible of the activities" covered by the topic. That approach appeared to some members to be inappropriate, since the concept around which the whole subject turned was harm. Thus the Commission was to focus its work on determining the legal effects of the harmful consequences arising out of acts not prohibited by international law.

33. The question raised by the Special Rapporteur (*ibid.*, para. 9) as to whether or not activities causing pollution with appreciable transboundary harm were prohibited by international law was the subject of some discussion in the Commission. Some members agreed with the Special Rapporteur's conclusion that the present topic should cover such activities, on the assumption that there was no certainty that they were prohibited by international law. That approach for them was without prejudice to the fact that there were several treaty régimes which prohibited a number of such activities. Some members expressed the view that such activities were prohibited by international law and that such a conclusion could be based on the general principles of law, treaties, declarations by international organizations, etc. For these members, a presumption by the Commission that activities causing pollution were not prohibited by international law was not judicious. In view of a number of relevant conventions, such a presumption on the part of the Commission seemed to deny at the outset the existence of any customary law on the matter. Such an approach was, in their opinion, to be avoided.

34. Some other members wondered whether the question was necessary or even appropriate in the context of the present topic. It would perhaps be more advisable, it was suggested, to consider whether there were instances of transboundary pollution which might be the grounds for a standard of liability higher than normal, namely strict liability rather than liability based on fault. For example, if a State was about to conduct an activity with potential transboundary harm, it was under an obligation of due diligence, i.e. it would have to take certain preventive measures. If the harm occurred nevertheless, that State was liable. Under the present topic, if the State of origin did not take the required precautions, then the issue would come under State responsibility for wrongful acts. With that approach there was no need, it was

suggested, to decide whether activities causing pollution were or were not prohibited by international law.

35. It was also stated that cumulative pollution of the atmosphere from innumerable sources was a difficult problem to deal with. Such problems could best be resolved globally by multilateral agreements. In that connection it was suggested that perhaps the burden of proof in cases of multiple sources of pollution should be shifted from the injured party to the defendants. In such cases, it would be sufficient for the injured party to establish the causal relationship between the harm it had suffered and the activities as a whole, as opposed to any single one of them. It would then be for the defendants to decide among themselves their respective contributions to compensation.

36. Some members furthermore expressed the view that, in dealing with the subject of liability, the Commission should not develop it only as an instrument for punishment. It should be promoted as a framework for prevention and international management of activities relevant to a new ethic of development for transfer of science and technology. Incentives such as insurance, international emergency relief, rehabilitation, aid and assistance also appeared to be very pertinent for development under the present topic.

37. The Special Rapporteur said he believed that a discussion on whether the topic involved progressive development or codification of international law was unnecessary and, so far as he could tell, would serve no useful purpose. Instead he wished to draw the Commission's attention to the fact that any meaningful development of the topic had to rely on sound judgment, common sense, co-operation and concerted efforts on the part of the Commission to reduce the gap between different policy preferences. As to whether activities causing pollution were or were not wrongful, he stated that he only intended to be pragmatic. With regard to activities which produced appreciable harm through pollution, he stated that, in the light of the debate on the matter, such activities would, in his opinion, fall within the scope of the topic.

### 3. CONSIDERATION OF THE DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

#### (a) CHAPTER I. GENERAL PROVISIONS

##### ARTICLE 1 (Scope of the present articles)

38. Introducing draft article 1, the Special Rapporteur pointed out that the basic situation contemplated under the present topic was essentially territorial: activities occurring in the territory of one State which produced harm in the territory of another State. But not all activities under the topic were territorially based. Activities involving risk could be carried on outside the territory of the State of origin. For example, such activities could occur on ships or space vehicles, which could not be regarded as "territory" of a State but were within its jurisdiction. There were still other situations where

the term "territory" was unhelpful, such as that of a foreign ship in the territorial sea of another State. The term "territory", in the Special Rapporteur's view, was much too limited to encompass all the activities covered by the topic. A better term, he explained, was "jurisdiction": the exercise of jurisdiction by a State under international law over activities involving risk. The requirements of taking preventive measures or making reparation could be expected only from a State which exercised jurisdiction under international law over an activity. The term "jurisdiction" overcame, he believed, the limits inherent in the concept of territory and would encompass all activities covered by the topic. But the term "jurisdiction" by itself would be insufficient. There were situations in which a State exercised *de facto* jurisdiction—jurisdiction not recognized under international law—such as the *de facto* jurisdiction of South Africa over Namibia or any other unlawful occupation of a territory. Such unlawful *de facto* jurisdiction did not and should not exempt the State from the harmful consequences of activities carried on under that jurisdiction. To include that situation, the concept of "effective control" by a State should be used. The Special Rapporteur said he believed that the formula he had proposed in article 1 provided workable criteria for determining the scope of the articles on the topic.

39. Also in connection with article 1, the Special Rapporteur stated that he had introduced the concept of "risk" as a criterion limiting the types of activities covered by the topic. In his view, any activity causing transboundary harm had to have an element of appreciable risk associated with it. Otherwise, that activity would not fall within the scope of the topic. The introduction of that new element better clarified the obligation of taking preventive measures to remove or reduce the harm. The Special Rapporteur stated that the "risk" must be appreciable, meaning that it had to be identifiable by virtue of the physical characteristics of the activity or things involved; its appreciation must be related to the nature of the risk involved in the activity rather than to specific features of the activity, and such risk had to be determined objectively and not be dependent on the point of view of one State. With the introduction of the concept of risk, the Special Rapporteur felt that it was no longer necessary to speak of activities which "gave rise or might give rise to" transboundary harm, for if an activity created appreciable risk it would be covered by the topic. Thus, if any reference to activities which caused transboundary harm was to be included, it should be associated with activities creating appreciable risk. He further stated that the concept of "situations" had not been retained in article 1, since it had met with some criticism. The term "situation" had formerly been used as an intermediate concept between the origin of a causal chain in a State and its final effects in another State, i.e. the case where a certain activity in a State produced some results which only after accumulation started causing transboundary harm. That accumulation was referred to in former articles as a "situation" which gave rise or might give rise to transboundary harm. Strictly speak-

ing, however, that intermediate concept was not necessary, since with or without it the causal chain led back to the State of origin. The other reason for including it had been to cover cases in which the activities concerned could not be described as dangerous in themselves, but nevertheless created a dangerous situation, such as the construction of a dam which could upset hydrological conditions, affect the rainfall in an area, etc. He was not sure that the concept of "situations" would still be useful.

40. Many members of the Commission pointed out that a number of important issues were connected with article 1. The article was of the utmost importance, since it created the framework within which the topic could develop.

41. Article 1, it was observed, limited the scope of the topic to activities involving *appreciable risk*. For some members, risk was a useful addition to the approach to the topic, for, in their view, the concept of risk provided a solid foundation for drafting articles on specific aspects of the topic. For these members, liability based on risk presented some definite advantages. The notion of risk made it possible to pin-point the topic and its limits within the broad field of liability and gave greater unity and coherence to the topic. It also introduced, in their view, a clearer line of demarcation between the present topic and responsibility for wrongful acts. Harm, it was suggested, was common to both topics. Thus, in order to determine the conditions governing reparation, the origin of harm was important. If the source lay in wrongfulness, the injured State had to prove the existence of wrongfulness. If the source lay in risk, the injured State simply had to prove that there was a causal link between the source and the harm. Finally, risk, in the view of these members, went to the heart of the topic, for it pointed to the main source of transboundary harm, namely dangerous activities or things.

42. It was also stated that the concept of risk provided a more logical basis for reparation. In the view of some members, there was a solid basis in international law for attribution of liability based on risk. One of the fundamental principles of relations between States was good-neighbourliness, a concept incorporated in the Preamble and in Article 74 of the Charter of the United Nations and which underlay the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>21</sup> The principle of good-neighbourliness, these members believed, went beyond mere geographical proximity and had larger implications. An example was to be found in the arbitral award of 17 July 1986 in the *Gulf of Saint Lawrence* case.<sup>22</sup> It was admitted that there were some difficulties in the concept of risk, such as how to deal with hidden

<sup>21</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>22</sup> See paragraph 27 of the award, reproduced (in French) in *Revue générale de droit international public* (Paris), vol. 90 (1986), pp. 713 *et seq.* (to appear in United Nations, *Reports of International Arbitral Awards*, vol. XIX).

risk. Perhaps that kind of activity, it was said, could be kept outside the topic.

43. One member was of the opinion that the concept of "risk" should not be introduced into the present topic in any form and preferred the concepts of "injury" or "harm".

44. Some other members of the Commission, while not rejecting the introduction of the concept of risk, disagreed with its place as the predominant concept in the topic. The concept of risk, in their view, could play an important role with regard to prevention, for preventive measures could, after all, reasonably be expected to be taken if certain risks were associated with an activity. The concept should not, however, be extended to liability. A régime of liability could not be based on risk; if it were, it would offer extremely limited possibilities for reparation. The whole principle of the protection of the innocent victim would thus be radically modified, since it would be possible to compensate such victims only for loss that was caused by activities involving risk. The fact remained, however, that those victims were still innocent when their loss was caused by an activity of another State involving no visible or appreciable risk. It would be unfair to expect the victims in such cases to bear the loss alone.

45. Some members pointed out that the concept of risk was ambiguous. Even with the criteria the Special Rapporteur had introduced, the concept suffered from imprecision. It left out, for example, activities in the conduct of which no appreciable risk could be identified, but in relation to which it was known that, if an accident occurred, the results would be catastrophic. For example, the manufacture of certain chemicals or the building of dams, although low-risk activities in themselves, could cause appreciable harm in the case of an accident. In the view of these members, therefore, it would be a mistake to limit the topic to the assessment of risk. They pointed out that the law was never indifferent to the occurrence of harm when it infringed the rights of other States, citing the *Trail Smelter*,<sup>23</sup> *Corfu Channel*<sup>24</sup> and *Lake Lanoux*<sup>25</sup> cases, Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)<sup>26</sup> and part XII of the 1982 United Nations Convention on the Law of the Sea.<sup>27</sup> However, one member expressed the view that legal principles governing activities such as the

operation of nuclear installations, which might cause extensive damage in the case of an accident, although risk was low, should be left to specific agreements providing for a special régime covering such activities, separately from the general principles under the present topic.

46. It was also suggested that the topic could take a different approach: it could focus, at its core, on activities creating an appreciable risk of causing transboundary harm, but could also deal separately with other activities causing transboundary harm. Thus the principles of prevention, co-operation and notification would be confined to activities creating risk. The guidelines for negotiating reparation would differ for the two categories. The title of the draft could be amended to accommodate those changes. It could, for example, read: "Draft articles on international liability for transboundary harm" and all draft articles could be amended accordingly.

47. One member pointed out that activities involving risk meant not any kind of risk but an exceptional risk capable of producing harm or injury. Risk would exist whatever its degree. The obligation under the draft articles would therefore be to co-operate with the States concerned in order to set up appropriate machinery to regulate matters pertaining to harm caused by the consequences of an exceptionally dangerous activity.

48. It was also suggested that the Commission should not be too concerned by the demarcation line between the present topic and the topics of State responsibility and the law of the non-navigational uses of international watercourses. International law relating to different subjects was a unity as a concept in itself. Regardless of how topics were defined, they would have overlapping principles and rules. What mattered, according to the members of the Commission holding this view, was to harmonize the overlapping parts of the different topics. For them, the usefulness of the concept of risk should therefore be determined only with respect to whether or not it contributed to the elaboration of the topic, not because it provided a better demarcation line between the present topic and the other two topics. One member observed that the risk to be taken into consideration was related to the potential appreciable harm corresponding to it. There was therefore no need to qualify the risk.

49. The Special Rapporteur, responding to the comments made, pointed out that it seemed to him that there were two different views within the Commission as to whether or not the activities to be dealt with under the present topic should be limited to those involving appreciable risk. Some preferred to limit the topic to activities involving appreciable risk. Many others felt that the criterion of risk should be limited to the obligation of prevention and that the articles should deal with all activities causing transboundary harm. This was an issue, he believed, that the Commission would have to decide.

<sup>23</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

<sup>24</sup> *I.C.J. Reports 1949*, p. 4.

<sup>25</sup> Original French text in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook ... 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

<sup>26</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

<sup>27</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

50. The Special Rapporteur admitted that the concept of risk as defined in draft article 2 (a) did not seem to cover properly activities with low risk but with the potential of great harm. As far as he was concerned, such activities should be included in the topic, and the necessary modifications would accordingly be introduced in article 2 for that purpose.

51. It was observed by some members that article 1 excluded the possibility of dealing with liability for harm occurring beyond the jurisdiction or control of any State, harm to the common areas of the high seas, outer space, the ozone layer, etc. In their view, in the light of the continuous deterioration of the human environment, such a limitation was unfortunate. The topic should have included, they believed, the whole of the human environment. In that context, the Special Rapporteur reminded the Commission that the present topic regulated certain types of State activities with consequences attached to them. The topic contemplated that States would have to take preventive measures, consult with potentially affected States and make reparation in the case of harm. All those obligations presupposed an identifiable State of origin and affected State, and identifiable harm. The framework of the topic did not seem to be appropriate for dealing with harm to the human environment as a whole, when there were many States of origin and virtually the whole community of mankind was affected. The mechanisms envisaged under the topic did not lend themselves to dealing with those types of activity. The present topic, the Special Rapporteur stated, dealt with the human environment only to the extent that the criteria mentioned in article 1, on scope, were satisfied.

52. As for the deletion of the word "situations" from article 1, some members considered it an improvement. For them the term "situation" was unclear; they found it preferable to limit the topic to activities. Others urged the Special Rapporteur to consider reinstating the word "situations", because the combination of activities and situations was much more comprehensive than the concept of activities alone. The problem was that not everything with potential for causing transboundary harm could correctly be identified as an activity. Moreover, the result of combined activities created a dangerous situation with potential for transboundary harm. Such cases could not be identified as activities, but at the same time there were no reasonable grounds for excluding them from the topic.

53. The Special Rapporteur stated that perhaps, in the light of the comments made, it would be useful to bring back the concept of "situations", and that it was worth reconsidering its place in the topic. The difficulty, however, still remained as to finding a precise definition of the concept.

54. Some members welcomed the deletion of the concept of "physical consequences" from article 1. That would enable the topic to encompass activities other than the physical use of the environment, for example economic issues. Many other members felt that, for precisely the same reason, the requirement that an activity have physical consequences in another State should be brought

back. In their view, however, it was not at all clear whether the Special Rapporteur intended to remove that requirement from article 1, for in article 2 (c) he had introduced it in the definition of "transboundary injury".

55. The Special Rapporteur said that, as he had explained in his previous reports, he believed that the activities covered by the present topic should be limited to those having *physical consequences*. That was an important criterion for keeping the topic manageable. He admitted that other activities, lacking physical consequences but having extraterritorial effects, were also important in international relations, but suggested that they be considered in another context. The Special Rapporteur agreed that the reference to a "physical consequence" in article 2 (c) was not sufficiently clear and that the term should be reintroduced in article 1.

56. In relation to the concepts of "jurisdiction" and "control", different views were expressed. Some members favoured the deletion of the term "territory". They agreed with the Special Rapporteur that "territory" was far too narrow a concept to be helpful in delimiting the scope of the topic. It was a much better approach to refer to activities under the "jurisdiction or control" of a State. That approach would allow the topic to deal effectively with activities involving risk conducted outside the territory of a State. The expression "jurisdiction or control" was also used extensively in the 1982 United Nations Convention on the Law of the Sea and other instruments, such as the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,<sup>28</sup> and that would provide an additional incentive for its use in the present draft.

57. Some members, however, while agreeing that "territory" alone was too narrow, felt that the expression "jurisdiction or control" was unclear. They were uncertain how jurisdiction or control over an activity — for example, the operations of a multinational company licensed in one State, having shareholders in another State and operating in several other States — could be determined. States were now sometimes seen to claim and enforce extraterritorial jurisdiction over foreign companies simply because they manufactured under licence or used certain technology. For these members, it was unclear whether a State claiming to have jurisdiction in such cases could or should be held liable in the event of an accident which caused transboundary harm. It was suggested that it was easy to refer to national jurisdiction so long as the State was being asked to protect some interest by adopting laws, regulations or other measures. But it was a different matter when the question was to determine who was liable for activities which, in one way or another, fell under that jurisdiction.

58. Some members wondered whether the phrase "as vested in it by international law" after the words "jurisdiction of a State" in article 1 was necessary. A view was expressed to the effect that acts performed by a State within the confines of its territory were carried out not

<sup>28</sup> United Nations, *Treaty Series*, vol. 1046, p. 120.

on the basis of any jurisdiction vested in it by international law, but on the basis of its sovereignty. The reference to jurisdiction in international law, according to this view, could be construed as a delimitation of the frontiers of national jurisdiction between States, but had nothing to do with an assessment of the lawfulness of an activity, unless the activity was directly covered by an international convention. These members were also not certain whether jurisdiction was intended to be over the activities themselves, or over activities "in spheres where another State exercises jurisdiction", as was stated in article 2 (c), for there were different scopes of application in the two cases.

59. It was suggested that the term "control" should be defined more clearly. The question was asked whether control included political, economic, legal, or some other kind of control; whether it applied to control over a territory or over an activity; and whether control was *de facto* or *de jure*. Many multinational corporations operating in developing countries were, it was observed, outside the effective control of those countries, some of which did not have adequate financial or technical means to monitor the activities in question.

60. The Special Rapporteur, responding to these comments, said he was still convinced that the concepts of jurisdiction and control were more appropriate for the definition of the scope of the articles than that of territory. He recalled that activities under the present topic might occur in areas which were not part of the territory of a State, adding that it would be unfortunate to exclude from the topic all those activities which could produce transboundary harm simply because they did not fit the territorial requirement. He said that the terms "territory" or "territorial rights" as used in international law consisted of two important legal components: the jurisdictional component and the ownership or title component. The jurisdictional component of territorial rights referred to the jurisdictional capacity of the State over certain activities or events. The right to ownership or title over certain resources, the other component of territorial rights, was irrelevant to the question of responsibility for the consequences of certain activities or events. The Special Rapporteur remarked that, in the present context, the distinction between those two components of territory was important, as the topic was concerned only with the jurisdiction of a State. He emphasized that, in international law, the rights and obligations of States were determined not only by their sovereign rights to a territory, but also by their competence to make and apply the law, their jurisdictional competence over certain activities or events. He stated that a close look at the three important cases relevant to the present topic, namely the *Island of Palmas (Miangas)*,<sup>29</sup> *Corfu Channel*<sup>30</sup> and *Trail Smelter*<sup>31</sup> cases,

<sup>29</sup> See United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), pp. 838-839.

<sup>30</sup> See *I.C.J. Reports 1949*, p. 22.

<sup>31</sup> See United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1965.

would indicate that the obligation of States to bear responsibility or liability was based on their jurisdictional competence. He referred to the four 1958 Geneva Conventions on the law of the sea, as well as to the 1982 United Nations Convention on the Law of the Sea, which covered many jurisdictional capacities of the flag-State. The Special Rapporteur explained that, in the areas of mixed jurisdiction where two or more States were entitled under international law to exercise jurisdiction, liability would be attributed to the State which was entitled to exercise jurisdiction over the activity or event that had led to transboundary harm.

61. The Special Rapporteur reminded the Commission that jurisdictional questions were complex and that sometimes they constituted the core of a dispute. He did not believe that unilateral extension of jurisdiction by States, to which some members of the Commission had referred, would create any obstacle to the utility of the concept to the topic. He felt that the qualifying words in the phrase "jurisdiction of a State *as vested in it by international law*" were sufficient to separate the concept of jurisdiction under the present topic from unilateral extensions of jurisdiction by States, not all of which were recognized under international law. He agreed that jurisdiction had a multitude of meanings; but under the present topic jurisdiction included the competence to make law *and* apply it to certain activities or events. As the three cases he had mentioned (para. 60 above) indicated, the existence of both of these jurisdictional competences was necessary for establishing the liability of a State. If a State could demonstrate that it had effectively been ousted by another State from the exercise of its jurisdiction, it would then be outside the scope of the topic. To fill that gap, the Special Rapporteur said, the concept of control had to be used. He explained that, while jurisdiction was a legal concept, control was a factual determination. Control, he said, had all the properties of jurisdiction, except that it was not recognized as jurisdiction in international law. Even though "control" was a factual determination, international law specified those facts which were to be deemed relevant. The Special Rapporteur pointed out that the notion of control had been used by the ICJ in the *Namibia* case<sup>32</sup> and had been given a legal content. Accordingly, "control" imported both the ouster of jurisdiction and the unavailability of any other remedy because the State with legitimate claims to jurisdiction could not effectively gain jurisdiction. This understanding of control was necessary, in the Special Rapporteur's view, in order to fill the vacuum created in situations where a jurisdictional State, either voluntarily or by implicit behaviour, allowed the exercise of effective control by another State in its territory or for acts within its jurisdiction. For those reasons, the Special Rapporteur said that, in his view, the concepts of jurisdiction and control were appropriate for the delimitation of the scope of the topic.

<sup>32</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

## ARTICLE 2 (Use of terms)

62. The Special Rapporteur said that the purpose of draft article 2 was to define the meaning of the terms employed in the various articles submitted so far. As the work progressed it might become necessary to introduce further definitions. In subparagraphs (a) and (b), he had attempted to provide a comprehensive definition of a dangerous activity, instead of providing a list of such activities. Most, if not all, known dangers arose from the use of dangerous things; *cosas peligrosas* in Spanish or *choses dangereuses* in French. This concept, as he had explained before, was essentially relative: it depended on the intrinsic properties of the things concerned (e.g. dynamite, nuclear materials), the place in which they were used (near a border), the environment in which they were used (air, water, etc.) and the way in which they were used (e.g. oil transported in great quantities by large tankers). The risk element constituted one of the most essential features of liability. Subparagraph (a) limited the risk to "appreciable risk", meaning that it had to be greater than a normal risk. It had to be visible to the professional eye. Hidden risk did not lie within the scope of the draft articles, unless it was known to exist because of some circumstance: for instance, if it became evident at a later stage by causing some transboundary injury. The purpose of the proposed wording was to protect the freedom of the State of origin. The Special Rapporteur stated that the proposed definition was in conformity with Principle 21 of the 1972 Stockholm Declaration.<sup>33</sup> It introduced a "threshold" which, even though it could not be measured with precision, was nevertheless useful.<sup>34</sup>

63. The Special Rapporteur pointed out that the concept of "transboundary injury" in subparagraph (c) had two parts: the transboundary element and the harm. In the light of his earlier explanation of article 1, the transboundary element must be understood in terms of jurisdictional limits, and not always territorial boundaries. Consequently, an activity and its effects must take place in different jurisdictions. As for the term "injury", he was not certain whether it was an adequate translation of the original Spanish *daño*, which was a neutral term describing anything detrimental to persons or property. Until it was decided whether "harm" or "injury" was a better translation of the Spanish *daño*, either one of those terms, wherever it appeared in his report, should be understood to mean anything detrimental to persons or property. His position was that not all types of harm had to be compensated and that only harm which was appreciable and arose from an activity creating appreciable risk should be compensatable. Thus anyone who created risk by conducting an activity must assume certain obligations, and it was precisely because of the risk created—which was greater than normal—that *a priori* he assumed the general obligation to provide compensation for any appreciable harm that might occur. Thus

<sup>33</sup> See footnote 26 above.

<sup>34</sup> For other remarks on the concept of risk, see paragraphs 28 and 39-50 above.

the obligation to provide compensation arose not merely because injury had occurred, but because it corresponded to a certain general anticipation that it was going to occur. The other subparagraphs of article 2, the Special Rapporteur felt, were self-explanatory.

64. It was suggested by many members of the Commission that article 2 should in any event be reviewed after the other articles had been drafted to ensure that the definitions of terms corresponded to the way those terms were used in the context of the articles. It might also be necessary to include additional terms in article 2.

65. There were, however, some queries about article 2 as presently drafted. It was asked, for example, whether the word "environment" in subparagraph (a) (i) referred to the environment of the State of origin, and whether the expression "appreciable risk" in subparagraph (a) (ii) was indeed an objective criterion. The definition of the expression "activities involving risk" in subparagraph (b) seemed, according to one view, tautological for it referred back to article 1. Thus it was stated in relation to subparagraph (b) that, if natural events were not to be covered, it would be necessary to specify that the risks envisaged were those directly or indirectly caused by man, including the risks resulting from man's failure to take action. As to subparagraph (c), a suggestion was made to replace the expression "appreciably detrimental" by the earlier wording "transboundary loss or injury". A question was also raised as to whether the words "spheres where another State exercises jurisdiction" in the same subparagraph meant something different from activities under the jurisdiction of a State as referred to in article 1.

66. Some of the queries about the terms "risk", "jurisdiction" and "control" raised in the context of article 1 were also referred to in the context of article 2. It was furthermore suggested by some that perhaps the word "harm" was preferable to "injury". "Harm" was a factual description of some value deprivation, while "injury" carried a legal meaning which made it more appropriate in the context of responsibility for wrongful acts.

67. The Special Rapporteur said that he had no objection to the term *daño* being translated as "harm". He simply drew the Commission's attention to the title of the topic, which referred to the "injurious" consequences of acts. He also pointed out that the translation of some of the Spanish terms into English did not quite reflect their legal meaning. He felt that the Drafting Committee should reconsider the appropriate translation of some Spanish terms into other languages in the light of the comments made in plenary.

## ARTICLE 3 (Attribution)

68. The Special Rapporteur pointed out that there were two issues involved in attribution. One was whether the harm was caused by an activity taking place under the jurisdiction or effective control of a State; the other was whether the State knew or had means of knowing that such activities were being conducted under its jurisdic-

tion or effective control. For the first, it was sufficient to establish a causal relationship. In the opinion of the Special Rapporteur, there was no difference in that regard—namely the factual attribution of consequences to certain acts—between the field of responsibility for wrongful acts and that of the present topic. Such a causal relationship between the activity and the harm caused was unaffected by the requirement of knowledge. The requirements of draft article 3 were fulfilled, the Special Rapporteur stated, when the causal relationship between the activity and the harm was accompanied by knowledge on the part of the State of origin that such activity was being carried on under its jurisdiction or effective control. That requirement, the Special Rapporteur felt, was useful in that it took into account the interests of some developing countries which might not have the technical means of monitoring activities within their territories. Since the mechanisms of the draft articles should be balanced and easily operable, article 3 had been drafted on the understanding that there was a presumption in favour of the affected State that the State of origin knew or had means of knowing. That presumption could be rebutted by the State of origin if it provided evidence to the contrary. In other words, the burden of proof to the contrary was shifted to the State of origin.

69. Some members agreed with the Special Rapporteur that no State could be held liable for harm arising from activities of which it had had no knowledge. However, in the context of the present topic, most activities would occur within the territory of a State, and a State normally had knowledge of what was happening in its territory. Article 3 should be drafted so as to reflect more clearly the intention of the Special Rapporteur, namely that the burden of proof was shifted to the State of origin to prove that it had not known and had had no means of knowing. It was also possible to use a negative formula to express that the State was not bound by the obligation in question if it could establish “that it had not known and could not have known” that the activity was being carried on. The article could also be redrafted to read: “The State of origin shall not have the obligations imposed on it with respect to an activity referred to in article 1 unless it knew or had means of knowing that the activity was being, or was about to be, carried on in areas under its jurisdiction or control.”

70. In this connection, a view was also expressed that the Commission should focus on the liability of a multinational corporation without attempting to view it through the prism of State jurisdiction. It was further suggested that such a concept of liability should be proportional to the effective control of the State or other entities operating within each jurisdiction and, more importantly, to the means at their disposal to prevent, minimize or redress harm.

71. It was, on the other hand, pointed out that the condition contained in article 3 as drafted—a proviso which related to the special position of the developing countries—might in fact detract in part from the effectiveness of the principle whereby an innocent victim must

not be left to bear loss alone. Accordingly, it was said that the proviso should be deleted or amended so that the burden of proof, as the Special Rapporteur had indicated, lay with the State of origin to prove that it had not known, or had had no means of knowing. It was noted that the State of origin, like the affected State, could well be a developing country.

72. Some members of the Commission thought that attribution appeared from the Special Rapporteur’s fourth report (A/CN.4/413) to be based primarily on territoriality. Accordingly, the characteristic features of an “act of State” did not come into play in the case of transboundary harm. Hence both activities undertaken by the State itself and those carried on by persons under its jurisdiction fell within the scope of article 3. Thus, in the view of these members, article 3 properly confirmed the notion of liability based on causality.

73. As for “causality”, it was suggested that additional clarification would be useful. It was necessary to state whether causality was legal or factual. The requirement of legal causality or “proximate cause” set the limit on liability, since it required a sufficiently close link between the activity and harm. The Special Rapporteur, however, seemed to rely on “cause in fact”, which required only an uninterrupted chain of causal links between the conduct and the harm. The notion of causal liability, therefore, had to be clarified. In this regard, a view was expressed that, in the consideration of the relationship between risk and harm, *force majeure* had not received sufficient attention. According to that view, the presence of *force majeure* in connection with activities involving risk from which harm ensued maintained the lawful character of those activities. Further thought should therefore be given to that issue.

74. It was also suggested that the title of article 3 should perhaps be changed, since “attribution” was used in the context of State responsibility with different meanings and requirements. There was a suggestion to change the title to read “Basis of obligations under the present articles”, or something similar.

75. The Special Rapporteur said that, in his view, causality under the present topic did not differ essentially from causality under responsibility for wrongful acts. The dividing line between the two topics in the field of attribution began when an act was ascribed to a State, in other words when an act was characterized as an act of State. Under the present topic, it was not the activity that was attributed to a State, but rather the consequences of the activity. In accordance with article 3, the Special Rapporteur pointed out, the State of origin must have had knowledge or means of knowing about the existence of the activity being conducted under its jurisdiction or control.

76. The Special Rapporteur explained that the purpose of article 3 was to take into account the interests of some developing countries having vast territories and insufficient financial and administrative means to monitor what was happening in some parts of their territory. The article was also intended to conform to the jurisprudence

that a State could not reasonably be expected to know *everything* that was happening in its territory or under its jurisdiction or control. However, those goals should also be consistent—as some members had remarked—with the principle that an innocent victim should not be left to bear loss alone. A look at a map of the globe showed that there were more developing States located within close proximity to other developing States than to developed States. There was therefore a greater likelihood that activities within developing States might harm another developing State, with the result that the intended protection of the developing States be extended only up to a certain limit, beyond which their own interests might be prejudiced. Those were the reasons, the Special Rapporteur said, for maintaining the presumption that a State had knowledge, or means of knowing, that an activity involving risk was being, or was about to be, carried on in areas under its jurisdiction or control. Perhaps, he said, that presumption should be more explicitly stated in article 3.

#### ARTICLE 4 (Relationship between the present articles and other international agreements)

77. Draft article 4, the Special Rapporteur said, was self-explanatory. It had also been introduced in earlier reports. Its purpose was to make explicit that the present articles were not intended to override any specific agreements that States might wish to conclude regarding the activities covered by the present topic. The application of the present articles would therefore be subject to those other international agreements.

78. For many members of the Commission, article 4 did not raise any difficulty, since it was in the nature of a saving clause and reflected provisions in many other international instruments. Some members, however, were not entirely satisfied with the article, and believed that it required further reflection. It was pointed out that, since the word “situations” had been deleted from article 1, it should also be deleted from article 4. There was also a query about the meaning of the words “subject to that other international agreement”.

#### ARTICLE 5 (Absence of effect upon other rules of international law)

79. The Special Rapporteur pointed out that draft article 5 had also been introduced in earlier reports and that its purpose was again to clarify areas of ambiguity as much as possible. The article was intended to allow for the application of other rules of international law to the activities also covered by the present topic. The article did, of course, state the obvious, but it seemed to have given a certain additional clarity to the approach adopted. He had therefore decided to retain it.

80. Some members observed that the wording of article 5 was vague but agreed that the principle it laid down was fundamental. The purpose of the article was to leave room for situations where harm could be caused by acts not otherwise covered under State responsibility. However, as drafted, it weakened the principle of li-

ability. A suggestion was made that the article could be amended to read: “The present articles are without prejudice to the operation of any other rule of international law establishing responsibility for transboundary harm resulting from a wrongful act or omission.”

#### (b) CHAPTER II. PRINCIPLES

81. The Special Rapporteur said that it was essential to have a set of principles for the topic, and that the Commission did not need to worry whether those principles should be regarded as a reflection of general international law or as part of the progressive development of that law. He said he would therefore be particularly grateful if the members of the Commission would focus their comments on whether or not the principles were applicable to the topic. He reminded the Commission that, at some level, the present topic was breaking new ground and would have to proceed by trial and error. In drafting the articles on principles, he had followed the guidance that he had received from the Commission at its thirty-ninth session, in 1987, as well as Principle 21 of the 1972 Stockholm Declaration.<sup>35</sup>

82. There was general agreement that the principles set out by the Special Rapporteur in paragraph 86 of his fourth report (A/CN.4/413) were relevant to the topic and acceptable in their general outline. Those principles were:

(a) the articles must ensure to each State as much freedom of choice within its territory as is compatible with the rights and interests of other States;

(b) the protection of such rights and interests requires the adoption of measures of prevention and, if injury nevertheless occurs, measures of reparation;

(c) in so far as may be consistent with those two principles, an innocent victim should not be left to bear his loss or injury.

Some members felt that, while it was easy to agree on principles at a general level of abstraction, it would be more difficult to reach a consensus on specific rules of implementation. Some members asked whether the Special Rapporteur intended to supplement the few articles on general principles with other provisions indicating how they should be applied. The Special Rapporteur replied that he intended to elaborate on those articles in other provisions which would appear in subsequent chapters.

#### ARTICLE 6 (Freedom of action and the limits thereto)

83. The first principle, the Special Rapporteur pointed out, was taken from Principle 21 of the 1972 Stockholm Declaration.<sup>36</sup> It expressed both the freedom of action of a State within its jurisdiction and the limits thereto. The principle was intended to maintain a reasonable balance, on the basis of jurisprudence and common sense, between the interests of the State conducting activities and those of States which might be at risk of suffering injury as a result of those activities. The Special Rapporteur

<sup>35</sup> See footnote 26 above.

<sup>36</sup> *Ibid.*

said that he preferred in draft article 6 to refer to the protection of the "rights" rather than of the "interests" of States. In his opinion the notion of "interests" was not sufficiently clear. It seemed to him that an "interest" was merely something which a State wished to protect because it might represent a gain or an advantage for the State, or because its destruction might cause a loss or disadvantage, but which did not have legal protection. When legal protection was extended to an "interest", it became a "right". In the Special Rapporteur's opinion, while rights should be accorded legal protection, interests should be left subject only to moral constraints, or constraints derived from international courtesy.

84. Many members of the Commission agreed that article 6 embodied an important principle, namely the freedom of States to conduct activities within their territories or in areas under their jurisdiction. That principle, based on the territorial sovereignty of States, should, in their view, be stated more explicitly. The principle, it was suggested, could be expressed even more concisely by stressing the idea—often repeated since the beginning of the consideration of the present topic—that the articles were aimed not at prohibiting the activities in question, but at regulating them by means of prevention and reparation. As a matter of drafting, it was suggested that the first sentence of the article was redundant and should be deleted. The text also appeared to some members to contain a reservation, inasmuch as it mentioned only activities "involving risk". The remark was made that such a reservation, if it was intended as such, was inappropriate when applied to the very general legal principle whereby one State's freedom ended where another State's rights began, and that the exercise of any activity must be compatible with the "protection of the rights" of other States. It was therefore suggested that the qualification "with regard to activities involving risk" be deleted.

85. It was also remarked that three elements should be considered in the context of article 6. The first was the freedom of States, based on the principle of sovereignty, to conduct activities, an element which the first sentence of the article attempted to cover. The second element was the prohibition of activities which inevitably inflicted "appreciable" harm on other States. On that point, the second sentence should also introduce the principle of territorial integrity. Thus it would be necessary to specify that no State had the right knowingly and wilfully to inflict on its neighbours the burden of the waste it generated. The third element was that activities which involved risk, but which were socially useful if responsibly controlled, must be tolerated.

86. Some members agreed with the Special Rapporteur that it was better not to include the term "interests", since it was vague and would create uncertainty as to the meaning of the articles. It was also suggested that article 6 should reflect more clearly Principles 21 and 22 of the 1972 Stockholm Declaration,<sup>37</sup> even though those principles were of a declaratory nature.

<sup>37</sup> *Ibid.*

#### ARTICLE 7 (Co-operation)

87. The Special Rapporteur explained that he had introduced an article on the principle of co-operation because it was one of the foundations of the provisions of the draft articles relating to notification, exchange of information and the taking of preventive measures. He felt that, although "co-operation" was perhaps not the only basis of the aforementioned obligations, it was, at least, one of the bases. In view of the pattern of introduction of modern technology to human civilization, any meaningful prevention of harmful by-products of certain activities would have to be based on co-operation among all States. Unilateral measures were insufficient, by themselves, to provide adequate protection. If transboundary harm occurred, however, justice and equity demanded reparation, even though co-operation would often be necessary to assist the State of origin in mitigating the harmful effects. The words "States shall co-operate in good faith" in paragraph 1 of draft article 7 were intended to accommodate the concern, expressed during the Commission's discussion at its thirty-ninth session, in 1987, that States should avoid acts which constituted attempts to take advantage—because of international rivalries or any other reason—of accidents such as those envisaged in the context of the present topic. Nor did the Special Rapporteur wish to imply that assistance provided under the rules on co-operation should be free of charge in all cases.

88. Some members of the Commission found article 7 useful, since it defined the content of co-operation. Co-operation, according to one view, was an indispensable component of any measures designed to protect the vital interests of mankind. However, these members felt that the words "both in affected States and in States of origin", in paragraph 1, should be deleted, for the article in its present form also appeared to cover activities having harmful effects only in the State of origin. Paragraph 2, it was suggested, could also be deleted, since it was obvious that, where there was co-operation, at least two parties were involved and, in the case in point, those parties could only be the affected State and the State of origin. According to a view expressed during the debate, it was essential, as the Special Rapporteur had indicated in his fourth report (A/CN.4/413), to take account of the rights and interests of the State of origin, for that was of crucial importance from the point of view of prevention. According to that view, taking account of the rights and interests of the State of origin was an integral part of the whole concept of liability in the event of transboundary harm caused by a lawful activity.

89. Some members suggested that the principle of co-operation laid down in article 7 could be more specifically stated to include the obligations of notification, consultations and prevention, as did the articles on the law of the non-navigational uses of international watercourses. Through those procedures, it would be possible to identify activities involving risk and to adopt by agreement the necessary preventive measures. A view was also expressed that, in drafting article 7, it should be

remembered that the present topic concerned not co-operation, but liability and prevention, and that it was therefore inadvisable to put too much emphasis on co-operation.

#### ARTICLE 8 (Participation)

90. The Special Rapporteur said that, in his opinion, the principle of participation was complementary to the principle of co-operation laid down in article 7. Hence the State of origin should permit participation by States exposed to a potential risk in choosing means of prevention. Such participation would cover the procedural steps for prevention. The purpose of draft article 8 was to allow a potentially affected State to assess more accurately the risk to which it might be exposed and play a more effective role in preventing the risk. The Special Rapporteur noted that it was important to have some sanctions attached to non-compliance with those obligations. He believed that it would perhaps be useful to relate non-compliance with procedural obligations to the extent and type of reparation of injuries as set out in section 6 of the schematic outline.<sup>38</sup>

91. In the opinion of many members of the Commission, article 8 obviously dealt with co-operation, but with a specific form of it. The duty of participation related to consultation machinery, which was already implicit in article 7, on co-operation. Besides, the modalities of such co-operation would have to be the subject of specific provisions. In view of article 7, therefore, article 8 seemed unnecessary and could conveniently be deleted without loss to the draft. If the idea expressed in article 8 was to be retained, however, it could be included in a reformulated version of article 7.

#### ARTICLE 9 (Prevention)

92. The concept of prevention, the Special Rapporteur remarked, had taken up a considerable part of the Commission's debates. In his view, an article on the matter was essential and could be drafted with three possibilities in mind: (a) prevention might be linked exclusively to reparation; (b) there could be "autonomous" obligations of prevention, i.e. obligations not connected with the possible harm and its reparation; (c) the draft might embody only norms of prevention, as had been suggested by a few members. In the first case, it was clear that the preventive effect, under a régime of liability for risk, was achieved through the conditions imposed by the régime with respect to reparation: the dissuasion would come from the knowledge that all harm had, in principle, to be compensated for. The shortcoming of that approach was that the other State—the potentially affected State—would not be able to take any action to compel the State of origin to take preventive measures before harm occurred. There were also some difficulties with the second possibility, namely placing obligations of prevention and reparation on an equal footing. It was remarked that that option would bring the subject within the scope of responsibility for wrongful acts,

since, if the State of origin did not comply with the obligations of prevention, it would be committing a wrongful act. Thus, apart from the conceptual difficulties just mentioned, such obligations of prevention might impose unnecessary limits on the freedom of States at the earliest stages of initiating an activity. Accordingly, the Special Rapporteur felt that, if the Commission agreed, an article on prevention with some linkage to the occurrence of harm would be useful.

93. Some members found the principle of prevention vital to the present topic. It was observed that the 1982 United Nations Convention on the Law of the Sea<sup>39</sup> offered many examples of provisions which referred to recognized international standards of prevention, whether in international treaties, in the resolutions and findings of international bodies, or in recommended practices. The same approach could perhaps be used for the present draft. Prevention, it was stated, must not be left entirely to the discretion of the State of origin; it must be related to more objective standards. It was pointed out that prevention should not be limited to activities involving risk, but must extend to all activities resulting in transboundary harm. It was also said that the inclusion of the term "reasonable" before the words "preventive measures" in draft article 9 tended to weaken the force of those measures and that it would therefore be preferable to retain the words "preventive measures" alone, which clearly established the obligation to prevent or minimize harm.

94. It was pointed out that the obligation of prevention had two aspects. One aspect related to mechanisms and procedures and the other to substance. The obligation of prevention in its procedural aspects included a number of practical steps: assessment of the possible transboundary effects of the activity contemplated; prevention on the part of the State of origin, to ward off accidents; consultation of those States likely to be affected by the activity; participation by those States in the preventive action, and so forth. Those procedures should enable the potentially affected States to protect themselves against the risk involved in an activity. The obligation of prevention in substance implied that, whether or not there was prior agreement among States threatened by the harmful effects of the activity undertaken, the State of origin had to take the necessary safety measures, for example by adopting laws and regulations and ensuring their application. The remark was made that it would be easier to deal with those two issues if they formed the subject of a few general articles, as was the case in the 1982 United Nations Convention on the Law of the Sea with regard to the protection of the environment. However, the Commission ought to be able to indicate more precisely what preventive measures the State of origin must take. If appreciable transboundary effects did result, the liability of the State of origin would not be the same if it had complied with its obligation of prevention as it would be if it had not. If it had taken the necessary precautions, that fact could be considered

<sup>38</sup> See footnote 10 above.

<sup>39</sup> See footnote 27 above.

in assessing its obligation to make reparation; if it had not done so, that might be considered as an aggravating circumstance.

95. Whereas some members felt that violation of obligations of prevention should entail State responsibility, some others felt that such violation should give rise to no cause of action. It was also suggested that violation of such obligations could be taken into account at the reparation stage, as an element which would lead to a higher measure of reparation.

#### ARTICLE 10 (Reparation)

96. The Special Rapporteur explained that the principle of reparation would prevail if there were no agreed régime between the State of origin and the affected State. In such a case, the régime set out in the present articles would, of course, apply. The innocent victim, as had been stated at the Commission's thirty-ninth session, should not be left to bear *alone* the harm suffered as a result of an activity involving risk carried out by another State. By the word "alone", the Special Rapporteur meant to underline the particular characteristic of liability under the present articles, namely that a victim might have to bear some loss. Harm in the present context was not assessed only in its individual physical dimensions, but also in relation to certain factors that would be enumerated. Such an assessment of harm was another difference between the present topic and that of State responsibility; for the activities dealt with in the present context were not prohibited and the preventive measures might impose a heavy financial burden on the State of origin, a factor which should not be ignored in the assessment of pecuniary damages. The Special Rapporteur also stated that the concept of reparation was broader than that of compensation. Reparation was intended to include other remedies, in addition to pecuniary damages, that the States concerned might prefer to choose.

97. Many members agreed that the concept of reparation was broader than that of compensation and should therefore be retained. Some members found no valid reason to limit the scope of reparation by specifying in draft article 10 that the harm must be "caused by an activity involving risk" and that the reparation must be settled "in accordance with the criteria laid down in the present articles". There had also been in the past examples of compensation being given *ex gratia* for harm caused by lawful activities, on the basis of what one might call moral obligation. It was that obligation that had to be transformed into a legal obligation. In the opinion of these members, therefore, the draft articles on the present topic should specify in what cases and in what circumstances the obligation to make reparation arose, regardless of risk.

98. On the other hand, a view was expressed that an article on reparation would serve no useful purpose. Even though the principle of strict liability was advanced by some States involved in certain activities, that was done only in accordance with a pre-existing treaty in which strict liability was accepted by the contracting parties. If the Special Rapporteur none the less intended to introduce the application of strict liability as a general principle of international law, he was likely to encounter the resistance of a great many Governments. Even the 1963 Vienna Convention on Civil Liability for Nuclear Damage<sup>40</sup> had so far been ratified by only 10 States, none of them nuclear Powers. Instead, the question of strict liability could be examined later solely in the context of activities involving a low risk but capable of causing large-scale harm.

99. Some members considered the Special Rapporteur's approach to reparation realistic, since harm had to be assessed in relation to a number of factors in addition to the loss actually suffered. But that approach, while justified in the case of two economically equal States, would not apply when that equality was absent. A better approach would perhaps be to adopt as a general principle the obligation to make full reparation for harm and then introduce exceptions to the general rule.

100. It was pointed out that article 10 might make a distinction between the case in which harm occurred despite preventive measures taken by the State of origin and the case in which the State of origin failed to take any preventive measures. In the latter situation, it would perhaps be possible to prove negligence. However, in the former, it would be difficult to establish whether the State of origin had taken all reasonable preventive measures or whether it had exercised due diligence. It was unclear whether there was an autonomous or objective standard by which to determine compliance with the obligation to take preventive measures or exercise due diligence or whether such a determination was left entirely at the discretion of the State of origin. That question, in the opinion of some members, required additional clarification.

101. At the end of the debate, at its 2075th meeting, the Commission referred draft articles 1 to 10 to the Drafting Committee, together with the comments made by members of the Commission regarding specific aspects of the texts.

#### C. Points on which comments are invited

102. The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the role risk and harm should play in the present topic (see paras. 28 and 39-50 above).

<sup>40</sup> United Nations, *Treaty Series*, vol. 1063, p. 265.

## Chapter III

### THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

#### A. Introduction<sup>41</sup>

103. The Commission included the topic "Non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.<sup>42</sup> At that session, the Commission adopted the report of a Sub-Committee set up on the topic during the same session and appointed Mr. Richard D. Kearney Special Rapporteur for the topic.

104. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States<sup>43</sup> to a questionnaire<sup>44</sup> which had been formulated by the Sub-Committee and circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.<sup>45</sup> The Commission's consideration of the topic at that session led to general agreement that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work.<sup>46</sup>

105. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission. Mr. Schwebel submitted his first report<sup>47</sup> at the Commission's thirty-first session, in 1979.

<sup>41</sup> For a fuller account of the Commission's work on the topic, see *Yearbook ... 1985*, vol. II (Part Two), pp. 68 *et seq.*, paras. 268-290.

<sup>42</sup> *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

<sup>43</sup> *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1. At subsequent sessions, the Commission had before it replies received from the Governments of 11 additional Member States; see *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314; *Yearbook ... 1979*, vol. II (Part One), p. 178, document A/CN.4/324; *Yearbook ... 1980*, vol. II (Part One), p. 153, document A/CN.4/329 and Add.1; and *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

<sup>44</sup> The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1. para. 6; see also *Yearbook ... 1984*, vol. II (Part Two), pp. 82-83, para. 262.

<sup>45</sup> *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

<sup>46</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

<sup>47</sup> *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

106. Mr. Schwebel submitted a second report containing six draft articles at the Commission's thirty-second session, in 1980.<sup>48</sup> At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted the following six draft articles: art. 1 (Scope of the present articles); art. 2 (System States); art. 3 (System agreements); art. 4 (Parties to the negotiation and conclusion of system agreements); art. 5 (Use of waters which constitute a shared natural resource); and art. X (Relationship between the present articles and other treaties in force).<sup>49</sup>

107. As further recommended by the Drafting Committee, the Commission, at its thirty-second session, accepted a provisional working hypothesis as to what was meant by the expression "international watercourse system". The hypothesis was contained in a note which read as follows:

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.<sup>50</sup>

108. Following Mr. Schwebel's resignation from the Commission upon his election to the ICJ in 1981, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic at its thirty-fourth session, in 1982. Also at that session, the third report of the previous Special Rapporteur, Mr. Schwebel, was circulated.<sup>51</sup>

109. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.<sup>52</sup> The report contained, as a basis for discussion,

<sup>48</sup> *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

<sup>49</sup> The texts of these articles and the commentaries thereto appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

<sup>50</sup> *Ibid.*, p. 108, para. 90.

<sup>51</sup> *Yearbook ... 1982*, vol. II (Part One) (and corrigendum), p. 65, document A/CN.4/348.

<sup>52</sup> *Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

an outline for a draft convention consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the expression "international watercourse system" and the question of an international watercourse system as a shared natural resource.

110. At its thirty-sixth session, in 1984, the Commission had before it the second report by Mr. Evensen.<sup>53</sup> It contained the revised text of the outline for a draft convention, comprising 41 articles arranged in six chapters. The Commission focused its discussion on draft articles 1 to 9<sup>54</sup> and questions related thereto and decided to refer those draft articles to the Drafting Committee for consideration in the light of the debate.<sup>55</sup> Due to lack of time, however, the Drafting Committee was unable to consider those articles at the 1984, 1985 and 1986 sessions.

111. At its thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey Special Rapporteur for the topic following Mr. Evensen's resignation from the Commission upon his election to the ICJ.

112. The Special Rapporteur submitted to the Commission at that session a preliminary report<sup>56</sup> reviewing the Commission's work on the topic to date and setting out his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to future work on the topic were: first, that draft articles 1 to 9, which had been referred to the Drafting Committee in 1984 and which the Committee had been unable to consider at the 1985 session, be taken up by the Drafting Committee at the 1986 session and not be the subject of another general debate in plenary session; and, secondly, that the Special Rapporteur should follow the

<sup>53</sup> *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

<sup>54</sup> Those nine draft articles were the following:

*Chapter I. Introductory articles:* art. 1 (Explanation (definition) of the term "international watercourse" as applied in the present Convention); art. 2 (Scope of the present Convention); art. 3 (Watercourse States); art. 4 (Watercourse agreements); art. 5 (Parties to the negotiation and conclusion of watercourse agreements);

*Chapter II. General principles, rights and duties of watercourse States:* art. 6 (General principles concerning the sharing of the waters of an international watercourse); art. 7 (Equitable sharing in the uses of the waters of an international watercourse); art. 8 (Determination of reasonable and equitable use); art. 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States).

For the texts of these articles, see *Yearbook ... 1984*, vol. II (Part Two), pp. 89 *et seq.*, footnotes 288, 290, 291, 292, 295, 296, 300, 301 and 304.

<sup>55</sup> It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 107 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see footnote 49 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report (see *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250).

<sup>56</sup> *Yearbook ... 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed.

113. At its thirty-eighth session, in 1986, the Commission had before it the second report of the Special Rapporteur on the topic.<sup>57</sup> In the report, the Special Rapporteur, after reviewing the status of the Commission's work on the topic, set out his views on draft articles 1 to 9 as submitted by the previous Special Rapporteur<sup>58</sup> and discussed the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules applicable in cases involving proposed new uses of watercourses.<sup>59</sup>

114. At its thirty-ninth session, in 1987, the Commission had before it the third report of the Special Rapporteur on the topic.<sup>60</sup>

115. In the third report, the Special Rapporteur briefly reviewed the status of the work on the topic (chap. I); set forth general considerations on procedural rules relating to the utilization of international watercourses (chap. II); submitted six draft articles concerning general principles of co-operation and notification<sup>61</sup> (chap. III); and introduced the subtopic of the general exchange of data and information (chap. IV).

116. The Special Rapporteur pointed out that the draft articles to be included in chapter III of the draft—which he suggested should be entitled "General principles of co-operation, notification and provision of data and information"—fell into two categories. The first consisted only of draft article 10, which dealt with the general obligation to co-operate; the second comprised draft articles 11 to 15, which set out rules on notification and consultation concerning proposed uses and could best be considered together. Draft articles 10 to 15 were referred to the Drafting Committee at the same session for consideration in the light of the discussion and the summing-up by the Special Rapporteur.<sup>62</sup>

<sup>57</sup> *Yearbook ... 1986*, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2.

<sup>58</sup> See footnote 54 above.

<sup>59</sup> Those five draft articles were the following: art. 10 (Notification concerning proposed uses); art. 11 (Period for reply to notification); art. 12 (Reply to notification; consultation and negotiation concerning proposed uses); art. 13 (Effect of failure to comply with articles 10 to 12); art. 14 (Proposed uses of utmost urgency).

<sup>60</sup> *Yearbook ... 1987*, vol. II (Part One), p. 15, document A/CN.4/406 and Add.1 and 2.

<sup>61</sup> Those six draft articles were the following: art. 10 (General obligation to co-operate); art. 11 (Notification concerning proposed uses); art. 12 (Period for reply to notification); art. 13 (Reply to notification; consultation and negotiation concerning proposed uses); art. 14 (Effect of failure to comply with articles 11 to 13); art. 15 (Proposed uses of utmost urgency). For the texts, see *Yearbook ... 1987*, vol. II (Part Two), pp. 21-23, footnotes 76 and 77.

<sup>62</sup> For a brief account of the major trends of the discussion on draft articles 10 to 15 at the thirty-ninth session, including the conclusions drawn by the Special Rapporteur following the debate, *ibid.*, pp. 21 *et seq.*, paras. 93-116.

117. Also at the thirty-ninth session, the Commission, after having considered the report of the Drafting Committee on the draft articles already referred to it on the present topic, approved the method followed by the Committee with regard to article 1 and the question of the use of the term "system", and provisionally adopted the following draft articles: article 2 (Scope of the present articles); article 3 (Watercourse States); article 4 ([Watercourse] [System] agreements); article 5 (Parties to [watercourse] [system] agreements); article 6 (Equitable and reasonable utilization and participation); and article 7 (Factors relevant to equitable and reasonable utilization).<sup>63</sup> The articles adopted at the thirty-ninth session were based on draft articles 2 to 8 referred to the Drafting Committee by the Commission at its thirty-sixth session, in 1984, as well as on articles 1 to 5 provisionally adopted by the Commission at its thirty-second session, in 1980 (see paras. 110 and 106 above, respectively). Due to lack of time, the Drafting Committee was unable to complete its consideration of draft article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States), submitted by the previous Special Rapporteur and referred to the Committee in 1984, nor was it able to take up draft articles 10 to 15 referred to it at the thirty-ninth session. Thus the Drafting Committee remained seized of draft articles 9 to 15.

#### B. Consideration of the topic at the present session

118. At the present session, the Commission had before it the fourth report of the Special Rapporteur on the topic (A/CN.4/412 and Add.1 and 2).

119. The report was divided into three chapters, entitled "Status of work on the topic and plan for future work" (chap. I); "Exchange of data and information" (chap. II); and "Environmental protection, pollution and related matters" (chap. III).

120. In chapter I, the Special Rapporteur provided the following tentative outline for the treatment of the topic as a whole: part I of the draft (Introduction) would consist of articles 1 to 5; part II (General principles) would contain articles 6 and 7, as well as the former articles 9 and 10, to be renumbered 8 and 9.<sup>64</sup> He proposed to include article 9 [10] (General obligation to co-operate) among the general principles, in accordance with the views expressed at the Commission's previous session. Part III (New uses and changes in existing uses) would contain articles 11 to 15, which would be renumbered 10 to 14. Part IV (Exchange of data and information) would consist of a single article, article 15 [16]. Part V would deal with environmental protection, pollution and related matters, part VI with water-related hazards

<sup>63</sup> For the texts of these articles and the commentaries thereto, *ibid.*, pp. 25 *et seq.*

<sup>64</sup> The renumbering of these and subsequent articles was necessary to ensure continuity of numeration. Where appropriate, the original numbers of the articles appear in square brackets.

and dangers and part VII with the relationship between non-navigational and navigational uses.

121. Under the heading "Other matters", the outline contained a list of subjects which, in the Special Rapporteur's view, would more appropriately be dealt with in annexes to the draft, due to its nature as a framework instrument. The Special Rapporteur suggested, however, that the Commission might wish to cover some of those subjects in the draft articles themselves.

122. Also in chapter I of the report, the Special Rapporteur proposed a schedule for submission of remaining material, subject to any decisions the Commission might take concerning the substantive coverage of the topic and its overall programme of work, including the possibility of straggling the consideration of topics. He planned to submit one report each year, however, even if its consideration was to be deferred, so as to maintain a regular flow of material and avoid submitting too extensive a report in any one year.

123. All members of the Commission who addressed the issue approved of the outline and schedule presented by the Special Rapporteur as the basis for future work on the topic.

124. The Commission considered the fourth report of the Special Rapporteur at its 2050th to 2052nd, 2062nd to 2069th and 2076th meetings, from 24 to 27 May, from 15 to 28 June and on 8 July 1988. The first set of meetings was devoted to the subtopic of exchange of data and information (part IV of the draft), on which the Special Rapporteur submitted draft article 15 [16]; the second set of meetings was devoted to the subtopic of environmental protection, pollution and related matters (part V of the draft), on which the Special Rapporteur submitted draft articles 16 [17], 17 [18] and 18 [19].

#### 1. EXCHANGE OF DATA AND INFORMATION

125. The Special Rapporteur noted that the subtopic of exchange of data and information had been introduced in his third report,<sup>65</sup> but that the Commission had been able to consider it only briefly at the thirty-ninth session. The subtopic had also been discussed earlier, at the thirty-second session, in 1980, when the Commission had referred to the Drafting Committee a draft article 6 submitted by Mr. Schwebel, entitled "Collection and exchange of information". The Committee had, however, been unable to consider the article due to lack of time.

126. The Special Rapporteur stressed that the regular exchange of data and information was an issue distinct from that of notification of planned uses and new uses of an international watercourse. The latter question had been dealt with in his third report and formed the subject of draft articles 11 to 15 submitted therein. The text which he now proposed for article 15 [16]<sup>66</sup> (hereinafter

<sup>65</sup> See *Yearbook ... 1987*, vol. II (Part One), pp. 40 *et seq.*, document A/CN.4/406 and Add.1 and 2, chap. IV.

<sup>66</sup> See footnote 67 below.

referred to as article 15) dealt with the regular and ongoing exchange of information, not with *ad hoc* notification of plans for new uses. The bedrock of the subtopic of regular exchange of data and information was the general obligation of co-operation between States for the purpose of achieving equitable and reasonable utilization of a watercourse.

ARTICLE 15 [16] (Regular exchange of data and information)

127. Introducing draft article 15,<sup>67</sup> the Special Rapporteur observed that the article could also have been placed immediately after article 9 [10] (General obligation to co-operate) in part II of the draft, on general principles. With particular reference to paragraph 4 of article 15, which dealt with conditions or incidents that posed a threat to the watercourse or to other watercourse States, the Special Rapporteur stated that the obligation to warn could equally be dealt with in a separate article on water-related hazards, dangers and emergencies, to appear in a later part of the draft.

128. As already indicated, the Commission devoted its 2050th to 2052nd meetings to consideration of part IV of the draft, on exchange of data and information. At its 2052nd meeting, the Commission referred draft article 15 to the Drafting Committee for consideration in the light of the discussion and the summing-up by the Special Rapporteur. At the 2071st and 2073rd meetings,

<sup>67</sup> Draft article 15 [16] submitted by the Special Rapporteur in his fourth report read:

*“Article 15 [16]. Regular exchange of data and information*

“1. In order to ensure the equitable and reasonable utilization of an international watercourse [system], and to attain optimal utilization thereof, watercourse States shall co-operate in the regular exchange of reasonably available data and information concerning the physical characteristics of the watercourse, including those of a hydrological, meteorological and hydrogeological nature, and concerning present and planned uses thereof, unless no watercourse State is presently using or planning to use the international watercourse [system].

“2. If a watercourse State is requested to provide data or information that are not reasonably available, it shall use its best efforts, in a spirit of co-operation, to comply with the request but may condition its compliance upon payment by the requesting watercourse State or other entity of the reasonable cost of collecting and, where appropriate, processing such data or information.

“3. Watercourse States shall employ their best efforts to collect and, where necessary, to process data and information in a manner which facilitates their co-operative utilization by the other watercourse States to which they are disseminated.

“4. Watercourse States shall inform other potentially affected watercourse States, as rapidly and fully as possible, of any condition or incident, or immediate threat thereof, affecting the international watercourse [system] that could result in a loss of human life, failure of a hydraulic work or other calamity in the other watercourse States.

“5. A watercourse State is not obligated to provide other watercourse States with data or information that are vital to its national defence or security, but shall co-operate in good faith with the other watercourse States with a view to informing them as fully as possible under the circumstances concerning the general subjects to which the withheld material relates, or finding another mutually satisfactory solution.”

on the recommendation of the Drafting Committee, the provisions of article 15 were provisionally adopted in the form of articles 10 and 20 (see para. 188 below).

## 2. ENVIRONMENTAL PROTECTION, POLLUTION AND RELATED MATTERS

129. At the 2062nd meeting, the Special Rapporteur introduced chapter III of his fourth report, dealing with environmental protection, pollution and related matters (part V of the draft). Chapter III contained background material on this subtopic and a survey of a number of authorities reviewed by the Special Rapporteur: international agreements, reports and studies prepared by intergovernmental and international non-governmental organizations, studies by individual experts, decisions of international courts and tribunals, and other instances of State practice. That survey, the Special Rapporteur explained, illustrated the long-standing concern of States about the pollution of international watercourses and showed that modern agreements recognized the intimate relationship between nature and humanity by providing for measures to safeguard the natural environment and ensure sustainable development.

130. Chapter III also contained three articles proposed by the Special Rapporteur: draft article 16 [17]<sup>68</sup> (hereinafter referred to as article 16) set out the basic obligations of States with regard to pollution; draft article 17 [18]<sup>69</sup> (hereinafter referred to as article 17) dealt with environmental protection; and draft article 18 [19]<sup>70</sup> (hereinafter referred to as article 18) concerned pollution or environmental emergencies. The Special Rapporteur suggested that the latter article should not be discussed extensively at the current session, since a new, comprehensive article on water-related hazards and dangers would be submitted in his next report.

131. On the proposal of the Special Rapporteur, the Commission first discussed draft article 16 and then took up draft articles 17 and 18.

132. The following paragraphs set out briefly the major trends of the discussion held at the present session on draft articles 16, 17 and 18 contained in the Special Rapporteur's fourth report, including the conclusions drawn by the Special Rapporteur following the debate.<sup>71</sup>

133. Concerning the general question of environmental protection and pollution control, most members of the Commission who spoke on the subtopic recognized its great importance and contemporary relevance. It was noted that fresh water was becoming scarce throughout the world, while at the same time pollution of water-

<sup>68</sup> See footnote 73 below.

<sup>69</sup> See footnote 91 below.

<sup>70</sup> See footnote 94 below.

<sup>71</sup> It should be noted that the views expressed during the debate, including remarks of a general character, and the comments made on the Commission's earlier work on the topic and on the previous reports of the Special Rapporteur are reflected extensively in the summary records of the 2062nd to 2069th and 2076th meetings (see *Yearbook ... 1988*, vol. I).

courses was on the increase. It was also pointed out that pollution of international watercourses was primarily responsible for the pollution of the marine environment. More than 80 per cent of marine pollution came from land-based sources, and, of this, about 90 per cent was carried by watercourses, especially in semi-enclosed and enclosed seas.

134. As to the desirability or justification of devoting a separate part of the draft solely to the question of environmental protection and pollution of international watercourses, some members who addressed the question stated that they did not see the need for, or desirability of, such a separate part. It was considered that treatment of this subtopic in a separate part of the draft was likely to raise problems of implementation by States. Since various provisions of the draft dealt with the rights and obligations of States with regard to the non-navigational uses of international watercourses—including the right to use the watercourse in an equitable and reasonable manner (art. 6), the obligation not to cause appreciable harm (art. 8 [9]) and the obligation to co-operate and to exchange data and information (arts. 9 [10] to 14 [15]) it was felt that the obligations relating to environmental protection and pollution control would best be treated as an integral part of those other rights and duties as enumerated in different parts of the draft. According to another view, it was essential that a link be provided between the provisions on pollution and environmental protection and the other parts of the draft which already referred more specifically to that question, in particular the articles just mentioned.

135. Most members who addressed the question, however, favoured treatment of this subtopic in a separate part of the draft, in view of its importance. It was considered that to follow any other approach, such as that of integrating the provisions on the subject into the other draft articles or sections of the draft, would dilute the importance attached to dealing with the dangers of pollution. Moreover, it was pointed out, pollution of international watercourses was likely to go beyond the area of national jurisdiction and could also affect other States that were not necessarily watercourse States. Since the other parts of the draft dealt only with the rights and duties of watercourse States, it was viewed as essential to have a separate part in the draft dealing with environmental protection and the control of pollution, so that the problem could be addressed in its entirety.

136. In this connection, a suggestion was made that articles should be formulated to deal specifically with the problem of the relationship between watercourse States and non-watercourse States in matters of environmental protection and pollution control. The Special Rapporteur reacted favourably to this suggestion. It was pointed out, however, that care should be taken not to exceed the scope of the Commission's mandate with regard to the present topic. Attention was also drawn to the fact that the 1982 United Nations Con-

vention on the Law of the Sea,<sup>72</sup> considered by many to be one of the most important multilateral conventions in recent history, contained a separate part (part XII) devoted entirely to the question of the protection and preservation of the marine environment. The Special Rapporteur believed that all these suggestions merited careful consideration.

137. Regarding the scope of the subtopic of environmental protection and pollution, most members who addressed the question expressed the view that, since the Commission was engaged in the preparation of a framework agreement, it was preferable to keep the number of articles on the subtopic to a minimum reflecting general rules relating to the subject-matter. It would then be left to States themselves to adopt more specific and detailed measures relating to the protection of the environment and the control of pollution of international watercourses. Some members, however, considered that the articles in part V of the draft were too few and suggested the further elaboration of the subtopic. In this connection, a suggestion was made that several paragraphs of the articles could become separate articles and that procedural rules could also be added, at least to draft article 16. Another suggestion was to reverse the order of articles 16 and 17 so that the more general provisions came first. A proposal was also made to change the title of part V of the draft to "Protection of the environment of international watercourses".

#### ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

138. Introducing draft article 16,<sup>73</sup> the Special Rapporteur explained that paragraph 1 contained a possible definition of pollution that might ultimately be incorporated in an introductory article with other definitions. The definition concentrated on the notion of alteration in the composition or quality of waters that resulted from human conduct and produced harmful

<sup>72</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>73</sup> Draft article 16 [17] submitted by the Special Rapporteur in his fourth report read:

#### "Article 16 [17]. Pollution of international watercourse[s] [systems]

"1. As used in these articles, 'pollution' means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

"2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system].

"3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate."

effects. Paragraph 2, the Special Rapporteur explained, was the core of the article and constituted a specific application of the "no-harm" principle contained in draft article 8 [9] as referred to the Drafting Committee in 1984.<sup>74</sup> It did not prohibit all pollution, only that which caused appreciable harm. As explained in his fourth report (A/CN.4/412 and Add.1 and 2), in paragraph (4) of his comments on draft article 16, "appreciable harm" was harm that was significant—i.e. not trivial or inconsequential—but was less than "substantial", in the sense of "considerable in size or amount". The term "harm" was used in its factual sense, to mean actual impairment of use, injury to health or property, or a detrimental effect on the ecology of the watercourse. The term "harm" had been preferred to "injury", which had legal as well as factual connotations. The Special Rapporteur also noted that the obligation laid down in paragraph 2 of article 16 was one of due diligence to ensure that appreciable harm from pollution was not caused to other watercourse States; strict liability was not, in his view, involved. Paragraph 3, the Special Rapporteur explained, was intended to reflect the emphasis placed on hazardous or dangerous substances in most recent relevant international agreements and the growing practice of States of preparing lists of substances whose introduction into a watercourse was to be banned, regulated or monitored.

139. *Paragraph 1:* In commenting on draft article 16, most members who spoke on the issue supported the idea mentioned by the Special Rapporteur of transferring paragraph 1, on the definition of "pollution", to draft article 1, on the use of terms. Most members also expressed general support for the definition as presently drafted. Some members, however, were of the view that the definition was too broad, others thought that it was too restrictive, and one member considered a definition unnecessary.

140. The view was expressed by some members that, in order to assure uniformity of law, the definition of pollution contained in article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea<sup>75</sup> should be closely followed in the present draft.

141. Some members expressed the view that the definition, apart from making reference to the physical, chemical or biological alteration of the composition or quality of the waters, should also refer to the introduction or withdrawal of substances or energy from the waters. Other members thought that reference to the alteration of the waters was broad enough to cover extraction from, as well as introduction of material into, the watercourse.

142. One member considered that the definition should be broad enough to cover situations in which continuous accumulation of small quantities of chemical substances in fish and shellfish would in the long run produce

effects detrimental to human health, since paragraph 1 of article 16 referred only to the composition and quality of the waters, not to living resources. In the opinion of another member, such a situation was already covered in the existing definition.

143. Concern was expressed by one member over the use of the words "results directly or indirectly from human conduct". In his view, that would not be in line with the traditional causation requirements in the law of State responsibility. The Special Rapporteur noted in his summing-up, however, that the same problem was raised by the definition in the 1982 United Nations Convention on the Law of the Sea (see para. 140 above), which referred to "the introduction by man, directly or indirectly, of substances or energy into the marine environment". He said that he would not, however, be opposed to examining possible alternatives with a view to finding suitable solutions to that problem.

144. A suggestion was made that the term "well-being" should be used instead of "safety" and that an express reference should also be made to "reduction of amenities", as had been done in the definition in the 1982 United Nations Convention. It was also considered important by some members to include in the definition pollution produced by new technologies and radioactive elements. The Special Rapporteur agreed that reference could perhaps be made to the introduction of "energy" to cover that particular point.

145. Some doubts were expressed about the use of the expression "any beneficial purpose". It was felt that even polluted water could sometimes be used for, or serve, a beneficial purpose. It was proposed that perhaps an adaptation of the definition in the 1982 United Nations Convention on the Law of the Sea, which referred to "hindrance to marine activities, including fishing and other legitimate uses of the sea", could be used to avoid confusion.

146. The Special Rapporteur explained that the concept of "beneficial use" was well known nationally and internationally in the field of watercourse law; it was linked to the concept of equitable utilization. However, he would not object to referring simply to "use of the waters".

147. One member proposed that the definition in paragraph 1 should also refer to changes in the river bed and to the ecological balance that might be altered as a result of pollution of the watercourse. Another member wondered whether the present definition of pollution as that which resulted from human conduct was also meant to cover pollution resulting from natural phenomena which were not a result of a human activity. On that point, the Special Rapporteur stated that he had not intended that the definition should cover the situation of pollution by natural phenomena.

148. *Paragraph 2* of draft article 16 was viewed by most speakers as essential for the present draft. All States, it was said, had an interest in not polluting the waters of an international watercourse, if only because the ecosystem was indivisible. The rule contained in para-

<sup>74</sup> For the text, see *Yearbook . . . 1984*, vol. II (Part Two), p. 96, footnote 304.

<sup>75</sup> See footnote 72 above.

graph 2, prohibiting States from polluting international watercourses in a way that might cause appreciable harm to other watercourse States or to the ecology of the watercourse, reflected the increasing interdependence of States and the interrelationship between international law on the one hand, and national law on the other. The rule was also thought to be well grounded in State practice, as evidenced, for example, by the *Trail Smelter*,<sup>76</sup> *Lake Lanoux*,<sup>77</sup> *Corfu Channel*<sup>78</sup> and *Gut Dam Claims*<sup>79</sup> cases; Principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration);<sup>80</sup> part XII of the 1982 United Nations Convention on the Law of the Sea; and other multilateral agreements.

149. In that connection, some members considered the principle so important as to warrant its placement in a separate article. However, in the view of other members, the obligation not to cause appreciable harm through pollution was to be viewed in the much wider context of the obligation to co-operate in the equitable utilization of international watercourse[s] [systems]. International co-operation in reducing and eliminating pollution was, according to these members, the best solution in achieving that objective. In that connection, it was proposed that paragraph 2 could thus provide that “watercourse States shall co-operate to prevent, reduce and control pollution of international watercourse[s] [systems]”. That approach was, however, not viewed favourably by other members who addressed the point, on the grounds that a stricter obligation was needed. Indeed, another view was that paragraph 2 should be transferred to the part of the draft dealing with general principles, to be placed alongside the principle of equitable use as an important part of the no-harm principle, with a cross-reference to part V as regards implementation.

150. The discussion on paragraph 2 focused on several specific legal issues, including the following: the concept of appreciable harm; the question of reconciling the concept of appreciable harm caused through pollution under paragraph 2 with that of detrimental effects under paragraph 1; the question of strict liability; the obligation of due diligence; and the issue of existing pollution as opposed to new pollution. The following paragraphs give a brief account of the discussion on those issues.

151. *The concept of appreciable harm:* Some speakers expressed support for the use of “appreciable harm” as the appropriate criterion for determining the threshold of unacceptable pollution of an international watercourse [system].

152. They found the explanation given by the Special Rapporteur to be sufficiently clear, first as to the mean-

ing of the expression itself, and secondly as to the fact that the concept was widely used in State practice in the field of international watercourses, in particular in various agreements on the subject. The concept, it was stated, provided a sufficiently clear and objective general standard that was suitable for attributing responsibility for pollution.

153. In the view of these members, the rule contained in paragraph 2 did not prohibit pollution as such, but only placed an obligation on States not to cause appreciable harm through pollution. To that extent, therefore, the rule was also a reflection of contemporary international law. Moreover, it was stated, while no harm was negligible, the exigencies of interdependence and good-neighbourliness made it necessary that some pollution be tolerated. It was difficult in a general framework instrument to be as precise as might be required. The principle in question was a general one, however, and it could be left to watercourse States to determine what levels of particular substances constituted appreciable harm.

154. Other members expressed doubts as to the exact meaning of the expression “appreciable harm”. In their view, the criterion was rather imprecise and subjective in nature and attempts to define it only led to more confusion. Furthermore, according to them, such a criterion seemed unnecessarily rigid; States would find it difficult to enforce in national courts. Strict enforcement of such a standard, in their view, could also slow down industrial activity. It was proposed that an expression such as “substantial harm” could provide a more objective and technical standard. Other members, however, considered that the use of the term “substantial” as a criterion would permit the introduction of considerably more pollution into the watercourse before legal injury could be said to have occurred. It was cautioned that care should be exercised not to give the impression that the standard being applied was an elastic one. The view was also expressed that the term “harm” was sufficient by itself and should not be qualified at all.

155. Some members, supporting the use of the expression “appreciable harm”, stated that there was a need for consistency among the various articles of the draft, notably with article 8 [9] on the obligation not to cause appreciable harm, as well as with the language used in other topics, such as that of international liability for injurious consequences arising out of acts not prohibited by international law.

156. The Special Rapporteur noted in response that the idea, as stated in his fourth report (A/CN.4/412 and Add.1 and 2), in paragraph (4) of his comments on draft article 16, was to use an expression that was entirely factual, one that provided as objective a standard as possible in the circumstances. He agreed with those who wished to have an objective standard, but pointed out that, in the absence of specific agreements on scientifically determined levels of permissible emissions, it was possible only to have a general standard that came as close as possible to objectivity. Moreover, he said that “appreciable harm” was the expression that had been

<sup>76</sup> See footnote 161 below.

<sup>77</sup> See footnote 158 below.

<sup>78</sup> See footnote 164 below.

<sup>79</sup> *International Legal Materials* (Washington, D.C.), vol. VIII (1969), p. 118.

<sup>80</sup> See footnote 170 below.

employed as the standard in draft article 8 [9] on the obligation not to cause appreciable harm, and that the expression, or its equivalent, was found in a number of international agreements.

157. *The question of reconciling the concept of appreciable harm under paragraph 2 with that of detrimental effects under paragraph 1:* A question was raised as to the relationship between the expression “appreciable harm” in paragraph 2 and the expression “effects detrimental to human health or safety” in paragraph 1 of draft article 16. A reservation was expressed as to the meaning of the latter expression, which was thought to be rather difficult to define. It was not quite clear whether paragraph 1 covered situations which, though causing pollution, did not cause appreciable harm.

158. Some members, however, saw no inconsistency between the “appreciable harm” referred to in paragraph 2 and the “effects detrimental to human health or safety” referred to in paragraph 1. According to that view, “detrimental effects” might or might not rise to the level of “appreciable harm”. Thus “pollution”, as defined in paragraph 1, would not necessarily constitute a violation of paragraph 2; it was only when the pollution entailed detrimental effects that exceeded the threshold of appreciable harm that it would be prohibited by article 16.

159. The Special Rapporteur noted that the same problem arose in other international instruments. For example, article 1, paragraph 1 (4), of the 1982 United Nations Convention on the Law of the Sea,<sup>81</sup> in defining “pollution of the marine environment”, referred to the introduction of “substances or energy” resulting in “deleterious effects” such as harm to marine life or hazards to human health. But article 194, paragraph 2, of that Convention required States to take measures to ensure that their activities were so conducted as not to cause “damage by pollution to other States and their environment”. In the Special Rapporteur’s view, the concept of “damage” by pollution could be compared to that of “harm” under draft article 16, and the relationship between “damage” and “deleterious effects” was similar to that between “appreciable harm” and “effects detrimental to human health or safety”. The Special Rapporteur confirmed that the view described in the preceding paragraph conformed with his own understanding of the relationship between the two concepts, and said that he could also endorse a suggestion made by one member that detrimental effects which did not rise to the level of appreciable harm should be the subject of the “reasonable measures” of abatement under paragraph 1 of draft article 17 [18].<sup>82</sup>

160. *The question of strict liability:* Some members who addressed the issue said that a State of origin which caused appreciable harm to another watercourse State should be strictly liable under paragraph 2 of article 16. Other members expressed the view that States could not

accept that causing appreciable harm through pollution to another watercourse State would result in strict liability. That principle, it was said, should be left for States to include, if they so wished, in the watercourse agreements concluded between them under article 4 of the draft. Some members also stated that paragraph 2 as presently drafted gave the impression that the basis of responsibility for causing appreciable harm through pollution was strict liability. But the Special Rapporteur noted that, as he had explained in his fourth report (*ibid.*), in paragraph (6) of his comments on draft article 16, he had taken due diligence as the measure of the obligation: in other words, a wrongful act would be committed only when appreciable harm to a watercourse State through pollution resulted from another watercourse State’s failure to exercise due diligence to prevent such harm. In that connection, it was observed by some members that the proper understanding of the rule embodied in paragraph 2 was that a watercourse State could not act in such a way that the level of pollution that affected other watercourse States or the ecology of the international watercourse rose above the threshold of appreciable harm. The responsibility which derived from violation of that obligation was responsibility for a wrongful act. Such a prohibition, it was said, was, however, not within the field of strict liability, which by definition attached to acts not prohibited by international law. That distinction was the dividing line between the topic of State responsibility and that of international liability for injurious consequences arising out of acts not prohibited by international law.

161. Paragraph 2 of draft article 16, it was further observed, imposed an obligation of result, that of preventing a certain event. It was noted that, according to article 21 of part 1 of the draft articles on State responsibility,<sup>83</sup> concerning obligations of result, a breach occurred when a State, through means of its own choice, did not achieve the result required by the obligation. Article 23 of those draft articles provided that, when the obligation of the State was to prevent the occurrence of a given event, there was a breach of that obligation only if the State, through means of its own choice, did not achieve that result. Those articles, it was said, seemed to mean that there was no breach of the obligation if the result—to prevent a given event—was achieved. If, on the other hand, the State did not achieve the required result under the aforementioned article 23, it was then necessary to examine the means employed in order finally to determine the responsibility of that State. In that connection, some members considered as acceptable the Special Rapporteur’s explanation that the State of origin must show that it had taken all measures at its disposal to prevent the harm—i.e. that it had exercised due diligence.

162. The Special Rapporteur observed that there was little, if any, evidence of State practice which recognized strict liability for water pollution damage which was non-accidental, or which did not result from a dangerous

<sup>81</sup> See footnote 72 above.

<sup>82</sup> See footnote 91 below.

<sup>83</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

activity. In his view, such activities were matters which were properly dealt with under the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In order to make it clear that what was intended in paragraph 2 of draft article 16 was responsibility for wrongfulness and not strict liability, the Special Rapporteur suggested that the paragraph might provide that watercourse States must [exercise due diligence] [take all measures necessary<sup>84</sup>] to prevent the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system]. Alternatively, the paragraph could require that watercourse States take all measures necessary to ensure that activities under their jurisdiction or control be so conducted as not to cause appreciable harm by pollution to other watercourse States or to the ecology of the international watercourse [system].<sup>85</sup>

163. *The obligation of due diligence:* Some members expressed the view that the obligation of due diligence as a standard for responsibility for causing appreciable harm through pollution was not clearly defined. The concept of due diligence, it was observed, was too weak and subjective to be used as a standard for responsibility. In the view of these members, it was necessary to set an international standard for determining responsibility, which should not be left to each watercourse State to determine, as would be the case if a due-diligence standard were used. Moreover, it was pointed out, the use of that standard could also put too heavy a burden on a victim State, since only the State of origin would have access to the means of proving whether or not it had exercised due diligence to prevent appreciable harm from being caused to another watercourse State. It was suggested in that connection that the burden of proving due diligence should be placed on the State of origin. Some members pointed out that the concept of due diligence was dangerous, inasmuch as it made responsibility rest on wrongfulness rather than on risk, and that States would be tempted to evade responsibility simply by trying to prove that they had complied with their obligation of due diligence. They also pointed out that the problem of responsibility should not be dealt with in the framework of the present topic, but rather in the framework of liability for acts not prohibited by international law.

164. In the view of some members, the duty of due diligence as the basis of responsibility would have been more readily acceptable had it been preceded by positive rules concerning co-operation. A State could then be held responsible if it failed to take the necessary measures to use the means at its disposal to prevent appreciable harm. In that connection, it was pointed out that the presumed behaviour of a so-called "civilized State" could not serve as the basis for the obligation of due diligence. The rule

<sup>84</sup> This wording is taken from article 194, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (see footnote 72 above).

<sup>85</sup> This wording is patterned on article 194, paragraph 2, of the 1982 Convention (*ibid.*).

of due diligence, it was stated, should perhaps have been the consequence of the obligation imposed by draft article 17 [18],<sup>86</sup> on protection of the environment of international watercourse[s] [systems]. It was proposed in that connection that perhaps the model law prepared by the American Law Institute<sup>87</sup> might be used.

165. Other members were of the view that, for the purposes of a framework agreement on international watercourses, the concept of due diligence was the proper standard for determining liability for causing appreciable harm through pollution. Moreover, it was stated, the concept of due diligence was well rooted in both tort law and the principles of State responsibility. States would thus find it sufficiently easy and practical to apply that concept in their national courts as a standard for determining responsibility for appreciable harm caused by pollution. Furthermore, it was said, it was necessary to employ the concept of due diligence as a criterion in order to delineate the borderline between responsibility arising under the present topic and responsibility under the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Some members, however, considered that the concept of due diligence would be acceptable only if it were linked to the level of development of a State, for it was rather difficult to believe that every State could be expected to exercise the same level of diligence notwithstanding the amount of resources at its disposal.

166. The Special Rapporteur observed in his summing-up that the obligation of due diligence could be traced to the *Alabama claims* arbitration of 1872 between the United States of America and the United Kingdom,<sup>88</sup> and had been applied in many cases involving the protection to be afforded by a State to foreign citizens within its territory. He recalled that, in 1924, Max Huber, the arbitrator in the case concerning *British Claims in the Spanish Zone of Morocco*, had said: "it has been recognized that a State is required simply to exercise the degree of surveillance corresponding to the means at its disposal".<sup>89</sup> He noted further that, while no cases had been found that expressly applied the principle of due diligence in the context of transboundary pollution, the principle was implicit in the *Trail Smelter* arbitral award<sup>90</sup> and a number of commentators had concluded that the general standard of due diligence was the appropriate one in transfrontier cases. That standard, he said, was appropriate because it afforded a certain degree of flexibility and allowed a general rule of responsibility

<sup>86</sup> See footnote 91 below.

<sup>87</sup> See American Law Institute, *Restatement of the Law, Foreign Relations Law of the United States* (St. Paul (Minn.), 1987), vol. 2 (14 May 1986), title 601 (State obligations with respect to the environment of other States and the common environment).

<sup>88</sup> Arbitral award of 14 September 1872 (see J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington (D.C.), 1898), vol. I, p. 653). On the obligation of due diligence, *ibid.*, pp. 572-573, 610-611, 612-613 and 654-655.

<sup>89</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 615, at p. 644.

<sup>90</sup> See footnote 161 below.

to be adopted to different situations, for example that of the level of development of a State concerned. In his view, the concept was also supported by State practice. A watercourse State would be internationally responsible only if appreciable harm to another watercourse State through pollution occurred as a result of failure by the State of origin to exercise due diligence to prevent such harm. In other words, harm must be the result of failure to fulfil the obligation of prevention. However, mere failure to exercise due diligence—without harm occurring to another watercourse State—did not, in his view, engage responsibility. The obligation, as he had stated earlier, was one of result, not one of conduct.

167. As to the proposal to place the burden of proof on the State of origin, the Special Rapporteur agreed that due diligence was essentially a defence—an exculpatory circumstance—and that the burden of proving it should therefore lie with the State of origin. He noted that that was, however, difficult to provide for in a framework instrument, especially without knowing whether such an instrument would contain dispute-settlement machinery.

168. Finally, the Special Rapporteur said that many of the questions that had been raised in connection with responsibility for appreciable harm and due diligence arose not because of difficulties with the present topic, but because of questions related to other topics, namely State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He agreed with other members that those issues were best left to be dealt with in the framework of other topics under consideration where they mainly belonged.

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems])

169. Introducing draft article 17,<sup>91</sup> the Special Rapporteur said that protection of the environment of international watercourses was most effectively achieved through individual and joint régimes specifically designed for that purpose. Unlike previous special rapporteurs, however, he had not proposed that watercourse States be required to adopt such measures and régimes, since the draft would be a framework instrument. At the same time, he said that the Commission might wish to consider adding such a provision, to which he would not be opposed.

<sup>91</sup> Draft article 17 [18] submitted by the Special Rapporteur in his fourth report read:

“Article 17 [18]. Protection of the environment of international watercourse[s] [systems]

“1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

“2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].”

170. With regard to paragraph 2, which addressed the important and increasingly serious problem of pollution of the marine environment through international watercourses, the Special Rapporteur pointed out that the obligation it contained was separate from, and additional to, other obligations concerning pollution of international watercourses and protection of their environment.

171. All members of the Commission who spoke on draft article 17 expressed support for the inclusion of a general obligation on protection of the environment of international watercourses and of the marine environment from pollution. Such a general duty was said to be well grounded in State practice, as evidenced by various international agreements.

172. The question was, however, raised in that connection as to who could exercise a general right corresponding to the obligation of protection where the ecology of the international watercourse was concerned. In other words, which State could be said to have been “injured” within the meaning of article 5 of part 2 of the draft articles on State responsibility.<sup>92</sup> It was observed that perhaps draft article 17 could be interpreted as meaning that any watercourse State which was a party to the present articles would be an “injured State”, even though it was not directly harmed, as in the case of harm to the environment of the watercourse outside its territory, or harm to the marine environment.

173. The Special Rapporteur stated that there was no intention to give an *erga omnes* effect to the obligation under article 17, but agreed that States parties to the articles might enjoy rights with regard to the environment of the watercourse or of the sea, even though they had suffered no direct harm.

174. Some speakers suggested that, since article 17 was focused on the general obligation of States not only not to pollute, but also to take all reasonable measures to protect the environment of international watercourses and of marine life, it should come before article 16 which dealt with a more specific obligation. It was also suggested that the title of article 17 should be changed to “Protection and preservation of the environment of international watercourses” and that paragraph 1 should refer to the obligation to “protect and preserve” the environment of international watercourses. A suggestion was also made that paragraph 2 be made a separate article. The Special Rapporteur said that he would not be opposed to such modifications.

175. *Paragraph 1:* It was suggested that paragraph 1 should be divided into two paragraphs, the first to deal generally with protection and preservation of the environment of international watercourses, and the second to deal specifically with protection against substances which were toxic and persistent and which tended to be bio-accumulative in nature.

176. It was also suggested that paragraph 1 should include the obligation to “prevent, reduce and control” pollution of the environment of international water-

<sup>92</sup> *Yearbook . . . 1985*, vol. II (Part Two), p. 25.

courses. Some members thought that reference to “the ecology of the watercourse” was not clear enough and suggested that the broader concept of the “environment” was more appropriate, since that also included “ecology”. The Special Rapporteur suggested that the Commission might wish to consider including a definition of the expression “environment of an international watercourse” in a future introductory article so as to make it clear that the ecology or ecosystems of international watercourses were also covered.

177. The view was expressed that the words “or serious danger thereof”, which appeared in paragraphs 1 and 2, should be further analysed. It was considered that the obligation requiring a watercourse State to protect the environment of an international watercourse “from impairment, degradation or destruction, or serious danger thereof” placed a “serious danger” of impairment, degradation or destruction on exactly the same plane as their actual occurrence. A watercourse State, it was said, was thus required to take measures to prevent not only impairment, degradation or destruction, but also the creation of a “serious danger thereof”. That requirement placed a watercourse State in a very strange position: if it wished to avoid responsibility, it would either have to take measures that totally prevented the creation of the “serious danger” or it would have to prohibit the activity in question altogether. The Special Rapporteur, while acknowledging that conceptual difficulty, noted that a similar problem could arise from the expression “results or is likely\* to result”, which had been employed in a number of instruments, including the 1982 United Nations Convention on the Law of the Sea.<sup>93</sup> In his view, the expression “serious danger” was actually more permissive of activities than “likely to result”, since the likelihood would have to be very strong in order for there to be a “serious danger”.

178. *Paragraph 2:* A suggestion was made that the obligation contained in paragraph 2 should be to protect “and preserve” the marine environment, including estuaries and river mouths, from pollution. A proposal was also made that there should as far as possible be harmony between the provisions of paragraph 2 and the relevant provisions of the 1982 United Nations Convention on the Law of the Sea. Some speakers expressed the view that paragraph 2, as presently drafted, was much too broad. It could be read as also covering the marine environment within the jurisdiction of an affected watercourse State. That State, however, did not need the protection of article 17, because the part of the watercourse running through its territory would be polluted first and its marine environment only afterwards. Paragraph 2, it was said, would thus be establishing protection for that State against itself, a course that would be extremely difficult. Paragraph 2 had a different purpose, namely to protect the marine environment against pollution from a downstream riparian State whose section of the watercourse flowed into the sea.

<sup>93</sup> See the definition of the expression “pollution of the marine environment” in article 1, paragraph 1 (4), of the Convention (see footnote 72 above).

179. It was also suggested that paragraph 2 should be in two parts, the first setting out the general obligation and the second dealing with co-operation between watercourse States to fulfil that obligation, with the reference to action being taken “on an equitable basis” being made only in the second part.

#### ARTICLE 18 [19] (Pollution or environmental emergencies)

180. With regard to draft article 18,<sup>94</sup> dealing with pollution or environmental emergencies, the Special Rapporteur stated in his introductory remarks that the article addressed the kind of emergency situations that resulted from serious incidents, such as toxic chemical spill or the sudden spread of a water-borne disease. Paragraph 1 provided a definition, and paragraph 2 required the State within whose territory such an incident had occurred to notify all potentially affected watercourse States. He noted that there was ample precedent for that requirement, including the relevant provisions of the 1982 United Nations Convention on the Law of the Sea and of the 1986 Convention on Early Notification of a Nuclear Accident.<sup>95</sup> Since watercourse States often established joint commissions or other competent international organizations, provision for notification of such organizations had been made in paragraph 2.

181. Most speakers expressed agreement with the inclusion of a comprehensive article which, as the Special Rapporteur had suggested in his introductory remarks, would deal with all kinds of emergencies, not just those related to pollution.

182. One member proposed that the title of article 18 should be amended to read: “Preventive measures in environmental emergencies”.

183. *Paragraph 1:* It was suggested that paragraph 1, defining the expression “pollution or environmental emergency”, should be transferred to an article on the definition of terms. It was also proposed that the definition should refer to natural as well as man-made emergencies.

184. *Paragraph 2:* A suggestion was made that, rather than being limited to notification, the obligation in para-

<sup>94</sup> Draft article 18 [19] submitted by the Special Rapporteur in his fourth report read:

#### “Article 18 [19]. Pollution or environmental emergencies

“1. As used in this article, “pollution or environmental emergency” means any situation affecting an international watercourse [system] which poses a serious and immediate threat to health, life, property or water resources.

“2. If a condition or incident affecting an international watercourse [system] results in a pollution or environmental emergency, the watercourse State within whose territory the condition or incident has occurred shall forthwith notify all potentially affected watercourse States, as well as any competent international organization, of the emergency and provide them with all available data and information relevant to the emergency.

“3. The watercourse State within whose territory the condition or incident has occurred shall take immediate action to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting therefrom.”

<sup>95</sup> IAEA, Legal Series No. 14 (Vienna, 1987), p. 1.

graph 2 should be expanded to include co-operation in minimizing the harm caused by the emergency. The obligation to co-operate, it was added, should be spelt out in detail so as to include provision of information and the establishment of contingency measures to deal with the emergency. It was also suggested that paragraph 2 should be harmonized with the relevant provisions of the 1982 United Nations Convention on the Law of the Sea,<sup>96</sup> in particular article 199, dealing with contingency plans against pollution. The reference to notification of an international organization, it was said, should be in the plural, as more than one international organization might need to be notified of the emergency.

185. *Paragraph 3:* It was proposed that the words “prevent, neutralize or mitigate” should be replaced by the much broader “prevent, control and abate”.

186. The Special Rapporteur, in his summing-up, said that he would take those proposals into account in formulating a more comprehensive article in the context of the subtopic of “Water-related hazards and dangers” for submission to the Commission at a future session.

187. At its 2069th meeting, the Commission referred draft articles 16 and 17 to the Drafting Committee for consideration in the light of the discussion and the summing-up by the Special Rapporteur. Due to lack of time, the Committee was unable to consider those articles at the present session. Thus the Drafting Committee remains seized of draft articles 16 and 17, which will be examined at a future session.

188. At its 2070th to 2073rd meetings, the Commission considered the report of the Drafting Committee on the draft articles referred to it on the present topic and provisionally adopted articles 8 to 21.<sup>97</sup> These articles are based on draft article 9 (Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States), submitted by the previous Special Rapporteur and referred to the Drafting Committee in 1984, draft articles 10 to 15 referred to the Committee in 1987 and draft article 15 [16] referred to the Committee at the present session (see paras. 110, 115-116 and 127-128 above, respectively). Draft articles 11 (Information concerning planned measures) and 21 (Indirect procedures) were proposed as new articles by the Drafting Committee.

### C. Draft articles on the law of the non-navigational uses of international watercourses

#### 1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

189. The texts of draft articles 2 to 21 provisionally adopted so far by the Commission are reproduced below.

<sup>96</sup> See footnote 72 above.

<sup>97</sup> The texts of these articles and the commentaries thereto appear in section C.2 of the present chapter.

## PART I

### INTRODUCTION

#### *Article 1. [Use of terms]*<sup>98</sup>

#### *Article 2. Scope of the present articles*

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

#### *Article 3. Watercourse States*

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

#### *Article 4. [Watercourse] [System] agreements*

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

#### *Article 5. Parties to [watercourse] [system] agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any [watercourse] [system] agreement that applies to the entire international watercourse [system], as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a part of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

## PART II

### GENERAL PRINCIPLES

#### *Article 6. Equitable and reasonable utilization and participation*

1. Watercourse States shall in their respective territories utilize

<sup>98</sup> The Commission agreed at its thirty-ninth session to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term “system” and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Thus the word “system” appears in square brackets throughout the draft articles.

an international watercourse [system] in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article ...

*Article 7. Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of an international watercourse [system] in one watercourse State on other watercourse States;

(d) existing and potential uses of the international watercourse [system];

(e) conservation, protection, development and economy of use of the water resources of the international watercourse [system] and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 6 or paragraph 1 of the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

*Article 8. Obligation not to cause appreciable harm*<sup>99</sup>

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

*Article 9. General obligation to co-operate*<sup>100</sup>

Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimum utilization and adequate protection of an international watercourse [system].

*Article 10. Regular exchange of data and information*<sup>101</sup>

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

<sup>99</sup> Text based on draft article 9 as submitted by the previous Special Rapporteur in 1984.

<sup>100</sup> Text based on draft article 10 as submitted by the Special Rapporteur in 1987.

<sup>101</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur at the present session.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

PART III

PLANNED MEASURES

*Article 11. Information concerning planned measures*

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

*Article 12. Notification concerning planned measures with possible adverse effects*<sup>102</sup>

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13. Period for reply to notification*<sup>103</sup>

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

*Article 14. Obligations of the notifying State during the period for reply*<sup>104</sup>

During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.

*Article 15. Reply to notification*<sup>105</sup>

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.

*Article 16. Absence of reply to notification*<sup>106</sup>

If, within the period referred to in article 13, the notifying State

<sup>102</sup> Text based on draft article 11 as submitted by the Special Rapporteur in 1987.

<sup>103</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>104</sup> Text based on draft article 12 as submitted by the Special Rapporteur in 1987.

<sup>105</sup> Text based on draft article 13 as submitted by the Special Rapporteur in 1987.

<sup>106</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

*Article 17. Consultations and negotiations concerning planned measures*<sup>107</sup>

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Article 18. Procedures in the absence of notification*<sup>108</sup>

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

*Article 19. Urgent implementation of planned measures*<sup>109</sup>

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

<sup>107</sup> Text based on draft article 13 as submitted by the Special Rapporteur in 1987.

<sup>108</sup> Text based on draft article 14 as submitted by the Special Rapporteur in 1987.

<sup>109</sup> Text based on draft article 15 as submitted by the Special Rapporteur in 1987.

*Article 20. Data and information vital to national defence or security*<sup>110</sup>

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

*Article 21. Indirect procedures*

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

2. TEXTS OF DRAFT ARTICLES 8 TO 21, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION

190. The texts of draft articles 8 to 21, with commentaries thereto, provisionally adopted by the Commission at its fortieth session are reproduced below.

PART II

GENERAL PRINCIPLES

...

*Article 8. Obligation not to cause appreciable harm*

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.

*Commentary*<sup>111</sup>

(1) Article 8 sets forth the fundamental rule that a State utilizing an international watercourse [system] must do so in a manner that does not cause appreciable harm to other watercourse States. This well-established rule is a specific application of the principle of the harmless use of territory expressed in the maxim *sic utere tuo ut alienum non laedas*, which is itself a reflection of the sovereign equality of States. In other words, the exclusive competence that a watercourse State enjoys within its territory is not to be exercised in such a way as to cause damage to other watercourse States. To cause such damage would be to interfere with the competence of those other watercourse States over matters within their territories.

<sup>110</sup> Text based on draft article 15 [16] as submitted by the Special Rapporteur at the present session.

<sup>111</sup> Certain members of the Commission reserved their positions with regard to article 8 and the commentary thereto because it was not clear from the text of the article and the commentary whether article 8 was meant as a rule of State responsibility or liability.

(2) The obligation not to cause appreciable harm to other watercourse States is complementary to that of equitable utilization, embodied in article 6. A watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—*prima facie*, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm.

(3) The Commission recognizes, however, that in some instances the attainment of equitable and reasonable utilization will depend upon the toleration by one or more watercourse States of a measure of harm. In these cases, the necessary accommodations would be arrived at through specific agreements. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is "equitable", in the absence of agreement between the watercourse States concerned. In this general connection, it is worth recalling a passage from the commentary to article 6, provisionally adopted by the Commission at its thirty-ninth session, in 1987:

... where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreements.<sup>112</sup>

(4) As in the case of article 6, the fact that article 8 refers only to "watercourse States" does not mean that the obligation extends only to utilization of a watercourse by the State itself. Watercourse States are also obligated not to permit private entities operating in their territories to utilize the watercourse "in such a way as to cause appreciable harm to other watercourse States".

(5) Article 8 does not prohibit all harm, no matter how minor. It instead requires a State utilizing an international watercourse [system] to do so in a manner that does not cause "appreciable" harm to other watercourse States. The term "appreciable" is also employed as a qualifying criterion in articles 4 and 5, already adopted by the Commission, and bears the same meaning in article 8 as in those articles. As explained in the commentary to article 4, the term "appreciable" embodies a factual standard.<sup>113</sup> The harm must be capable of being established by objective evidence. There must be a real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected State. "Appreciable" harm is therefore that which is not insignificant or barely detectable, but is not necessarily "serious". The passages from the arbitral award in the *Lake Lanoux* case discussed in the commentary to article 4<sup>114</sup> are also pertinent here.

<sup>112</sup> *Yearbook ... 1987*, vol. II (Part Two), pp. 32-33, para. (9) of the commentary to article 6.

<sup>113</sup> *Ibid.*, p. 29, paras. (15)-(16) of the commentary to article 4.

<sup>114</sup> *Ibid.*, para. (15) of the commentary.

(6) While international instruments may be found which purport to prohibit activities that cause any harm whatsoever to another watercourse State,<sup>115</sup> most protect watercourse States only against harm that is of some significance. The qualifying terms vary, but the intent of the instruments employing such terms seems to be to protect the parties against material or significant harm. "Substantial", "significant", *sensible* (in French and Spanish) and "appreciable" (especially in French) are the adjectives most frequently employed to modify the term "harm" or its equivalent. Although each of these expressions contains an element of subjectivity—and in some cases even ambiguity<sup>116</sup>—the Commission has concluded that "appreciable" is the preferable term, since, among the various possibilities, it provides the most factual and objective standard.

(7) The expression "appreciable harm", or its functional equivalent, is employed as a standard in a number of international instruments. For example, article 35 of the Statute of the Uruguay River, adopted by Uruguay and Argentina on 26 February 1975,<sup>117</sup> provides:

The Parties undertake to adopt the necessary measures to ensure that the management of land and forests and the use of groundwater and of the river's tributaries do not effect an alteration such as to cause appreciable harm to the régime of the river or the quality of its waters.<sup>118</sup>

Other illustrations are the Act of Santiago of 26 June 1971 concerning hydrologic basins, between Argentina and Chile<sup>119</sup> (para. 4), and the 1971 Declaration of Asunción on the Use of International Rivers (Argen-

<sup>115</sup> See, for example: (a) the Convention of 27 September 1971 between Ecuador and Peru (Ecuador, *Registro Oficial* (Quito), 2nd year, No. 385 (4 January 1972), p. 1), which recognizes the right of each country to use the waters in its territory for its needs "provided that it causes no damage or injury to the other Party" (art. 1); (b) the Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters (*British and Foreign States Papers, 1908-1909*, vol. 102, p. 137; United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4) (hereinafter referred to as "United Nations, *Legislative Texts ...*"), p. 260, No. 79; *Yearbook ... 1974*, vol. II (Part Two), pp. 72-74, document A/5409, paras. 154 *et seq.*), which provides that the waters "shall not be polluted on either side to the injury of health or property on the other" (art. IV); (c) the Exchange of Notes of 7 May 1929 between the United Kingdom and Egypt (League of Nations, *Treaty Series*, vol. XCIII, p. 43), which refers to the avoidance of works entailing "any prejudice" to Egypt's interests. See also the Exchange of Notes of 16 July 1952 and 5 January 1953 between the United Kingdom and Egypt (United Nations, *Treaty Series*, vol. 207, p. 277).

<sup>116</sup> The problem of precision in relation to a qualifying term is discussed in *Annuaire de l'Institut de droit international, 1979*, vol. 58-1, pp. 218 *et passim*, provisional report of J. J. A. Salmon on "La pollution des fleuves et des lacs et le droit international".

<sup>117</sup> *Actos Internacionales, Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

<sup>118</sup> The expression "appreciable harm" (*perjuicio sensible*) is also employed, *inter alia*, in articles 7 and 11 of the Statute, concerning notification of planned works, as well as in article 32.

<sup>119</sup> OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 495-496; *Yearbook ... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.

tina, Bolivia, Brazil, Paraguay and Uruguay)<sup>120</sup> (para. 2), both of which use the expression *perjuicio sensible*; the Convention of 20 December 1933 between Brazil and Uruguay regarding the determination of the legal status of the frontier between the two countries,<sup>121</sup> which employs the expression *modificación sensible y durable* (art. XX); the Convention of 15 April 1891 between Italy and Great Britain,<sup>122</sup> which refers to works *qui pourrait sensiblement modifier* (art. III); the Convention of 26 October 1905 between Norway and Sweden concerning common lakes and watercourses,<sup>123</sup> which speaks of *entraves sensibles* (art. 2); the General Convention of 14 December 1931 between Roumania and Yugoslavia,<sup>124</sup> which uses the expression *changement sensible du régime des eaux* (art. 3); the Convention of 11 March 1972 relating to the status of the Senegal River,<sup>125</sup> which refers to a *projet susceptible de modifier d'une manière sensible* (art. 4); the Statutes of the Lake Chad Basin of 22 May 1964,<sup>126</sup> which speak of *mesures susceptibles d'exercer une influence sensible* (art. 5); and the Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Act of Niamey),<sup>127</sup> which refers to "any project likely to have an appreciable effect on certain features of the régime of the river" (art. 4). The word *sensible* in French and Spanish is ordinarily translated by "appreciable" in English.

(8) The principle embodied in article 8 is reflected in numerous international agreements. In addition to those already referred to,<sup>128</sup> the following instruments may be cited for the purposes of illustration. The Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano<sup>129</sup> provides in article X that, if the parties should undertake the construction or alteration of any civil engineering works, they are to ensure the prevention of "any obstruction of or interference with the regulation of the lake or any damage to the bank belonging to the other State". The Indus Waters Treaty of 19 September 1960 between India and Pakistan<sup>130</sup> contains may relevant provisions. In paragraph 2 of article IV, for example, each party

agrees that any non-consumptive use made by it shall be so made as not to materially change, on account of such use, the flow in any channel to the prejudice of the uses on that channel by the other Party under the provisions of this Treaty.

<sup>120</sup> Resolution No. 25 annexed to the Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States at their Fourth Meeting, from 1 to 3 June 1971 (OAS, *Ríos y Lagos* . . . , pp. 183-186; extracts in *Yearbook* . . . 1974, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326).

<sup>121</sup> League of Nations, *Treaty Series*, vol. CLXXXI, p. 69.

<sup>122</sup> G. F. de Martens, ed., *Nouveau Recueil Général de Traités*, 2nd series (Göttingen, 1893), vol. XVIII-1, p. 737.

<sup>123</sup> *Ibid.* (Leipzig, 1907), vol. XXXIV, p. 710.

<sup>124</sup> League of Nations, *Treaty Series*, vol. CXXXV, p. 31.

<sup>125</sup> See footnote 174 (d) below.

<sup>126</sup> See footnote 174 (e) below.

<sup>127</sup> United Nations, *Treaty Series*, vol. 587, p. 9.

<sup>128</sup> See footnote 115 and paragraph (7) of the present commentary above.

<sup>129</sup> United Nations, *Treaty Series*, vol. 291, p. 213.

<sup>130</sup> *Ibid.*, vol. 419, p. 125.

Paragraph 3 of article IV provides:

Nothing in this Treaty shall be construed as having the effect of preventing either Party from undertaking schemes of drainage, river training, conservation of soil against erosion and dredging, or from removal of stones, gravel or sand from the beds of the Rivers, provided that:

(a) in executing any of the schemes mentioned above, each Party will avoid, as far as practicable, any material damage to the other Party;

...

The Agreement of 29 December 1949 concerning the régime of the Norwegian-Soviet frontier and procedure for the settlement of frontier disputes and incidents<sup>131</sup> requires in article 14, paragraph 1, that the parties "ensure that the frontier waters are kept clean and are not artificially polluted or fouled in any way" and that they "take the necessary measures to prevent damage to the banks of frontier rivers and lakes". Pollution is also addressed in the 1909 Boundary Waters Treaty between Great Britain and the United States,<sup>132</sup> which provides in article IV that the waters in question "shall not be polluted on either side to the injury of health or property on the other". The 1971 Convention between Ecuador and Peru concerning the Puyango-Túmbez and Catamayo-Chira river basins<sup>133</sup> recognizes in article 1 the right of each country to use the waters in its territory for its needs "provided that it causes no damage or injury to the other party". The Treaty of 3 February 1944 between the United States of America and Mexico<sup>134</sup> provides in article 17 that each Government will "operate its storage dams in such manner, consistent with the normal operations of its hydraulic systems, as to avoid, as far as feasible, material damage in the territory of the other". Pursuant to the 1969 Treaty of the River Plate Basin,<sup>135</sup> the Ministers of Foreign Affairs of the five States of the River Plate Basin (Argentina, Bolivia, Brazil, Paraguay and Uruguay) adopted in 1971 the Act of Asunción, annexed to which was the Declaration of Asunción on the Use of International Rivers.<sup>136</sup> Paragraph 2 of the Declaration provides that, with respect to successive international rivers, "each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin".<sup>137</sup>

<sup>131</sup> *Ibid.*, vol. 83, p. 291.

<sup>132</sup> See footnote 115 (b) above.

<sup>133</sup> See footnote 115 (a) above.

<sup>134</sup> Treaty relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (United Nations, *Treaty Series*, vol. 3, p. 313).

<sup>135</sup> *Ibid.*, vol. 875, p. 3.

<sup>136</sup> See footnote 120 above.

<sup>137</sup> See also the Act of Santiago concerning hydrologic basins, signed on 26 June 1971 by the Ministers of Foreign Affairs of Argentina and Chile (see footnote 119 above), relevant paragraphs of which provide:

"1. The waters of rivers and lakes shall always be utilized in a fair and reasonable manner.

"2. The Parties shall avoid polluting their river and lake systems in any manner and shall conserve the ecological resources of their common river basins in the areas within their respective jurisdictions.

"4. Each Party shall recognize the other's right to utilize the waters of their common lakes and successive international rivers within its territory in accordance with its needs, provided that the other Party does not suffer any appreciable damage."

(9) The principle expressed in article 8 is applied in a variety of agreements, many of which require that, before undertaking possibly harmful activities, parties obtain the approval of, or inform and consult with, other parties or a joint body. For example, the Convention of 30 June 1978 relating to the status of the River Gambia<sup>138</sup> requires in article 4 the approval of the contracting parties prior to the implementation of

*aucun projet susceptible de modifier d'une manière sensible les caractéristiques du régime du fleuve, ses conditions de navigabilité, d'exploitation agricole ou industrielle, l'état sanitaire des eaux, les caractéristiques biologiques de sa faune ou de sa flore, [ou] son plan d'eau . . .*

Similarly, the Statutes of the Lake Chad Basin of 22 May 1964<sup>139</sup> provide in article 5:

. . . Member States agree not to undertake in that part of the Basin falling within their jurisdiction any work in connection with the development of water resources or the soil likely to have a marked influence upon the system of the watercourses and levels of the Basin without adequate notice and prior consultation with the [Chad Basin] Commission . . .

Likewise, the Convention of 27 October 1960 on the protection of Lake Constance against pollution<sup>140</sup> provides in article 1, paragraph 3, that the riparian States are to inform each other, in good time, of any contemplated utilization of the water *dont la réalisation pourrait porter atteinte aux intérêts d'un autre Etat riverain* in maintaining the salubrious condition of the water.

(10) In addition, the rule expressed in article 8 is applied in many modern watercourse agreements whose chief purpose is to set standards for the prevention, reduction and control of pollution. Since the subtopic of environmental protection and pollution control is envisaged as the subject of a subsequent part of the draft articles, only some examples of agreements of this kind will be cited. An instrument which contains detailed provisions on general and specific water quality objectives is the Agreement of 22 November 1978 between Canada and the United States of America on Great Lakes water quality.<sup>141</sup> The Agreement of 3 December 1976 for the protection of the Rhine against chemical pollution<sup>142</sup> contains annexes listing substances whose discharge is to be subject to prior authorization or to be reduced, depending on their dangerousness.

(11) More general provisions on the prevention of extraterritorial harm through pollution—a specific application of the principle embodied in article 8—are

<sup>138</sup> Signed by Gambia, Guinea and Senegal (United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa, Natural Resources/Water Series No. 13* (Sales No. E/F.84.II.A.7), p. 39).

<sup>139</sup> Signed by Cameroon, Chad, Niger and Nigeria (see footnote 174 (e) below).

<sup>140</sup> Switzerland, *Recueil officiel des lois et des ordonnances, 1961*, vol. 2, p. 923, No. 43; United Nations, *Legislative Texts . . .* (see footnote 115 (b) above), p. 438, No. 127.

<sup>141</sup> *United States Treaties and Other International Agreements, 1978-79*, vol. 30, part 2, p. 1383.

<sup>142</sup> Signed by EEC, France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland (United Nations, *Treaty Series*, vol. 1124, p. 375).

to be found in the 1982 United Nations Convention on the Law of the Sea.<sup>143</sup> For example, article 194, paragraph 2, of the Convention provides that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment". Also relevant is article 300, entitled "Good faith and abuse of rights", which provides that parties "shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right".<sup>144</sup>

(12) The rule laid down in article 8 has also been recognized in diplomatic exchanges. For example, a United States official who participated in the negotiation of the 1909 Boundary Waters Treaty between Great Britain and the United States<sup>145</sup> made the following statements concerning boundary waters in a communication to the then American Secretary of State, Elihu Root:

"... absolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a co-extensive restraint upon the other, so that neither country is at liberty to so use its own waters as to injuriously affect the other.

"... the conclusion is justified that international law would recognize the right of either side to make any use of the waters on its side which did not interfere with the coextensive rights of the other, and was not injurious to it . . ." <sup>146</sup>

(13) In a memorandum of 26 May 1942 relating to the negotiations between the United States and Mexico concerning the Colorado River, the Legal Adviser of the United States Department of State reviewed existing treaties regarding international rivers and lakes. He stated that the review

is by no means comprehensive but is believed to be sufficient to indicate the trend of thought concerning the adjustment of questions relating to the equitable distribution of the beneficial uses of such waters. No one of these agreements adopts the early theory advanced by Attorney-General Harmon . . . On the contrary, the rights of the subjacent State are specifically recognized and protected by these agreements.<sup>147</sup>

(14) In 1950, the Government of India, in response to reports of plans to construct a dam on the Karnafuli River in East Pakistan (since 1971, Bangladesh) which would result in the flooding of areas in the Indian State of Assam, stated that "the Government of India can-

<sup>143</sup> See footnote 72 above.

<sup>144</sup> The principle of the harmless use of territory has been linked by many commentators with that of abuse of rights. For example, J. G. Starke describes as an important qualification to the absolute independence of States "the principle, corresponding possibly to the municipal law prohibition of 'abuse of rights', that a State should not permit the use of its territory for purposes injurious to the interests of other States" (J. G. Starke, *An Introduction to International Law*, 5th ed. (London, Butterworths, 1963), p. 101).

<sup>145</sup> See footnote 115 (b) above.

<sup>146</sup> See United States of America, Memorandum of the State Department of 21 April 1958, *Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909*, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), pp. 60-61.

<sup>147</sup> Memorandum of G. H. Hackworth, cited in M. M. Whiteman, ed., *Digest of International Law* (Washington, D.C.), vol. 3 (1964), p. 950.

not obviously permit this and trusts that the Government of Pakistan will not embark on any works likely to submerge land situated in India". Pakistan replied that construction of a dam which would flood land in India was not contemplated.<sup>148</sup>

(15) In discussions between the same two countries concerning the barrage constructed by India on the Ganges River at Farakka, some 11 miles upstream from the Bangladesh border, India originally took the position that the Ganges was not an international river, but "overwhelmingly" an Indian river.<sup>149</sup> India nevertheless declared that it was "willing to discuss this matter with Pakistan to satisfy them that construction of the Farakka Barrage will not do any damage to Pakistan".<sup>150</sup> In subsequent debates in the Special Political Committee of the General Assembly, India not only ceased to deny the internationality of the Ganges, but stated its general position as follows:

... When a river crossed more than one country, each country was entitled to an equitable share of the waters of that river. ...

Those views did not conform to the Harmon Doctrine of absolute sovereignty of a riparian State over the waters within its territory, as had been implied in the statement by the representative of Bangladesh. India, for its part, had always subscribed to the view that each riparian State was entitled to a reasonable and equitable share of the waters of an international river.<sup>151</sup>

(16) In a dispute between Chile and Bolivia over the use of the Lauca River,<sup>152</sup> Chile, the upstream State,

<sup>148</sup> Exchange of Notes of 13 February and 15 April 1950, referred to by M. Qadir, "Note on the uses of the waters of international rivers", *Principles of Law Governing the Uses of International Rivers* (London, I.L.A., 1956), reports and commentaries submitted to the International Law Association at its Forty-seventh Conference (Dubrovnik (Yugoslavia), 26 August-1 September 1956), p. 12; cited by J. G. Lammers, *Pollution of International Watercourses* (The Hague, Nijhoff, 1984), p. 311.

<sup>149</sup> *Official Records of the General Assembly, Twenty-third Session, Plenary Meetings*, 1682nd meeting, para. 177; and *ibid.*, *Thirty-first Session, Special Political Committee*, 21st meeting, para. 15. This position was based on the fact that 90 per cent of the main channel of the Ganges and 99 per cent of its catchment area lay within India. For details of the negotiations on this issue, see Lammers, *op. cit.* (footnote 148 above), pp. 313-319.

<sup>150</sup> *Official Records of the General Assembly, Twenty-fourth Session, Plenary Meetings*, 1776th meeting, para. 285.

<sup>151</sup> *Ibid.*, *Thirty-first Session, Special Political Committee*, 21st meeting, paras. 8-9. Pursuant to a joint statement adopted by consensus in 1976 by both the Special Political Committee and the General Assembly (*ibid.*, 27th meeting, para. 3; and *ibid.*, *Plenary Meetings*, 80th meeting, paras. 134-142), the parties met to work out a settlement and in fact reached agreement on an interim arrangement in the form of the 1977 Agreement on Sharing of the Ganges Waters (*International Legal Materials* (Washington, D.C.), vol. XVII (1978), p. 103). The Agreement entered into force for a period of five years on 5 November 1977.

<sup>152</sup> J. Lipper points out that "the situation arose after Chile announced its intention to divert for agricultural purposes the waters of the Lauca which flow from Chile into Bolivia. In the ensuing disagreement, rioting and a severance of diplomatic relations by Bolivia resulted." He further notes that, "despite the heat of the quarrel and the interests at stake, Chile did not assert the Harmon Doctrine" ("Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), p. 27). See also the discussion of this controversy in Lammers, *op. cit.* (footnote 148 above), pp. 289-290.

recognized that Bolivia had "rights" in the waters and went on to state that the 1933 Declaration of Montevideo,<sup>153</sup> which proscribes alterations of watercourses that may prove injurious to other States, "may be considered as a codification of the generally accepted legal principles on this matter".<sup>154</sup>

(17) Similarly, the Government of France, in the *Lake Lanoux* arbitration, pointed to "the sovereignty in its own territory of a State desirous of carrying out hydroelectric developments", but at the same time recognized "the correlative duty not to injure the interests of a neighbouring State".<sup>155</sup> France did not assert a "Harmon Doctrine" position, but argued that Spain's consent to the project in question was not required because restitution of the diverted water would result in there being no alteration of the water régime in Spain.

(18) Spain's position in the same arbitration was similarly moderate. According to the tribunal:

... the Spanish Government does not attribute an absolute meaning to respect for natural order; according to the counter-case ... "A State has the right to use unilaterally the part of a river which traverses it to the extent that this use is likely to cause on the territory of another State a limited harm only, a minimal inconvenience, which comes within the bounds of those that derive from good-neighbourliness."<sup>156</sup>

(19) Finally, an early example of a lower riparian State's espousal of the principle of equitable allocation is to be found in the letter of 30 May 1862 from the Government of the Netherlands to its Ministers in Paris and London concerning the use of the River Meuse by Belgium and the Netherlands. The letter contains the following passage:

The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation.<sup>157</sup>

(20) The principle of the harmless use of territory has been recognized in a number of decisions of international courts and tribunals. A decision which dealt specifically with problems of the non-navigational uses of international watercourses was the award of the tribunal in

<sup>153</sup> Declaration of Montevideo concerning the industrial and agricultural use of international rivers, resolution LXXII adopted by the Seventh International Conference of American States at its fifth plenary session, 24 December 1933 (*The International Conferences of American States, First Supplement, 1933-1940* (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88; reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A).

<sup>154</sup> Statement by Chile's Minister of Foreign Affairs, Martínez Sotomayor, to the OAS Council, 19 April 1962 (OEA/Ser.G/VI, p. 1), cited by Lipper, *loc. cit.* (footnote 152 above), pp. 27-28.

<sup>155</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 296-297; *International Law Reports, 1957* (London), vol. 24 (1961), pp. 111-112. See also footnote 158 below.

<sup>156</sup> Para. 7 (third subparagraph) of the arbitral award (see *Yearbook ... 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064).

<sup>157</sup> Cited and translated in H. A. Smith, *The Economic Uses of International Rivers* (London, King, 1931), p. 217, where a substantial portion of the letter is reproduced (pp. 217-221) in the original Dutch (original text in the State Archives at The Hague).

the *Lake Lanoux* arbitration.<sup>158</sup> In the course of its decision, the tribunal made the following statement:

... while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal ... that the French project did not alter the waters of the Carol [River].  
...<sup>159</sup>

While this statement cannot, strictly speaking, be characterized as a "holding" of the tribunal, since it was not necessary to the decision, it is none the less significant that the tribunal did not appear to doubt the existence of the "rule" referred to. In any event, the tribunal went on to declare, in language that was necessary to its decision, that "France may use its rights; it may not disregard Spanish interests. Spain may demand respect for its rights and consideration of its interests."<sup>160</sup>

(21) A case involving the obligation of a State to prevent the occurrence, in the territory of a neighbouring State, of injury resulting from an activity carried on in the territory of the first State is the *Trail Smelter* arbitration.<sup>161</sup> In its second award, of 11 March 1941, the tribunal declared:

... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>162</sup>

The tribunal went on to impose upon the smelter a régime which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States\* ...<sup>163</sup>

(22) The international judicial decision most frequently cited as bearing upon problems of transfrontier harm was rendered by the ICJ in 1949 in the *Corfu Channel*

<sup>158</sup> Original French text of the award in United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *Yearbook* ... 1974, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068; *The American Journal of International Law* (Washington, D.C.), vol. 53 (1959), pp. 156 *et seq.*; and *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.* The arbitration is also discussed in the Special Rapporteur's second report, *Yearbook* ... 1986, vol. II (Part One), pp. 116 *et seq.*, document A/CN.4/399 and Add.1 and 2, paras. 111-124.

<sup>159</sup> Para. 13 (first subparagraph) of the award (*Yearbook* ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066).

<sup>160</sup> Para. 23 (second subparagraph) of the award (*ibid.*, p. 198, para. 1068).

<sup>161</sup> For the texts of the awards of 16 April 1938 and 11 March 1941 in this case, see United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.* The awards are summarized and excerpted in *Yearbook* ... 1974, vol. II (Part Two), pp. 192 *et seq.*, document A/5409, paras. 1049-1054. The arbitration is also discussed in the Special Rapporteur's second report, *Yearbook* ... 1986, vol. II (Part One), pp. 119 *et seq.*, document A/CN.4/399 and Add.1 and 2, paras. 125-128; and in his fourth report, document A/CN.4/412 and Add.1 and 2, para. 85. The case is also referred to in the commentary to article 23 (Breach of an international obligation to prevent a given event) of part I of the draft articles on State responsibility (*Yearbook* ... 1978, vol. II (Part Two), p. 84, para. (11) of the commentary and footnote 408).

<sup>162</sup> United Nations, *Reports of International Arbitral Awards*, vol. III ... , p. 1965.

<sup>163</sup> *Ibid.*, p. 1939.

case.<sup>164</sup> The Court there held that Albania's knowledge that mines had been laid in its territorial waters gave rise to an obligation to notify ships operating in the area of the existence of the mines and to warn ships of the resulting imminent danger. Such obligations, according to the Court, are based, *inter alia*, on

every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.<sup>165</sup>

A statement made by the arbitrator, Max Huber, in the *Island of Palmas (Miangas)* case between the United States of America and the Netherlands<sup>166</sup> is to the same effect:

Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. ...<sup>167</sup>

(23) The principle underlying article 8 is also reflected in a number of instruments adopted by intergovernmental and international non-governmental organizations.<sup>168</sup> The Seventh International Conference of American States, in 1933, adopted the Declaration of Montevideo concerning the industrial and agricultural use of international rivers,<sup>169</sup> which contains the following relevant provisions:

...

<sup>164</sup> Judgment of 9 April 1949 (United Kingdom v. Albania), *I.C.J. Reports 1949*, p. 4. The case is also discussed in the Special Rapporteur's second report, *Yearbook* ... 1986, vol. II (Part One), pp. 115-116, document A/CN.4/399 and Add.1 and 2, paras. 108-110.

<sup>165</sup> *I.C.J. Reports 1949*, p. 22.

<sup>166</sup> United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829.

<sup>167</sup> *Ibid.*, p. 839.

<sup>168</sup> The following are examples of resolutions of international non-governmental organizations which reflect the principle underlying article 8: (a) the resolution on "International regulations regarding the use of international watercourses" adopted by the Institute of International Law at its Madrid session, in 1911 (*Annuaire de l'Institut de droit international, 1911*, vol. 24, pp. 365-367; reproduced in *Yearbook* ... 1974, vol. II (Part Two), p. 200, document A/5409, para. 1072) (regulation I and regulation II, paras. (2), (3) and (5)); (b) the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute at its Salzburg session, in 1961 (*Annuaire de l'Institut de droit international, 1961*, vol. 49-II, pp. 381-384; reproduced in *Yearbook* ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076) (arts. 2, 3 and 4); (c) the resolution on "The pollution of rivers and lakes and international law" adopted by the Institute at its Athens session, in 1979 (*Annuaire de l'Institut de droit international, 1979*, vol. 58-II, pp. 196 *et seq.*; reproduced in *Yearbook* ... 1982, vol. II (Part One) (and corrigendum), pp. 126-127, document A/CN.4/348, para. 259) (art. II); (d) the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at its Fifty-second Conference, held at Helsinki in 1966 (ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook* ... 1974, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405) (art. X, para. 1); (e) the articles on "Regulation of the flow of water of international watercourses" adopted by ILA at its Fifty-ninth Conference, held at Belgrade in 1980 (ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 362 *et seq.*) (art. 6); (f) the articles on "The relationship between water, other natural resources and the environment", also adopted by ILA at its Belgrade Conference in 1980 (*ibid.*, pp. 374-375) (art. 1); (g) the Rules on Water Pollution in an International Drainage Basin, adopted by ILA at its Sixtieth Conference, held at Montreal in 1982 (ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 535 *et seq.*) (arts. 1, 2 and 3).

<sup>169</sup> See footnote 153 above.

2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right, however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State on the margin under its jurisdiction.

In consequence, no State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.

3. In the cases of damage referred to in the foregoing article, an agreement of the parties shall always be necessary. When damages capable of repair are concerned, the works may only be executed after adjustment of the incident regarding indemnity, reparation (or) compensation of the damages, in accordance with the procedure indicated below.

4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers.

...  
(24) Another provision relating generally to the duty to ensure that transboundary harm does not result from the utilization of natural resources is Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adopted on 16 June 1972.<sup>170</sup> Principle 21 provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

(25) Similarly, the Charter of Economic Rights and Duties of States<sup>171</sup> provides in article 3 that "each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others".

(26) The foregoing survey of international agreements, diplomatic exchanges, decisions of international courts and tribunals, and instruments adopted by intergovernmental and international non-governmental organizations indicates the broad recognition of the principle reflected in article 8. The general rule expressed in article 8, together with those laid down in article 6, are applied and further developed in subsequent articles.

### *Article 9. General obligation to co-operate*

#### **Watercourse States shall co-operate on the basis of sovereign equality, territorial integrity and mutual benefit**

<sup>170</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I. The General Assembly, in resolution 2994 (XXVII) of 15 December 1972 on the United Nations Conference on the Human Environment (adopted by 112 votes to none, with 10 abstentions), took note "with satisfaction" of the report of the Conference containing the Declaration on the Human Environment. Language very similar to that employed in Principle 21 of the Stockholm Declaration is found in Principle 1 of the "Principles regarding co-operation in the field of transboundary waters", contained in decision I (42) adopted by ECE on 10 April 1987 (see the annual report of ECE (28 April 1986-10 April 1987), *Official Records of the Economic and Social Council, 1987, Supplement No. 13* (E/1987/33-E/ECE/1148), pp. 65 *et seq.*).

<sup>171</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

#### **in order to attain optimum utilization and adequate protection of an international watercourse [system].**

#### *Commentary*

(1) Article 9 lays down the general obligation of watercourse States to co-operate with each other in order to fulfil the obligations and attain the objectives set forth in the draft articles. Co-operation between watercourse States with regard to their utilization of an international watercourse is an important basis for the attainment and maintenance of an equitable allocation of the uses and benefits of the watercourse and for the smooth functioning of the procedural rules contained in part III of the draft.

(2) Article 9 indicates both the basis and the objectives of co-operation. With regard to the basis of co-operation, the article refers to the most fundamental principles upon which co-operation between watercourse States is founded. Other relevant principles include those of good faith and good-neighbourliness. As to the objectives of co-operation, the Commission considered whether these should be set forth in some detail. It came to the conclusion that a general formulation would be more appropriate, especially in view of the wide diversity of international watercourses and the uses thereof, and the needs of watercourse States. This formulation, expressed in the phrase "in order to attain optimum utilization and adequate protection of an international watercourse [system]", is derived from the second sentence of paragraph 1 of article 6, provisionally adopted by the Commission at its thirty-ninth session.<sup>172</sup>

(3) A wide variety of international instruments call for co-operation between the parties with regard to their utilization of the relevant international watercourses.<sup>173</sup> An example of an international instrument incorporating such an obligation is the Agreement of 17 July 1964 between Poland and the USSR concerning the use of water resources in frontier waters,<sup>174</sup> article 3 of which

<sup>172</sup> For the text, see sect. C.1 of the present chapter.

<sup>173</sup> A survey of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and non-governmental organizations relating to the principle of co-operation is contained in the Special Rapporteur's third report, *Yearbook . . . 1987*, vol. II (Part One), pp. 24 *et seq.*, document A/CN.4/406 and Add.1 and 2, paras. 43-58.

<sup>174</sup> Entered into force on 16 February 1965 (United Nations, *Treaty Series*, vol. 552, p. 175). Other examples of international watercourse agreements providing for co-operation between the parties are: (a) the Convention of 16 November 1962 between France and Switzerland concerning protection of the waters of Lake Geneva against pollution (entered into force on 1 November 1963) (*ibid.*, vol. 922, p. 49) (arts. 1-4); (b) the Agreement of 14 August 1983 between the United States of America and Mexico on co-operation for the protection and improvement of the environment in the border area (entered into force on 16 February 1984), a framework agreement encompassing boundary water resources (*International Legal Materials* (Washington, D.C.), vol. XXII (1983), p. 1025) (art. 1 and annex 1); (c) the Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad) (entered into force on 1 February 1966) (see footnote 127 above) (art. 4); (d) the Convention relating to the status of the Senegal River and the Convention establishing the Organization for the Development of the Senegal River, both of

(Continued on next page.)

states that the purpose of the Agreement is to ensure co-operation between the parties in economic, scientific and technical activities relating to the use of water resources in frontier waters. Articles 7 and 8 of the Agreement provide for co-operation with regard, *inter alia*, to water projects and the regular exchange of data and information.

(4) The importance of co-operation in relation to the utilization of international watercourses and other common natural resources has been emphasized repeatedly in declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, as well as in article 3 of the Charter of Economic Rights and Duties of States, to which reference has already been made.<sup>175</sup> For example, the General Assembly addressed the subject in resolution 2995 (XXVII) of 15 December 1972 on co-operation between States in the field of the environment, and resolution 3129 (XXVIII) of 13 December 1973 on co-operation in the field of the environment concerning natural resources shared by two or more States. By way of illustration, the former provides, in its preamble, that, "in exercising their sovereignty over their natural resources, States must seek, through effective bilateral and multilateral co-operation or through regional machinery, to preserve and improve the environment". The subject of co-operation in the utilization of common water resources and in the field of environmental protection was also addressed in the Declaration of the United Nations Conference on the Human Environment in 1972.<sup>176</sup> Principle 24 of that Declaration provides:

*Principle 24*

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.<sup>177</sup>

The Mar del Plata Action Plan, adopted by the United Nations Water Conference, held at Mar del Plata

(Footnote 174 continued.)

11 March 1972 (United Nations, Natural Resources/Water Series No. 13 (see footnote 138 above), pp. 16 and 21, respectively); (e) the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin (*Official Gazette of the Federal Republic of Cameroon* (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003; *Yearbook* . . . 1974, vol. II (Part Two), pp. 290-291, document A/CN.4/274, paras. 51-56) (art. 1 of the Statutes); (f) the Indus Waters Treaty of 19 September 1960 between India and Pakistan (entered into force on 12 January 1961) (see footnote 130 above) (arts. VII and VIII). More generally, article 197 of the 1982 United Nations Convention on the Law of the Sea (see footnote 72 above), entitled "Co-operation on a global or regional basis", requires States to co-operate "in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

<sup>175</sup> See paragraph (25) of the commentary to article 8 above.

<sup>176</sup> See footnote 170 above.

<sup>177</sup> See also Recommendation 51 of the Action Plan for the Human Environment adopted by the same Conference (*Report of the United Nations Conference on the Human Environment* . . . , *op. cit.* (footnote 170 above), part one, chap. II.B), which provides for co-operation with regard specifically to international watercourses.

(Argentina) in 1977,<sup>178</sup> contains a number of recommendations relating to regional and international co-operation with regard to the use and development of international watercourses. For example, Recommendation 90 provides that co-operation between States in the case of international watercourses "in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment".<sup>179</sup> In 1987, ECE adopted a set of "Principles regarding co-operation in the field of transboundary waters",<sup>180</sup> Principle 2 of which provides:

*Co-operation*

2. Transboundary effects of natural phenomena and human activities on transboundary waters are best regulated by the concerted efforts of the countries immediately concerned. Therefore co-operation should be established as practical as possible among riparian countries leading to a constant and comprehensive exchange of information, regular consultations and decisions concerning issues of mutual interest: objectives, standards and norms, monitoring, planning, research and development programmes and concrete measures, including the implementation and surveillance of such measures.

(5) Numerous studies by intergovernmental and international non-governmental organizations have also recognized the importance of co-operation between States in the use and development of international watercourses.<sup>181</sup> An instrument expressly recognizing the importance of co-operation between States to the effectiveness of procedural and other rules concerning international watercourses is the Rules on Water Pollution in an International Drainage Basin, adopted by ILA in 1982.<sup>182</sup> Article 4 of the Rules provides: "In order to give effect to the provisions of these articles, States shall cooperate with the other States concerned." A forceful statement of the importance of co-operation with regard to international water resources, owing to the physical properties of water, is found in Principle XII of the European Water Charter, adopted by the Committee of Ministers of the Council of Europe in 1967,<sup>183</sup> which declares: "Water

<sup>178</sup> *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I.

<sup>179</sup> *Ibid.*, p. 53 (Principle 21 of the Declaration on the Human Environment is reproduced in paragraph (24) of the commentary to article 8 above). See also Recommendation 84 of the Mar del Plata Action Plan (*ibid.*, p. 51) and the resolutions contained in the Action Plan on "Technical co-operation among developing countries in the water sector", "River commissions" and "Institutional arrangements for international co-operation in the water sector" (*ibid.*, pp. 76-79).

<sup>180</sup> See footnote 170 *in fine* above. The preamble to the principles states: "... The following principles address only issues regarding control and prevention of transboundary water pollution, as well as flood management in transboundary waters, including general issues in this field. ..."

<sup>181</sup> See generally the studies referred to and excerpted in *Yearbook* . . . 1974, vol. II (Part Two), pp. 199 *et seq.*, document A/5409, paras. 1069-1098; and pp. 338 *et seq.*, document A/CN.4/274, paras. 364-381, and pp. 356 *et seq.*, paras. 399-409.

<sup>182</sup> See footnote 168 (g) above.

<sup>183</sup> Adopted on 28 April 1967 by the Consultative Assembly of the Council of Europe (Recommendation 493 (1967)), and on 26 May 1967 by the Committee of Ministers (resolution (67) 10); text reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 342-343, document A/CN.4/274, para. 373.

declares: "Water knows no frontiers; as a common resource it demands international co-operation." Finally, the resolution on "The pollution of rivers and lakes and international law" adopted by the Institute of International Law at its Athens session, in 1979,<sup>184</sup> provides:

*Article IV*

In order to comply with the obligations set forth in articles II and III [on the prevention of water pollution], States shall in particular use the following means:

...

(b) at international level, co-operation in good faith with the other States concerned.<sup>185</sup>

(6) In conclusion, co-operation between watercourse States is important to the equitable and reasonable utilization of international watercourses. It also forms the basis for the regular exchange of data and information under article 10, as well as for the other parts of the draft.

**Article 10. Regular exchange of data and information**

**1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.**

**2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.**

**3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.**

*Commentary*

(1) Article 10 sets forth the general minimum requirements for the exchange between watercourse States of the data and information necessary to ensure the equitable and reasonable utilization of an international watercourse [system]. Watercourse States require data and information concerning the condition of the watercourse in order to apply article 7, provisionally adopted by the Commission at its thirty-ninth session, which calls for watercourse States to take into account "all relevant factors and circumstances" in implementing the obligation

<sup>184</sup> See footnote 168 (c) above.

<sup>185</sup> Article VII of the resolution provides that, "in carrying out their duty to co-operate, States bordering the same hydrographic basin shall, as far as practicable, especially through agreements, resort to the following ways of co-operation", including providing data concerning pollution, giving advance notification of potentially polluting activities, and consulting on actual or potential transboundary pollution problems.

of equitable utilization laid down in article 6. The rules contained in article 10 are, of course, residual: they apply in the absence of particularized regulation of the subject in an agreement of the kind envisaged in article 4, i.e. one relating to a specific international watercourse [system]. Indeed, the need is clear for watercourse States to conclude such agreements among themselves in order to provide, *inter alia*, for the collection and exchange of data and information in the light of the characteristics of the international watercourse [system] involved, as well as of their special requirements and circumstances. The smooth and effective functioning of the régime envisaged in article 10 is dependent upon co-operation between watercourse States. The rules in this article thus constitute a specific application of the general obligation to co-operate laid down in article 9, as reflected in the opening phrase of paragraph 1.

(2) The requirement of *paragraph 1* that data and information be exchanged on a regular basis is designed to ensure that watercourse States will have the facts necessary to enable them to comply with their obligation of equitable and reasonable utilization under articles 6 and 7, and their obligation under article 8 not to cause appreciable harm to other watercourse States. The data and information may be transmitted directly or indirectly. In many cases, watercourse States have established joint bodies entrusted, *inter alia*, with the collection, processing and dissemination of data and information of the kind referred to in paragraph 1.<sup>186</sup> But the States concerned are, of course, free to utilize for this purpose any mutually acceptable method.

(3) The Commission recognizes that circumstances such as an armed conflict or the absence of diplomatic rela-

<sup>186</sup> For illustrative lists of such bodies and discussions thereof, see (a) *Yearbook* ... 1974, vol. II (Part Two), pp. 351 *et seq.*, document A/CN.4/274, paras. 382-398; (b) the Proceedings of the United Nations Interregional Meeting of International River Organizations, held at Dakar (Senegal) from 5 to 14 May 1981, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17), part three; (c) N. Ely and A. Wolman, "Administration", *The Law of International Drainage Basins* ... , *op. cit.* (footnote 152 above), pp. 125-133; (d) United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), annex IV; (e) T. Parnall and A. E. Utton, "The Senegal Valley Authority: A unique experiment in international river basin planning", *Indiana Law Journal* (Bloomington), vol. 51 (1975-1976), pp. 254 *et seq.*

Notable among these administrative mechanisms are: in *Africa*: the Lake Chad Basin Commission, the Niger Basin Authority (formerly River Niger Commission), the Permanent Joint Technical Commission for Nile Waters (Egypt and Sudan) and the Organization for the Management and Development of the Kagera River Basin; in *America*: the Intergovernmental Co-ordinating Committee of the River Plate Basin, the International Joint Commission (Canada and United States of America) and the International Boundary and Water Commission (United States of America and Mexico); in *Asia*: the Committee for Co-ordination of Investigations of the Lower Mekong Basin, the Permanent Indus Commission (India and Pakistan), the Joint Rivers Commission (India and Bangladesh) and the Helmand River Delta Commission (Afghanistan and Iran); in *Europe*: the Danube Commission, the International Commission for the Protection of the Moselle against Pollution, the International Commission for the Protection of the Rhine against Pollution and the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses.

tions may raise serious obstacles to the direct exchange of data and information, as well as to a number of the procedures provided for in articles 11 to 20. The Commission decided that this problem would be best dealt with through a general saving clause specifically providing for indirect procedures, which has taken the form of article 21.

(4) In requiring the "regular" exchange of data and information, article 10 provides for an ongoing and systematic process, as distinct from the *ad hoc* provision of information concerning planned measures envisaged in part III of the draft.

(5) Paragraph 1 requires that watercourse States exchange data and information that is "reasonably available".<sup>187</sup> This expression is used to indicate that, as a matter of general legal duty, a watercourse State is obligated to provide only such information as is reasonably at its disposal, for example that which it has already collected for its own use or is easily accessible.<sup>188</sup> In a specific case, whether data and information was "reasonably" available would depend upon an objective evaluation of such factors as the effort and cost its provision would entail, taking into account the human, technical, financial and other relevant resources of the requested watercourse State. The terms "reasonably", as used in paragraphs 1 and 2, and "reasonable", as used in paragraph 2, are thus terms of art having a meaning corresponding roughly to the expression "in the light of all the relevant circumstances" or to the word "feasible", rather than, for example, "rationally" or "logically".

(6) In the absence of agreement to the contrary, watercourse States are not required to process the data and information to be exchanged. Under paragraph 3 of article 10, however, they are to employ their best efforts to provide the information in a form that is usable by the States receiving it.

(7) Examples of instruments which employ the term "available" in reference to information to be provided are the 1960 Indus Waters Treaty between India and Pakistan<sup>189</sup> and the 1986 Convention on Early Notification of a Nuclear Accident.<sup>190</sup>

<sup>187</sup> Art. XXIX, para. 1, of the Helsinki Rules (see footnote 168 (d) above) employs the expression "relevant and reasonably available".

<sup>188</sup> Cf. the commentary to art. XXIX, para. 1, of the Helsinki Rules, which states:

"The reference to 'relevant and reasonably available information' makes it clear that the basin State in question cannot be called upon to furnish information which is not pertinent and cannot be put to the expense and trouble of securing statistics and other data which are not already at hand or readily obtainable. The provision of the article is not intended to prejudge the question whether a basin State may justifiably call upon another to furnish information which is not 'reasonably available' if the first State is willing to bear the cost of securing the desired information." (ILA, *op. cit.* (footnote 168 (d) above), p. 519.)

<sup>189</sup> See footnote 130 above. Art. VII, para. 2, of the Treaty provides that a party planning to construct engineering works which would affect the other party materially

"shall notify the other Party of its plans and shall supply such data relating to the work as may be available\* and as would enable the other Party to inform itself of the nature, magnitude and effect of the work".

(8) Watercourse States are required to exchange data and information concerning the "condition" of the international watercourse [system]. This term, which also appears in article 11, has its usual meaning, referring generally to the current state or characteristics of the watercourse. As indicated by the words "in particular", the kinds of data and information mentioned, while by no means comprising an exhaustive list, are those regarded as being the most important for the purpose of equitable utilization. Although article 10 does not mention the exchange of samples, the Commission recognizes that this may indeed be of great practical value in some circumstances and should be effected as appropriate.

(9) The data and information transmitted to other watercourse States should include indications of effects upon the condition of the watercourse of present uses thereof within the State transmitting the information. Possible effects of planned uses are dealt with in articles 11 to 20.

(10) Paragraph 1 of article 10 requires the regular exchange of, *inter alia*, data and information of an "ecological" nature. The Commission regarded this term as being preferable to "environmental", since it relates more specifically to the living resources of the watercourse itself. The term "environmental" was thought to be susceptible of a broader interpretation, which would result in the imposition of too great a burden upon watercourse States.

(11) Watercourse States are required by paragraph 1 to exchange not only data and information on the present condition of the watercourse, but also related forecasts. The latter requirement is, like the former, subject to the qualification that such forecasts be "reasonably available". Thus watercourse States are not required to undertake special efforts in order to fulfil this obligation. The forecasts envisaged would relate to such matters as weather patterns and the possible effects thereof upon water levels and flows; foreseeable ice conditions; possible long-term effects of present use; and the condition or movement of living resources.

(12) The requirement in paragraph 1 applies even in the relatively rare instances in which no watercourse State is presently using or planning to use the watercourse. If data and information concerning the condition of the watercourse is "reasonably available", the Commission believed that requiring the exchange of such data and information would not be excessively burdensome. In fact, the exchange of data and information concerning such watercourses might assist watercourse States in planning for the future and in meeting development or other needs.

(13) Paragraph 2 concerns requests for data or information that is not reasonably available to the watercourse State from which it is sought. In such cases, the State

Cf. art. XXIX, para. 1, of the Helsinki Rules and the commentary thereto, cited in footnotes 187 and 188 above.

<sup>190</sup> See footnote 95 above. Art. 2 (b) of the Convention requires the provision of "available information relevant to minimizing the radiological consequences . . .".

in question is to employ its "best efforts" to comply with the request, i.e. it is to act in good faith and in a spirit of co-operation in endeavouring to provide the data or information sought by the requesting watercourse State.

(14) For data and information to be of practical value to watercourse States, it must be in a form which allows them to use it. *Paragraph 3* therefore requires watercourse States to use their "best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization". The meaning of the expression "best efforts" is explained in paragraph (13) of the present commentary, relating to paragraph 2. The expression "where appropriate" is used in order to provide a measure of flexibility, which is necessary for several reasons. In some cases, it may not be necessary to process data and information in order to render it usable by another State. In other cases, such processing may be necessary in order to ensure that the material is usable by other States, but this may entail undue burdens for the State providing the material.

(15) The need for the regular collection and exchange of a broad range of data and information relating to international watercourses has been recognized in a large number of international agreements, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental organizations.<sup>191</sup> An example of agreements containing general provisions on the regular exchange of data and information is the 1964 Agreement between Poland and the USSR concerning the use of water resources in frontier waters,<sup>192</sup> article 8, paragraph 1, of which provides:

1. The Contracting Parties shall establish principles of co-operation governing the regular exchange of hydrological, hydrometeorological and hydrogeological information and forecasts relating to frontier waters and shall determine the scope, programmes and methods of carrying out measurements and observation and of processing their results and also the places and times at which the work is to be done.

Other examples of agreements containing provisions on the exchange of data and information are the 1960 Indus Waters Treaty between India and Pakistan<sup>193</sup> (art. VI), the 1944 Treaty between the United States of America and Mexico<sup>194</sup> (art. 9 (j)), the Agreement of 25 November 1964 concerning the Niger River Commission and the navigation and transport on the River Niger<sup>195</sup> (art. 2 (c)) and the Agreement of 16 September 1971 between Finland and Sweden concerning frontier rivers<sup>196</sup> (chap. 9, art. 3).

(16) The regular exchange of data and information is particularly important for the effective protection of international watercourses, preservation of water quality

and prevention of pollution. This is recognized in a number of international agreements, declarations and resolutions, and studies.<sup>197</sup> For example, the "Principles regarding co-operation in the field of transboundary waters" adopted by ECE in 1987<sup>198</sup> provide in Principle 11 (a):

11 (a). In addition to supplying each other with information on events, measures and plans at the national level affecting the other contracting parties, as well as on implementation of jointly harmonized programmes, contracting parties should maintain a permanent exchange of information on their practical experience and research. Joint commissions offer numerous opportunities for this exchange, but joint lectures and seminars serve also as suitable means of passing on a great deal of scientific and practical information.

(17) In summary, the regular exchange by watercourse States of data and information concerning the condition of the watercourse provides those States with the material necessary to comply with their obligations under articles 6 to 8, as well as for their own planning purposes. While article 10 concerns the exchange of data and information on a regular basis, the articles in part III, which follows, deal with the provision of information on an *ad hoc* basis, namely with regard to planned measures.

### PART III

#### PLANNED MEASURES

##### *Article 11. Information concerning planned measures*

**Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].**

##### *Commentary*

(1) Article 11 introduces the articles of part III of the draft and provides a bridge between part II, which concludes with article 10 on the regular exchange of data and information, and part III, which deals with the provision of information concerning planned measures.

(2) Article 11 lays down a general obligation of watercourse States to provide each other with information concerning the possible effects upon the condition of the international watercourse [system] of measures they might plan to undertake. The article also requires that watercourse States consult with each other on the effects of such measures.

(3) The expression "possible effects" includes all potential effects of planned measures, whether adverse or beneficial. Article 11 thus goes beyond article 12 and subsequent articles, which concern planned measures that may have an appreciable adverse effect upon other watercourse States. Indeed, watercourse States have an interest in being informed of possible positive as well as negative

<sup>191</sup> A survey of the relevant provisions of these instruments is contained in the Special Rapporteur's fourth report, document A/CN.4/412 and Add.1 and 2, paras. 15-26. See also article 3 of the Charter of Economic Rights and Duties of States, quoted in paragraph (25) of the commentary to article 8 above.

<sup>192</sup> See footnote 174 above.

<sup>193</sup> See footnote 130 above.

<sup>194</sup> See footnote 134 above.

<sup>195</sup> United Nations, *Treaty Series*, vol. 587, p. 19.

<sup>196</sup> *Ibid.*, vol. 825, p. 191.

<sup>197</sup> See the examples cited in the Special Rapporteur's fourth report, document A/CN.4/412 and Add.1 and 2, footnotes 42 to 44.

<sup>198</sup> See footnote 170 *in fine* above. The Principles are limited by their preamble to flood management and the prevention and control of pollution.

effects of planned measures. In addition, requiring the exchange of information and consultation with regard to all possible effects avoids problems inherent in unilateral assessments of the actual nature of such effects.

(4) The term “measures” is to be taken in its broad sense, i.e. as including new projects or programmes of a major or minor nature, as well as changes in existing uses of an international watercourse [system].

(5) Illustrations of instruments and decisions which lay down a requirement similar to that contained in article 11 are provided in the commentary to article 12 below.

*Article 12. Notification concerning planned measures with possible adverse effects*

**Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.**

*Commentary*

(1) Article 12 introduces a set of articles on planned measures that may have an appreciable adverse effect upon other watercourse States. These articles establish a procedural framework designed to assist watercourse States in maintaining an equitable balance between their respective uses of an international watercourse [system]. It is envisaged that this set of procedures will thus help to avoid disputes relating to new uses of watercourses.

(2) The procedures provided for in articles 12 to 20 are triggered by the criterion that measures planned by a watercourse State may have “an appreciable adverse effect” upon other watercourse States.<sup>199</sup> The threshold established by this standard is intended to be lower than that of “appreciable harm” under article 8. Thus an “appreciable adverse effect” may not rise to the level of “appreciable harm” within the meaning of article 8. “Appreciable harm” is not an appropriate standard for the setting in motion of the procedures under articles 12 to 20, since use of that standard would mean that the procedures would be engaged only where implementation of the new measures might result in a violation of article 8. Thus a watercourse State providing a notification of planned measures would be put in the position of admitting that the measures it was planning might

cause appreciable harm to other watercourse States in violation of article 8. The standard of an “appreciable adverse effect” is employed to avoid such a situation.

(3) The phrase “implements or permits the implementation of” is intended to make clear that article 12 covers not only measures planned by the State, but also those planned by private entities. The word “permit” is employed in its broad sense, i.e. as meaning both “allow” and “authorize”. Thus, in the case of measures planned by a private entity, the watercourse State in question is under an obligation not to authorize the entity to implement the measures—and otherwise not to allow it to go forward with their implementation—before notifying other watercourse States as provided in article 12. References in subsequent articles to “implementation” of planned measures<sup>200</sup> are to be understood as including permitting the implementation thereof.

(4) The term “timely” is intended to require notification sufficiently early in the planning stages to permit meaningful consultations and negotiations under subsequent articles, if such prove necessary. An example of a treaty containing a requirement of this kind is the Agreement of 30 April 1966 between Austria, the Federal Republic of Germany and Switzerland regulating the withdrawal of water from Lake Constance,<sup>201</sup> article 7 of which provides that “riparian States shall, before authorizing [certain specified] withdrawals of water, afford one another in good time an opportunity to express their views”.

(5) The reference to “available” technical data and information is intended to indicate that the notifying State is generally not required to conduct additional research at the request of a potentially affected State, but must only provide such relevant data and information as has been developed in relation to the planned measures and is readily accessible. (The meaning of the term “available” is also discussed in paragraphs (5)-(7) of the commentary to article 10.) If a notified State requests data or information that is not readily available, but is accessible only to the notifying State, it would generally be appropriate for the former to offer to indemnify the latter for expenses incurred in producing the requested material. As provided in article 20, the notifying State is not required to divulge data or information that is vital to its national defence or national security. Examples of instruments which employ the term “available” in reference to information to be provided are given in paragraph (7) of the commentary to article 10.

(6) The principle of notification of planned measures is embodied in a number of international agreements, decisions of international courts and tribunals, declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, and studies by intergovernmental and international non-governmental

<sup>199</sup> The “Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States”, adopted by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978), define the expression “significantly affect” as referring to “any appreciable effects on a shared natural resource and [excluding] *de minimis* effects”. For the text of the draft principles, see UNEP/IG.12/2, annexed to document UNEP/GC.6/17; for the final text, see UNEP, *Environmental Law. Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

<sup>200</sup> See art. 15, para. 2, art. 16 and art. 19, para. 1, below.

<sup>201</sup> Entered into force on 25 November 1967 (United Nations, *Treaty Series*, vol. 620, p. 191).

organizations.<sup>202</sup> An example of a treaty containing such a provision is the Convention of 25 May 1954 between Yugoslavia and Austria concerning water economy questions relating to the Drava,<sup>203</sup> article 4 of which provides that should Austria, the upper riparian State, seriously contemplate plans for new installations to divert water from the Drava basin or for construction work which might affect the Drava river régime to the detriment of Yugoslavia, the Austrian Federal Government undertakes to discuss such plans with the Federal People's Republic of Yugoslavia prior to legal negotiations concerning rights in the water.

Provisions to the same or similar effect are found in a number of other agreements, beginning as early as 1866 with the Treaty of Bayonne (Boundary Treaty between Spain and France) and its Additional Act<sup>204</sup> (art. XI of the Act). Additional examples are the 1972 Convention relating to the status of the Senegal River<sup>205</sup> (art. 4), the 1960 Convention on the protection of Lake Constance against pollution<sup>206</sup> (art. 1, para. 3), the 1960 Indus Waters Treaty between India and Pakistan<sup>207</sup> (art. VII, para. 2) and the Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State<sup>208</sup> (art. 4).

(7) A number of agreements provide for notification and exchange of information concerning new projects or uses through an institutional mechanism established to facilitate the management of a watercourse. An example is the 1975 Statute of the Uruguay River,<sup>209</sup> adopted by Uruguay and Argentina, which contains detailed provisions on notification requirements, the content of the notification, the period for reply, and procedures applicable in the event that the parties fail to agree on the proposed project. These provisions are reproduced below in full, since they are relevant not only to article 12, but also to subsequent articles of part III of the draft:

#### Article 7

A party planning the construction of new channels, the substantial modification or alteration to existing ones, or the execution of any other works of such magnitude as to affect navigation, the régime of the river or the quality of its waters, shall so inform the Commission, which shall determine expeditiously, and within a maximum period of 30 days, whether the project may cause appreciable harm to the other party.

<sup>202</sup> A survey of these authorities is contained in the Special Rapporteur's third report, *Yearbook . . . 1987*, vol. II (Part One), pp. 28 *et seq.*, document A/CN.4/406 and Add.1 and 2, paras. 63-87, and p. 46, annex II.

<sup>203</sup> Entered into force on 15 January 1955 (United Nations, *Treaty Series*, vol. 227, p. 111).

<sup>204</sup> The relevant provisions of the Additional Act of 26 May 1866 to the Boundary Treaties of 2 December 1856, 14 April 1862 and 26 May 1866 (ratified on 12 July 1866) are reproduced in *International Law Reports, 1957* (London), vol. 24 (1961), pp. 102-105 (see also p. 138); summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 170-171, document A/5409, paras. 895-902. This agreement was construed and applied in the *Lake Lanoux* arbitration (see footnote 158 above).

<sup>205</sup> See footnote 174 (d) above.

<sup>206</sup> See footnote 140 above.

<sup>207</sup> See footnote 130 above.

<sup>208</sup> Entered into force on 30 June 1925 (League of Nations, *Treaty Series*, vol. XXXVI, p. 75).

<sup>209</sup> See footnote 117 above.

If it is determined that such is the case, or if no decision is reached on the subject, the party concerned shall, through the Commission, notify the other party of its project.

The notification shall give an account of the main aspects of the project and, as appropriate, its mode of operation and such other technical data as may enable the notified party to assess the probable effect of the project on navigation or on the régime of the river or the quality of its waters.

#### Article 8

The notified party shall be allowed a period of 180 days in which to evaluate the project, from the date on which its delegation to the Commission receives the notification.

If the documentation referred to in article 7 is incomplete, the notified party shall be allowed a period of 30 days in which, through the Commission, so to inform the party planning to execute the project.

The aforementioned period of 180 days shall begin to run from the date on which the delegation of the notified party receives complete documentation.

This period may be extended by the Commission, at its discretion, if the complexity of the project so requires.

#### Article 9

If the notified party presents no objections or does not reply within the period specified in article 8, the other party may execute or authorize the execution of the planned project.

#### Article 10

The notified party shall have the right to inspect the works in progress in order to determine whether they are being carried out in accordance with the project submitted.

#### Article 11

If the notified party concludes that the execution of the works or the mode of operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, it shall so inform the other party, through the Commission, within the period of 180 days specified in article 8.

Its communication shall state which aspects of the works or of the mode of operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation.

#### Article 12

If the parties fail to reach agreement within 180 days of the date of the communication referred to in article 11, the procedure indicated in chapter XV shall be followed.<sup>210</sup>

Other agreements providing for notification of planned measures through a joint body include the treaty régime governing the Niger River<sup>211</sup> and the Treaty of 19 November 1973 between Argentina and Uruguay on the River Plate and its maritime outlet<sup>212</sup> (art. 17).

(8) The subject of notification concerning planned measures was dealt with extensively by the arbitral

<sup>210</sup> Chapter XV (art. 60) of the Statute, referred to in article 12, provides for judicial settlement of disputes, while chapter XIV (arts. 58 and 59) provides for a conciliation procedure.

<sup>211</sup> See art. 4 of the Act of Niamey of 1963 (see footnote 127 above) and art. 12 of the 1964 Agreement concerning the Niger River Commission (see footnote 195 above).

<sup>212</sup> Entered into force on 12 February 1974 (INTAL, *Derecho de la Integración* (Buenos Aires), vol. VII, No. 15 (March 1974), p. 225; *International Legal Materials* (Washington, D.C.), vol. XIII (1974), p. 251; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 298 *et seq.*, document A/CN.4/274, paras. 115-130).

tribunal in the *Lake Lanoux* case.<sup>213</sup> Relevant conclusions reached by the tribunal in its award include the following: (a) at least in the factual context of the case, international law does not require prior agreement between the upper and lower riparian States concerning a proposed new use, and “international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement”;<sup>214</sup> (b) under then current trends in international practice concerning hydroelectric development, “consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right”;<sup>215</sup> (c) “the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own”;<sup>216</sup> (d) there is an “intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted”.<sup>217</sup> France had, in fact, consulted with Spain prior to the initiation of the diversion project at issue in that case, in response to Spain’s claim that it was entitled to prior notification under article 11 of the 1866 Additional Act to the Treaty of Bayonne.<sup>218</sup>

(9) The need for prior notification of planned measures has been recognized in a number of declarations and resolutions adopted by intergovernmental organizations, conferences and meetings. Recommendation 51 of the Action Plan for the Human Environment adopted by the United Nations Conference on the Human Environment in 1972<sup>219</sup> contains the following principle relating to notification of planned new uses:

Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged;

(10) Nearly 40 years earlier, the Seventh International Conference of American States adopted the Declaration of Montevideo,<sup>220</sup> which provides not only for advance notice of planned works, but also for prior consent with regard to potentially injurious modifications, as follows:

2. ...

<sup>213</sup> See footnote 158 above.

<sup>214</sup> Para. 11 (third subparagraph) of the award (*Yearbook ... 1974*, vol. II (Part Two), p. 197, document A/5409, para. 1065).

<sup>215</sup> Para. 22 (second subparagraph) of the award (*ibid.*, p. 198, para. 1068).

<sup>216</sup> Para. 22 (third subparagraph) of the award (*ibid.*).

<sup>217</sup> Para. 24 (penultimate subparagraph) of the award (*ibid.*).

<sup>218</sup> See footnote 204 above.

<sup>219</sup> *Report of the United Nations Conference on the Human Environment ...*, *op. cit.* (footnote 170 above), part one, chap. II.B.

<sup>220</sup> See footnote 153 above.

... no State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.

...

7. The works which a State plans to perform in international waters shall be previously announced to the other riparian or co-jurisdictional States. The announcement shall be accompanied by the necessary technical documentation in order that the other interested States may judge the scope of such works, and by the name of the technical expert or experts who are to deal, if necessary, with the international side of the matter.

8. The announcement shall be answered within a period of three months, with or without observations. In the former case, the answer shall indicate the name of the technical expert or experts to be charged by the respondent with dealing with the technical experts of the applicant, and shall propose the date and place for constituting the Mixed Technical Commission of technical experts from both sides to pass judgment on the case. The Commission shall act within a period of six months, and if within this period no agreement has been reached, the members shall set forth their respective opinions, informing the Governments thereof.

...<sup>221</sup>

Examples of similar provisions are the “Principle of information and consultation” annexed to the “Principles concerning transfrontier pollution” adopted by the Council of OECD in 1974,<sup>222</sup> and the recommendations on “regional co-operation” adopted by the United Nations Water Conference in 1977.<sup>223</sup>

(11) Provisions on notification concerning planned measures may be found in a number of studies by intergovernmental and international non-governmental organizations. For reasons of brevity, examples of these studies will merely be mentioned here, without setting forth the relevant provisions in full.<sup>224</sup> This listing is intended to provide an indication of the wide-ranging recognition of the need for such prior notification.

(12) Provisions on prior notification of planned measures are contained, for example, in the revised draft convention on the industrial and agricultural use of international rivers and lakes adopted by the Inter-American Juridical Committee in 1965<sup>225</sup> (especially

<sup>221</sup> Paragraph 9 of the Declaration provides for the resolution of any remaining differences through diplomatic channels, conciliation, and ultimately any procedures under conventions in effect in America. The tribunal is to act within a three-month period and its award is to take into account the proceedings of the Mixed Technical Commission provided for in paragraph 8. It may be noted that Bolivia and Chile recognized that the Declaration embodied obligations applicable to the Lauca River dispute between them. See OAS Council, documents OEA/SER.G/VI, C/INF-47 (15 and 20 April 1962) and OEA/SER.G/VI, C/INF-50 (19 April 1962).

<sup>222</sup> Recommendation C(74)224 adopted by the Council of OECD on 14 November 1974 (OECD, *OECD and the Environment* (Paris, 1986), p. 142).

<sup>223</sup> *Report of the United Nations Water Conference ...*, *op. cit.* (footnote 178 above), pp. 51-52, especially Recommendation 86 (g).

<sup>224</sup> The relevant provisions are reproduced *in extenso* in the Special Rapporteur’s third report, *Yearbook ... 1987*, vol. II (Part One), pp. 32 *et seq.*, document A/CN.4/406 and Add.1 and 2, paras 81-87.

<sup>225</sup> *Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting* (OEA/Ser.I/VI.1, CIJ-83) (Washington (D.C.), 1966), pp. 7-10; text reproduced in part in *Yearbook ... 1974*, vol. II (Part Two), pp. 349-351, document A/CN.4/274, para. 379.

arts. 8 and 9); the revised draft propositions submitted to the Asian-African Legal Consultative Committee in 1973 by its sub-committee on the law of international rivers<sup>226</sup> (especially proposition IV, para. 2, and proposition X); the resolution on "Utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law in 1961<sup>227</sup> (arts. 4-9); the resolution on the use of international rivers adopted by the Inter-American Bar Association at its Tenth Conference, in 1957<sup>228</sup> (para I.3); the Helsinki Rules adopted by ILA in 1966<sup>229</sup> (art. XXIX); the articles on "Regulation of the flow of water of international watercourses" adopted by ILA in 1980<sup>230</sup> (arts. 7 and 8); the Rules on Water Pollution in an International Drainage Basin, adopted by ILA in 1982<sup>231</sup> (arts. 5 and 6);<sup>232</sup> and the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", adopted by the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States and approved by the Governing Council of UNEP in 1978<sup>233</sup> (principles 6 and 7).

(13) The foregoing survey of authorities is illustrative only, but it reveals the importance that States and expert bodies attach to the principle of prior notification of planned measures. Procedures to be followed subsequent to a notification under article 12 are dealt with in articles 13 to 17.

### *Article 13. Period for reply to notification*

**Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.**

<sup>226</sup> Asian-African Legal Consultative Committee, *Report of the Fourteenth Session held in New Delhi (10-18 January 1973)* (New Delhi), pp. 99 *et seq.*; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

<sup>227</sup> See footnote 168 (b) above.

<sup>228</sup> Inter-American Bar Association, *Proceedings of the Tenth Conference, Buenos Aires, 1957* (Buenos Aires, 1958), pp. 82-83; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.

<sup>229</sup> See footnote 168 (d) above.

<sup>230</sup> For the texts of the articles, with introduction and comments by the Rapporteur, E. J. Manner, see ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 362 *et seq.* The term "regulation" is defined in article 1 as

"continuing measures intended for controlling, moderating, increasing or otherwise modifying the flow of the waters in an international watercourse for any purpose; such measures may include storing, releasing and diverting of water by means such as dams, reservoirs, barrages and canals".

<sup>231</sup> ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 535 *et seq.* The Association has prepared other studies that are of present relevance. See, for example, the Rules of International Law Applicable to Transfrontier Pollution, also adopted at the Montreal Conference in 1982 (*ibid.*, pp. 1-3) (art. 3, para. 1).

<sup>232</sup> See also art. 3.

<sup>233</sup> See footnote 199 above.

### *Commentary*

(1) The provision of a notification under article 12 has two effects, which are dealt with in articles 13 and 14. The first effect, provided for in article 13, is that the period for reply to the notification begins to run. The second effect, dealt with in article 14, is that the obligations specified in that article arise for the notifying State.

(2) A full understanding of the effect of article 13 requires that brief reference be made to the provisions of several subsequent articles. Article 13 affords the notified State or States a period of six months for study and evaluation of the possible effects of the planned measures. During this period, article 14 requires that the notifying State, *inter alia*, not proceed with the implementation of its plans without the consent of the notified State. If the notified State wishes implementation of the plans to be further suspended, it must reply during the six-month period stipulated in article 13 and request such a further suspension, as provided for in paragraph 3 of article 17. In any event, paragraph 1 of article 15 requires the notified State to reply as early as possible, out of good-faith consideration for the interest of the notifying State in proceeding with its plans. Of course, the notified State may reply after the six-month period has elapsed, but such a reply could not operate to prevent the notifying State from proceeding with the implementation of its plans, in view of the provisions of article 16. The latter article allows the notifying State to proceed to implementation if it receives no reply within the six-month period.

(3) The Commission considered the possibility of using a general standard for the determination of the period for reply, such as "a reasonable period of time",<sup>234</sup> rather than a fixed period such as six months.<sup>235</sup> It concluded, however, that a fixed period, while necessarily somewhat arbitrary, would ultimately be in the interests of both the notifying and the notified States. While a general standard would be more flexible and adaptable to different situations, its inherent uncertainty could at the same time lead to disputes between the States concerned. All these considerations demonstrate the need for watercourse States to agree upon a period of time that is appropriate to the case concerned, in the light of all relevant facts and circumstances. Indeed, the opening clause of article 13, "unless otherwise agreed", is intended to emphasize that, in each case, States are expected and encouraged to agree upon an appropriate period. The six-month period provided for in article 13 is thus residual, and applies only in the absence of agreement between the States concerned upon another period.

<sup>234</sup> Instruments using this kind of standard include the 1961 resolution of the Institute of International Law on "Utilization of non-maritime international waters (except for navigation)" (see footnote 168 (b) above) (art. 6), and ILA's 1966 Helsinki Rules (see footnote 168 (d) above) (art. XXIX, para. 3).

<sup>235</sup> An instrument stipulating a six-month period is the 1975 Statute of the Uruguay River (see footnote 117 above) (art. 8).

**Article 14. Obligations of the notifying State during the period for reply**

**During the period referred to in article 13, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement, or permit the implementation of, the planned measures without the consent of the notified States.**

*Commentary*

(1) As its title indicates, article 14 deals with the obligations of the notifying State during the period specified in article 13 for reply to a notification made pursuant to article 12. There are two obligations. The first is an obligation of co-operation, which takes the specific form of a duty to provide the notified State or States, at their request, "with any additional data and information that is available and necessary for an accurate evaluation" of the possible effects of the planned measures. Such data and information would be "additional" to that which had already been provided under article 12. The meaning of the term "available" is discussed in paragraph (5) of the commentary to article 12.

(2) The second obligation of the notifying State under article 14 is not to "implement, or permit the implementation of, the planned measures without the consent of the notified States". The expression "implement, or permit the implementation of" is discussed in paragraph (3) of the commentary to article 12, and bears the same meaning as in that article. It perhaps goes without saying that this second obligation is a necessary element of the procedures provided for in part III of the draft, since these procedures are designed to maintain a state of affairs characterized by the expression "equitable utilization" within the meaning of article 6. If the notifying State were to proceed with implementation before the notified State had had an opportunity to evaluate the possible effects of the planned measures and inform the notifying State of its findings, the notifying State would not have at its disposal all the information it would need to be in a position to comply with articles 6 to 8. The duty not to proceed with implementation is thus intended to assist watercourse States in ensuring that any measures they plan will not be inconsistent with their obligations under articles 6 and 8.

**Article 15. Reply to notification**

**1. The notified States shall communicate their findings to the notifying State as early as possible.**

**2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8, it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding.**

*Commentary*

(1) Article 15 deals with the obligations of the notified State or States with regard to their response to the notification provided under article 12. As with article 14, there are two obligations. The first, laid down in *paragraph 1*, is to communicate their findings concerning possible effects of the planned measures to the notifying State "as early as possible". As explained in paragraph (2) of the commentary to article 13, this communication must be made within the six-month period provided for in article 13 in order for a notified State to have the right to request a further suspension of implementation under paragraph 3 of article 17. If a notified State completed its evaluation in less than six months, however, paragraph 1 of article 15 would call for it to inform the notifying State immediately of its findings. A finding that the planned measures would be consistent with articles 6 and 8 would conclude the procedures under part III of the draft, and the notifying State could proceed without delay to implement its plans. Even if a contrary finding were made, however, early communication of that finding to the notifying State would result in bringing to a speedier conclusion the applicable procedures under article 17.

(2) *Paragraph 2* deals with the second obligation of the notified States. This obligation arises, however, only for a notified State which "finds that implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8". In other words, the obligation is triggered by a finding that implementation of the plans would result in a breach of the obligation of equitable and reasonable utilization under article 6, or of the duty not to cause appreciable harm under article 8. (As noted in paragraph (3) of the commentary to article 12, the term "implementation" applies to measures planned by private parties as well as to those planned by the State itself.) Paragraph 2 of article 15 requires a notified State which has made such a finding to provide the notifying State, within the six-month period specified in article 13, with an explanation of the finding. The explanation must be "documented" — i.e. it must be supported by an indication of the factual or other bases for the finding — and must set forth the reasons for the notified State's conclusion that implementation of the planned measures would violate articles 6 or 8.<sup>236</sup> The word "would" was used rather than a term such as "might" in order to indicate that the notified State must conclude that a violation of articles 6 or 8 is more than a mere possibility. The reason for the strictness of these requirements is that a communication of the kind described in paragraph 2 permits a notified State to request, pursuant to paragraph 3 of article 17, further suspension of the implementation of the planned measures in question. This effect of

<sup>236</sup> A similar requirement is contained in article 11 of the 1975 Statute of the Uruguay River (*ibid.*), which provides that the communication of the notified party "shall state which aspects of the works or of the mode of operation may cause appreciable harm to . . . the régime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation".

the communication justifies the requirement of paragraph 2 that the notified State demonstrate its good faith by showing that it has made a serious and considered assessment of the effects of the planned measures.

*Article 16. Absence of reply to notification*

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 6 and 8, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

*Commentary*

(1) Article 16 deals with cases in which the notifying State, during the six-month period provided for in article 13, receives no communication under paragraph 2 of article 15 — i.e. one which states that the planned measures would be inconsistent with the provisions of articles 6 or 8, and provides an explanation for such finding. In such a case, the notifying State may implement or permit the implementation of the planned measures, subject to two conditions. The first is that the plans be implemented “in accordance with the notification and any other data and information provided to the notified States” under articles 12 and 14. The reason for this condition is that the silence of a notified State with regard to the planned measures can be regarded as tacit consent only in relation to matters which were brought to its attention. The second condition is that implementation of the planned measures be consistent with the obligations of the notifying State under articles 6 and 8.

(2) The idea underlying article 16 is that, if a notified State does not provide a response under paragraph 2 of article 15 within the required period, it is precluded from claiming the benefits of the protective régime established in part III of the draft. The notifying State may then proceed with the implementation of its plans, subject to the conditions referred to in paragraph (1) of the present commentary. Permitting the notifying State to proceed in such cases is an important aspect of the balance which the present articles seek to strike between the interests of notifying and notified States.

*Article 17. Consultations and negotiations concerning planned measures*

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations provided for in paragraph 1 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time of making the communication under paragraph 2 of article 15, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Commentary*

(1) Article 17 deals with cases in which there has been a communication under paragraph 2 of article 15, i.e. one containing a finding by the notified State that “implementation of the planned measures would be inconsistent with the provisions of articles 6 or 8”.

(2) Paragraph 1 of article 17 calls for the notifying State to enter into consultations and negotiations with the State making a communication under paragraph 2 of article 15 “with a view to arriving at an equitable resolution of the situation”. The “situation” referred to is that produced by the good-faith finding of the notified State that implementation of the planned measures would be inconsistent with the obligations of the notifying State under articles 6 and 8. The “equitable resolution” referred to in paragraph 1 could include, for example, modification of the plans so as to eliminate their potentially harmful aspects, adjustment of other uses being made by either of the States, or the provision by the notifying State of monetary or another form of compensation acceptable to the notified State. Consultations and negotiations have been required in similar circumstances in a number of international agreements<sup>237</sup> and decisions of international courts and tribunals.<sup>238</sup> The need

<sup>237</sup> See, for example, the 1954 Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava (see footnote 203 above) (art. 4); the 1960 Convention on the protection of Lake Constance against pollution (see footnote 140 above) (art. 1, para. 3); the 1964 Agreement between Poland and the USSR concerning the use of water resources in frontier waters (see footnote 174 above) (art. 6); the 1964 Agreement concerning the Niger River Commission and the navigation and transport on the River Niger (see footnote 195 above) (art. 12); and the 1981 Convention between Hungary and the USSR concerning water economy questions in frontier waters (referred to in *Environmental Protection and Sustainable Development. Legal Principles and Recommendations* (Dordrecht, Martinus Nijhoff, 1987), p. 106) (arts. 3-5).

<sup>238</sup> See especially the *Lake Lanoux* arbitral award (see footnote 158 above). After finding that, under international law, an agreement with potentially affected States was not a prerequisite for the implementation of planned measures, the tribunal stated:

“... international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. ...” (Para. 11 (third subparagraph) of the award (*Yearbook ... 1974*, vol. II (Part Two), p. 197, document A/5409, para. 1065). The tribunal cited in this connection the *Tacna-Arica Question* (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), pp. 921 *et seq.*), and *Railway Traffic between Lithuania and Poland* (P.C.I.J., *Series A/B*, No. 42, p. 108.)

The tribunal continued:

“... there would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements. ...” (Para. 13 (first subparagraph) of the award (*Yearbook ... 1974*, vol. II (Part Two), p. 197, document A/5409, para. 1066).)

(Continued on next page.)

for such consultations and negotiations has also been recognized in a variety of resolutions and studies by inter-governmental<sup>239</sup> and international non-governmental organizations.<sup>240</sup>

(3) *Paragraph 2* concerns the manner in which the consultations and negotiations provided for in paragraph 1 are to be conducted. The language employed is inspired chiefly by the judgment of the ICJ in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case<sup>241</sup> and by the award of the arbitral tribunal in the *Lake Lanoux* case.<sup>242</sup> The manner in which consultations and negotiations are to be conducted was also addressed by the ICJ in the *North Sea Continental Shelf* cases.<sup>243</sup> The expression "legitimate" interests is employed in article 3 of the Charter of Economic Rights and Duties of States<sup>244</sup> and is used in the present paragraph 2 in order to provide some limitation of the scope of the term "interests".

(4) *Paragraph 3* requires the notifying State to suspend implementation of the planned measures for a further period of six months, but only if requested to do so by the notified State when the latter makes a communication under paragraph 2 of article 15. Implementation of the measures during a reasonable period of consultations and negotiations would not be consistent with the requirements of good faith laid down in paragraph 2 of article 17 and referred to in the *Lake Lanoux* arbitral award.<sup>245</sup> By the same token, however, consultations

(Footnote 238 continued.)

And it further stated:

"... The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own." (Para. 22 (third subparagraph) of the award (*Yearbook* . . . , p. 198, para. 1068).)

Of general relevance in this regard are several decisions of the ICJ in cases involving the law of the sea, such as the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark, and Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3, especially pp. 46-48, paras. 85 and 87; and the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case, Merits, Judgment of 25 July 1974, *I.C.J. Reports 1974*, p. 3, especially pp. 30-31, para. 71, and p. 33, para. 78.

<sup>239</sup> See, for example, the Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974) (art. 3); General Assembly resolution 3129 (XXVIII) of 13 December 1973 on co-operation in the field of the environment concerning natural resources shared by two or more States; the "Principle of information and consultation" annexed to the 1974 OECD "Principles concerning transfrontier pollution" (see footnote 222 above); and UNEP's 1978 "Draft principles of conduct" concerning shared natural resources (see footnote 199 above) (principles 5, 6 and 7).

<sup>240</sup> See, for example, the above-mentioned resolutions adopted by the Institute of International Law in 1961 (see footnote 168 (b) above) (art. 6) and in 1979 (see footnote 168 (c) above) (art. VII (d)); and the articles adopted by ILA in 1980 (see footnote 168 (e) above) (art. 8) and in 1982 (see footnote 168 (g) above) (art. 6).

<sup>241</sup> See especially paragraph 78 of the judgment (see footnote 238 *in fine* above).

<sup>242</sup> See footnote 158 above, and the passages from the award quoted in footnote 238 above.

<sup>243</sup> See paragraphs 85 and 87 of the judgment (see footnote 238 *in fine* above).

<sup>244</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>245</sup> See the passages from the award quoted in footnote 238 above.

and negotiations should not further suspend implementation for more than a reasonable period of time. This period should be the subject of agreement by the States concerned, who are in the best position to decide upon a length of time that is appropriate under the circumstances. In the event that they are not able to reach agreement, however, paragraph 3 sets a period of six months. After this period has expired, the notifying State may proceed with implementation of its plans, subject always to its obligations under articles 6 and 8.

#### *Article 18. Procedures in the absence of notification*

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

#### *Commentary*

(1) Article 18 addresses the situation in which a watercourse State is aware that measures are being planned by another State (or by private parties in that State) and believes that they may have an appreciable adverse effect upon it, but has received no notification thereof. In such a case, article 18 allows the first State to seek the benefits of the protective régime provided for under articles 12 *et seq.*

(2) *Paragraph 1* allows "a watercourse State" in the position described above to request the State planning the measures in question "to apply the provisions of article 12". Several comments are called for concerning the quoted language. First, the expression "a watercourse State" is not intended to exclude the possibility that more than one State may believe measures are being planned by another State. Secondly, the words "apply the provisions of article 12" should not be taken as suggesting that the State planning the measures has necessarily failed to comply with its obligations under article 12. In other words, that State may have made an assessment of the potential of the planned measures for causing appreciable

cial adverse effects upon other watercourse States and concluded in good faith that no such effects would result therefrom. Paragraph 1 allows a watercourse State to request that the State planning measures take a "second look" at its assessment and conclusion, and does not prejudice the question whether the planning State initially complied with its obligations under article 12. In order for the first State to be entitled to make such a request, however, two conditions must be satisfied. The first is that the requesting State must have "serious reason to believe" that measures are being planned which may have an appreciable adverse effect upon it. The second is that the requesting State must provide a "documented explanation setting forth the reasons for such belief". These conditions are intended to require that the requesting State have more than a vague and unsubstantiated apprehension. A serious and substantiated belief is necessary, particularly in view of the possibility that the planning State may be required to suspend implementation of its plans under paragraph 3 of article 18.

(3) The first sentence of *paragraph 2* deals with the case in which the planning State concludes, after taking a "second look" as described in paragraph (2) of the present commentary, that it is not under an obligation to provide a notification under article 12. In such a situation, paragraph 2 seeks to maintain a fair balance between the interests of the States concerned by requiring the planning State to provide the same kind of justification for its finding as was required of the requesting State under paragraph 1. The second sentence of paragraph 2 deals with the case in which the finding of the planning State does not satisfy the requesting State. It requires that, in such a situation, the planning State promptly enter into consultations and negotiations with the other State (or States), at the request of the latter. The consultations and negotiations are to be conducted in the manner indicated in paragraphs 1 and 2 of article 17. In other words, their purpose is to achieve "an equitable resolution of the situation", and they are to be conducted "on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". These phrases are discussed in the commentary to article 17.

(4) *Paragraph 3* requires the planning State to refrain from implementing the planned measures for a period of six months, in order to allow consultations and negotiations to be held, if it is requested to do so by the other State at the time the latter requests consultations and negotiations under paragraph 2. This provision is similar to that contained in paragraph 3 of article 17, but in the case of article 18 the period starts to run from the time of the request for consultations under paragraph 2.

#### *Article 19. Urgent implementation of planned measures*

**1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important**

**interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.**

**2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.**

**3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.**

#### *Commentary*

(1) Article 19 deals with planned measures whose implementation is of the utmost urgency "in order to protect public health, public safety or other equally important interests". It does not deal with emergency situations, which will be addressed in a subsequent article. Article 19 concerns highly exceptional cases in which interests of overriding importance require that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations. Provisions of this kind have been included in a number of international agreements.<sup>246</sup> In formulating the article, the Commission has endeavoured to guard against possibilities of abuse of the exception it establishes.

(2) *Paragraph 1* refers to the kinds of interests that must be involved in order for a State to be entitled to proceed to implementation under article 19. The interests in question are those of the highest order of importance, such as protecting the population from the danger of flooding. Paragraph 1 also contains a waiver of the waiting periods provided for under article 14 and paragraph 3 of article 17. The right of the State to proceed to implementation is, however, subject to its obligations under paragraphs 2 and 3 of article 19.

(3) *Paragraph 2* requires a State proceeding to immediate implementation under article 19 to provide the "other watercourse States referred to in article 12" with a formal declaration of the urgency of the measures, together with the relevant data and information. These requirements are intended to provide for a demonstration of the good faith of the State proceeding to implementation, and to ensure that the other States are informed as fully as possible of the possible effects of the measures. The "other watercourse States" are those upon which the measures "may have an appreciable adverse effect" (art. 12).

(4) *Paragraph 3* requires that the State proceeding to immediate implementation enter promptly into consul-

<sup>246</sup> See, for example, the Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier (League of Nations, *Treaty Series*, vol. X, p. 201) (art. 29 *in fine*); and the 1960 Convention on the protection of Lake Constance against pollution (see footnote 140 above) (art. 1, para. 3).

tations and negotiations with the other States, if and when requested to do so by those States. The requirement that the consultations and negotiations be conducted in the manner indicated in paragraphs 1 and 2 of article 17 is the same as that contained in paragraph 2 of article 18, and is discussed in the commentary to that paragraph.

*Article 20. Data and information vital to national defence or security*

**Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.**

*Commentary*

Article 20 creates a very narrow exception to the requirements of articles 10 to 19. The Commission is of the view that States cannot realistically be expected to agree to the release of information that is vital to their national defence or security. At the same time, however, a watercourse State that may experience adverse effects of planned measures should not be left entirely without information concerning those possible effects. Article 20 therefore requires a State withholding information to "co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances". The "circumstances" referred to are those that led to the withholding of the data or information. The obligation to provide "as much information as possible" could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the water or affect other States. The article is thus intended to achieve a balance between the legitimate needs of the States concerned: the need for the confidentiality of sensitive information, on the one hand, and the need for information pertaining to possible adverse effects of planned measures, on the other. As always, the exception created by article 20 is without prejudice to the obligations of the planning State under articles 6 and 8.

*Article 21. Indirect procedures*

**In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.**

*Commentary*

Article 21 addresses the exceptional case in which direct contacts cannot be established between the watercourse States concerned. As already mentioned in the commentary to article 10 (para. (3)), circumstances such as an armed conflict or the absence of diplomatic relations may raise serious obstacles to the kinds of direct contacts provided for in articles 10 to 20. Even in such circumstances, however, there will often be channels which the States concerned utilize for the purpose of conveying communications to each other. Examples of such channels are third countries, armistice commissions and the good offices of international organizations. Article 21 requires that the various forms of contact provided for in articles 10 to 20 be effected through any channel, or "indirect procedure", which has been accepted by the States concerned. All the forms of contact required by articles 10 to 20 are covered by the expressions employed in article 21, namely "exchange of data and information, notification, communication, consultations and negotiations".

**D. Points on which comments are invited**

191. The Commission would welcome the views of Governments, either in the Sixth Committee or in written form, in particular on the following points:

(a) the degree of elaboration with which the draft articles should deal with problems of pollution and environmental protection relating to the law of the non-navigational uses of international watercourses, problems which are discussed in paragraphs 134-137, 169-170 and 175-176 above;

(b) the concept of "appreciable harm" in the context of paragraph 2 of draft article 16, discussed in paragraphs 151-159 above.

## Chapter IV

### DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

#### A. Introduction

192. By its resolution 177 (II) of 21 November 1947, the General Assembly directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. At its first session, in 1949, the Commission appointed Mr. Jean Spiropoulos Special Rapporteur.

193. On the basis of the reports of the Special Rapporteur, the Commission, at its second session, in 1950, adopted a formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal<sup>247</sup> and submitted those principles, with commentaries, to the General Assembly; then, at its sixth session, in 1954, the Commission adopted a draft Code of Offences against the Peace and Security of Mankind<sup>248</sup> and submitted it, with commentaries, to the General Assembly.<sup>249</sup>

194. By its resolution 897 (IX) of 4 December 1954, the General Assembly, considering that the draft Code of Offences against the Peace and Security of Mankind formulated by the Commission raised problems closely related to that of the definition of aggression, and that the General Assembly had entrusted to a Special Committee the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft code until the Special Committee had submitted its report.

195. By its resolution 3314 (XXIX) of 14 December 1974, the General Assembly adopted by consensus the Definition of Aggression.

196. By its resolution 36/106 of 10 December 1981, the General Assembly invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

<sup>247</sup> Hereinafter referred to as the "Nürnberg Principles" (*Yearbook* ... 1950, vol. II, pp. 374-378, document A/1316, paras. 95-127).

<sup>248</sup> *Yearbook* ... 1954, vol. II, pp. 150-152, document A/2693, paras. 49-54.

<sup>249</sup> The texts of the 1954 draft code and of the Nürnberg Principles are reproduced in *Yearbook* ... 1985, vol. II (Part Two), p. 8, para. 18, and p. 12, para. 45, respectively.

197. At its thirty-fourth session, in 1982, the Commission appointed Mr. Doudou Thiam Special Rapporteur for the topic. From its thirty-fifth session (1983) to its thirty-seventh session (1985), the Commission considered three reports submitted by the Special Rapporteur.<sup>250</sup>

198. By the end of its thirty-seventh session, in 1985, the Commission had reached the following stage in its work on the topic. It was of the opinion that the draft code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations on the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem of the international criminal responsibility of States. As to the implementation of the code, since some members considered that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals.<sup>251</sup> The General Assembly was requested to indicate whether such a jurisdiction should also be competent with respect to States.<sup>252</sup>

199. Moreover, the Commission stated that it was its intention that the content *ratione personae* of the draft code should be limited at the current stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. As to the first stage of its work on the draft code, the Commission, in accordance with General Assembly resolution 38/132 of 19 December 1983, intended to begin by drawing up a provisional list of offences, while bearing in mind the drafting of an introduction sum-

<sup>250</sup> These three reports are reproduced as follows:

First report: *Yearbook* ... 1983, vol. II (Part One), p. 137, document A/CN.4/364;

Second report: *Yearbook* ... 1984, vol. II (Part One), p. 89, document A/CN.4/377;

Third report: *Yearbook* ... 1985, vol. II (Part One), p. 63, document A/CN.4/387.

<sup>251</sup> On the question of an international criminal jurisdiction, see *Yearbook* ... 1985, vol. II (Part Two), pp. 8-9, para. 19 and footnotes 16 and 17.

<sup>252</sup> *Yearbook* ... 1983, vol. II (Part Two), p. 16, para. 69 (c) (ii).

marizing the general principles of international criminal law relating to offences against the peace and security of mankind.

200. As regards the content *ratione materiae* of the draft code, the Commission intended to include the offences covered by the 1954 draft code, with appropriate modifications of form and substance which it would consider at a later stage. As of the thirty-sixth session, in 1984, a general trend had emerged in the Commission in favour of including in the draft code colonialism, *apartheid* and possibly serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session, in 1985, but no definite conclusions were reached. As regards the use of nuclear weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. With regard to the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as related to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized that it was an international crime under customary international law. It doubted, however, whether in the present international community the offence could be such as to constitute a threat to the peace and security of mankind.<sup>253</sup>

201. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, in which he specified the category of individuals to be covered by the draft code and defined an offence against the peace and security of mankind. The Special Rapporteur examined the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft code and possible additions to those paragraphs. He also proposed four draft articles relating to those offences, namely: "Scope of the present articles" (art. 1); "Persons covered by the present articles" (art. 2); "Definition of an offence against the peace and security of mankind" (art. 3); and "Acts constituting an offence against the peace and security of mankind" (art. 4).<sup>254</sup>

202. At the same session, the Commission referred draft article 1, the first alternative of draft article 2 and both alternatives of draft article 3 to the Drafting Com-

mittee. It also referred both alternatives of section A of draft article 4, concerning "The commission [by the authorities of a State] of an act of aggression", to the Drafting Committee, on the understanding that the Committee would consider them only if time permitted and that, if the Committee agreed on a text for section A of draft article 4, it would be for the purpose of assisting the Special Rapporteur in the preparation of his fourth report.<sup>255</sup>

203. At its thirty-eighth session, in 1986, the Commission had before it the Special Rapporteur's fourth report on the topic.<sup>256</sup> The Special Rapporteur had divided his fourth report into five parts as follows: part I: Crimes against humanity; part II: War crimes; part III: Other offences (related offences); part IV: General principles; part V: Draft articles.

204. The set of draft articles submitted by the Special Rapporteur in part V of his report contained revised texts of draft articles submitted at the Commission's thirty-seventh session and a number of new draft articles.<sup>257</sup>

205. After engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report,<sup>258</sup> the Commission decided to defer consideration of the draft articles to future sessions. It was of the opinion that, in the mean time, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and the proposals made by members of the Commission at the thirty-eighth session, and of the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session.<sup>259</sup>

206. At the same session, the Commission again discussed the problem of the implementation of the code, when it considered the principles relating to the application of criminal law in space. It indicated that it would examine carefully any guidance that might be furnished on the various options set out in paragraphs 146-148 of its report on that session, reminding the General Assembly in that regard of the conclusion contained in paragraph 69 (c) (i) of the report of the Commission on the work of its thirty-fifth session, in 1983.<sup>260</sup>

207. At its thirty-ninth session, in 1987, the Commission had before it the Special Rapporteur's fifth report on the topic.<sup>261</sup> In the report, the Special Rapporteur presented revised texts of some of the draft articles he had submitted at the thirty-eighth session. Those draft articles comprised the introduction to the draft code and dealt with the definition and characterization of offences against the peace and security of mankind, as well as with

<sup>253</sup> *Ibid.*, p. 12, para. 40. Due to lack of time, the Drafting Committee was not able to take up these draft articles.

<sup>254</sup> *Yearbook ... 1986*, vol. II (Part One), p. 53, document A/CN.4/398.

<sup>255</sup> For the texts of the draft articles, see *Yearbook ... 1986*, vol. II (Part Two), pp. 41 *et seq.*, footnote 105.

<sup>256</sup> For a summary of the debate, *ibid.*, pp. 42 *et seq.*, paras. 80-182.

<sup>257</sup> *Ibid.*, p. 54, para. 185.

<sup>258</sup> *Ibid.*; see also para. 198 above.

<sup>259</sup> *Yearbook ... 1987*, vol. II (Part One), p. 1, document A/CN.4/404.

<sup>253</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65.

<sup>254</sup> For the texts, see *Yearbook ... 1985*, vol. II (Part Two), pp. 14-18, footnotes 40, 46-50 and 52-53.

general principles. The Commission also had before it the observations of Member States on the topic.<sup>262</sup>

208. In recasting the draft articles, the Special Rapporteur had taken account of the discussion held at the Commission's thirty-eighth session and of the views expressed in the Sixth Committee at the forty-first session of the General Assembly. Moreover, following each of the 11 draft articles submitted in his fifth report, the Special Rapporteur had included a commentary briefly describing the questions raised in those provisions.

209. At the thirty-ninth session, the Commission considered draft articles 1 to 11 as contained in the fifth report of the Special Rapporteur<sup>263</sup> and decided to refer them to the Drafting Committee. It furthermore recommended to the General Assembly that it amend the title of the topic in English, in order to achieve greater uniformity and equivalence between the different language versions.<sup>264</sup> The General Assembly, in its resolution 42/151 of 7 December 1987, endorsed that recommendation; thus the title of the topic in English now reads: "Draft Code of Crimes against the Peace and Security of Mankind".

210. Also at the thirty-ninth session, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 5 (Non-applicability of statutory limitations) and 6 (Judicial guarantees), with the commentaries thereto.<sup>265</sup>

#### B. Consideration of the topic at the present session

211. At the present session, the Commission had before it the sixth report of the Special Rapporteur on the topic (A/CN.4/411). In the report, the Special Rapporteur presented a revised text for draft article 11 (Acts constituting crimes against peace) as submitted in his fourth report, in 1986.<sup>266</sup> In recasting draft article 11, the Special Rapporteur had taken account of the discussion held at the Commission's thirty-eighth session and of the views expressed in the Sixth Committee at the forty-first session of the General Assembly. The Special Rapporteur had divided his sixth report into three main parts. In part I, he sought to revise and supplement the part of the 1954 draft code relating to crimes against peace. He dealt, in particular, with the problems raised by preparation of aggression, annexation, the sending of armed bands into the territory of another State and intervention in the internal or external affairs of a State.

<sup>262</sup> *Ibid.*, p. 11, document A/CN.4/407 and Add.1 and 2. See also A/41/406, A/41/537 and Add.1 and 2 and A/42/179.

<sup>263</sup> For a summary of the debate, see *Yearbook ... 1987*, vol. II (Part Two), pp. 9 *et seq.*, paras. 29-61.

<sup>264</sup> *Ibid.*, p. 13, para. 65.

<sup>265</sup> For the texts of these articles and the commentaries thereto, *ibid.*, pp. 13 *et seq.*

<sup>266</sup> See *Yearbook ... 1986*, vol. II (Part Two), pp. 42-43, footnote 105.

In part II, the Special Rapporteur proposed new characterizations of acts as crimes against peace and dealt in particular with colonial domination and mercenarism. Part III of the report contained the revised draft article 11.

212. The Commission considered the sixth report of the Special Rapporteur at its 2053rd to 2061st meetings, from 31 May to 14 June 1988. Having heard the Special Rapporteur's introduction, the Commission considered draft article 11 as contained in the report and decided to refer it to the Drafting Committee.

213. At its 2082nd to 2085th meetings, from 20 to 22 July 1988, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 4 (Obligation to try or extradite), 7 (*Non bis in idem*), 8 (Non-retroactivity), 10 (Responsibility of the superior), 11 (Official position and criminal responsibility) and 12 (Aggression).

214. Views expressed by members of the Commission on these articles are reflected in the commentaries thereto, reproduced with the texts of the articles in section C.2 of the present chapter.

#### 1. AGGRESSION

215. With regard to the crime of aggression, paragraph 1 of draft article 11 submitted by the Special Rapporteur in his sixth report reproduced the Definition of Aggression adopted by the General Assembly in 1974,<sup>267</sup> with the exception of the latter's provisions relating to evidence of aggression, the consequences of aggression and interpretation.

216. The various positions stated in the Commission on the crime of aggression led to the text of article 12 provisionally adopted at the present session and are reflected in the commentary thereto (see sect. C.2 below).

#### 2. THREAT OF AGGRESSION

217. In draft article 11, paragraph 2,<sup>268</sup> the Special Rapporteur included a separate provision on the threat of aggression as a crime against peace.

218. Some members of the Commission expressed doubts about the threat of aggression as a crime against peace. They asked how individuals could be punished for having committed a threat of aggression and what would happen if the threat was not carried out. In their

<sup>267</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>268</sup> Paragraph 2 of draft article 11 submitted by the Special Rapporteur in his sixth report read:

"CHAPTER II. ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

"PART I. CRIMES AGAINST PEACE

"Article 11. Acts constituting crimes against peace

" ...

"2. Recourse by the authorities of a State to the threat of aggression against another State."

view, a threat which was not followed by some specific action should not be regarded as a criminal act.

219. Many members nevertheless stated that they were in favour of including the threat of aggression as a separate crime. It was pointed out in that regard that the threat of aggression, which had been covered by the 1954 draft code (art. 2, para. (2)), was referred to in Article 2, paragraph 4, of the Charter of the United Nations, on the prohibition of the use of force, and that the General Assembly, in the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,<sup>269</sup> referred to it seven times as an act constituting a violation of international law and of the Charter and entailing State responsibility.

220. As to its concrete manifestations, the threat of aggression could take the form of intimidation, troop concentrations or military manoeuvres near another State's borders, or mobilization for the purpose of exerting pressure on a State to make it yield to demands. In some circumstances, the result of the threat of aggression was the same as that of aggression. Its inclusion as a separate crime against peace in the draft code was thus fully justified and would, at the same time, help to deter would-be aggressors from preparing aggression.

221. As to the wording of the provision on the threat of aggression, some members indicated that it was important not to allow any confusion between an actual threat of aggression and mere verbal excesses. There was also the delicate problem of proof, as in the case of preparation of aggression. It was essential to avoid a loosely drafted definition that would enable a State to use the pretext of an alleged threat in order to justify aggression. In that connection, one member pointed out that useful guidance could be derived from the judgment of the ICJ in the *Nicaragua* case,<sup>270</sup> in which the Court had dwelt on the distinction between aggression and the threat of aggression and between the latter and intervention.

### 3. ANNEXATION

222. The Special Rapporteur did not include in draft article 11 a separate provision on annexation as a crime against peace. In his oral introduction of his sixth report, he recalled that annexation was already covered in the 1974 Definition of Aggression,<sup>271</sup> article 3 (a) of which referred to "any annexation by the use of force of the territory of another State or part thereof". Since he had used that wording in paragraph 1 of draft article 11, on aggression, he asked whether that provision was enough or whether there should be another, separate provision on annexation, as had been the case in the 1954 draft code (art. 2, para. (8)).

<sup>269</sup> General Assembly resolution 42/22 of 18 November 1987, annex.

<sup>270</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14.

<sup>271</sup> See footnote 267 above.

223. Many members of the Commission pointed out that annexation as covered by the Definition of Aggression meant only annexation resulting from the use of armed force. Yet annexation was the acquisition, against the wishes of a State, of part or all of its territory by another State and it could result not only from the actual use of force, but also from a threat. The wording used in the 1954 draft code was thus much broader, since it referred to annexation by means of acts contrary to international law. In the opinion of these members, any annexation, whatever its modalities, should be regarded as a crime against peace. It should therefore be included as a separate crime in the draft code.

### 4. PREPARATION OF AGGRESSION

224. The Special Rapporteur did not include in draft article 11 a provision on the preparation or planning of aggression. In his sixth report (A/CN.4/411, para. 7), he pointed out that preparation of aggression had been covered by the Charter of the Nürnberg International Military Tribunal<sup>272</sup> (art. 6 (a)) and the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal)<sup>273</sup> (art. 5 (a)), as well as by the Commission in the Nürnberg Principles (Principle VI (a) (i)). He nevertheless questioned whether preparation of aggression should be retained as an offence separate from aggression, since it was very difficult to make a clear-cut distinction between preparation of aggression and preparation for defence. He also questioned how criminal intent could be established if aggression had not occurred and whether a perpetrator who had deliberately decided not to carry out his plans of preparation — which remained unexecuted — should be prosecuted.

225. Many members of the Commission were of the opinion that preparation of aggression should be dealt with as a crime distinct from aggression itself. The concept would nevertheless have to be precisely defined. The fact that the concept was elusive was not a valid argument for not including it in the code. It was pointed out that a distinction could be drawn between preparation of aggression and defensive measures on the basis of existing military, technical, legal and political criteria. It was noted that the inclusion of preparation of aggression would be of vital importance for deterrence and prevention, particularly of nuclear war. Nowadays, aggression involved far more complicated techniques than formerly, and hence more sophisticated planning, which would be carried out by the entire State apparatus. It was a fairly long-term undertaking and, at every stage, it involved particular persons who occupied key posts in the State military or economic apparatus, who took decisions and who could not be relieved of responsibility. It was pointed out that the inclusion of preparation

<sup>272</sup> Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

<sup>273</sup> *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

of aggression would offer the advantage of making it possible to punish not only preparations which did not lead to actual aggression for reasons beyond the control of the potential aggressor, but also preparations carried out by authorities which were not the same as those that committed the aggression. It was also noted that the necessary elements of the crime of preparation of aggression were criminal intent and the material element of preparation. In general, preparation would not consist simply of military measures, such as a build-up of weapons and armed forces, which would be difficult to distinguish from a country's preparation of its defence. Preparation of aggression would consist rather of a high degree of military preparation far exceeding the needs of legitimate national defence, the planning of attacks by the general staff, the pursuit of foreign policies of expansion and domination, and persistent refusal of peaceful settlement of disputes.

226. Some members, however, were of the view that preparation of aggression should not be included in the code as a separate offence. They believed that it would be very difficult to distinguish acts amounting to preparation of aggression from other legitimate acts of defence, and that in any case it could be covered by the crime of the threat of aggression.

227. Several members who were in favour of the inclusion of preparation of aggression referred to the concept of planning as an element of preparation.

228. With regard to the concept of planning, the Special Rapporteur pointed out that the Charter of the Nürnberg Tribunal referred to "participation in a common plan" (art. 6 (a)) and to the "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy" (art. 6 *in fine*). The Special Rapporteur agreed that it was an important question, one that was, moreover, covered by the Charter of the Tokyo Tribunal, which also referred to "participation in a common plan" (art. 5 (a)), and by Law No. 10 of the Allied Control Council,<sup>274</sup> which referred to "participation in a common plan or conspiracy" (art. II, para. 1 (a)). He also recalled that he had dealt with the question in his fourth report, in connection with criminal participation, and in particular with the concept of conspiracy,<sup>275</sup> and that that concept, which involved the idea of collective responsibility, would be considered during the study of related offences.

#### 5. SENDING OF ARMED BANDS INTO THE TERRITORY OF ANOTHER STATE

229. With regard to the organization or toleration of armed bands within the territory of a State for the purpose of incursions into the territory of another State, acts

<sup>274</sup> Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

<sup>275</sup> See *Yearbook ... 1986*, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398, paras. 89-131.

which had been characterized as offences against the peace and security of mankind in the 1954 draft code (art. 2, para (4)), the Special Rapporteur pointed out that they had been included among the acts constituting aggression specified in the 1974 Definition of Aggression (art. 3 (g)). He therefore proposed that such acts should not be made separate crimes, but should be regarded as coming under the crime of aggression.

230. The Commission shared the view of the Special Rapporteur.

#### 6. INTERVENTION AND TERRORISM

231. The Special Rapporteur submitted two alternatives for paragraph 3 of draft article 11,<sup>276</sup> concerning intervention, including acts of terrorism.

232. The Special Rapporteur said that *intervention* was an elusive concept as regards both its nature and its manifestations. It could be military, political or economic and be based on the most varied motives. Military intervention merged into aggression. When the intervention was political, the problem was to determine from what point in time it became wrongful. It was difficult to exclude from international relations the influence

<sup>276</sup> The two alternatives of paragraph 3 of draft article 11 submitted by the Special Rapporteur in his sixth report read:

"Article 11. Acts constituting crimes against peace

" ...

##### "3. FIRST ALTERNATIVE

"Interference by the authorities of a State in the internal or external affairs of another State. The term 'interference' means any act or any measure, whatever its nature or form, amounting to coercion of a State."

##### "3. SECOND ALTERNATIVE

"Interference by the authorities of a State in the internal or external affairs of another State:

"(i) by fomenting, encouraging or tolerating the fomenting of civil strife or any other form of internal disturbance or unrest in another State;

"(ii) by organizing, training, arming, assisting, financing or otherwise encouraging activities against another State, in particular terrorist activities.

##### "(a) Definition of terrorist acts

"The expression 'terrorist acts' means criminal acts directed against a State or the population of a State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

##### "(b) Terrorist acts

"The following constitute terrorist acts:

"i. any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

"ii. acts calculated to destroy or damage public property or property devoted to a public purpose;

"iii. any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;

"iv. the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act."

which certain States had on other States and which was sometimes mutual. That influence created a kind of privileged relationship between them that authorized certain forms of intervention which were acceptable to the States concerned. That type of intervention, which often took the form of advice or friendly pressure, was not at issue. But not all pressure was friendly. Beyond certain limits, it became coercion.

233. As to the legal basis of the principle of non-intervention, the Special Rapporteur pointed out that, since the Charter of the United Nations, that principle had been enunciated in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty<sup>277</sup> and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,<sup>278</sup> which devoted five paragraphs to the principle. In addition, according to the judgment of the ICJ in the *Nicaragua* case,<sup>279</sup> the rules of non-use of force and non-intervention were part of customary international law. The Court emphasized:

In the present dispute, the Court, while exercising its jurisdiction only in respect of the application of the customary rules of non-use of force and non-intervention, cannot disregard the fact that the Parties are bound by these rules as a matter of treaty law and of customary international law. Furthermore, 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.  
...<sup>280</sup>

And it further stated:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.  
...<sup>281</sup>

234. As to the legal content of the concept of intervention, the Special Rapporteur wondered whether, in view of the nuances and degrees involved, the concept was not too general and too varied in its manifestations to constitute a legal concept. The relevant instruments generally contained too broad a definition of intervention.

235. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States<sup>282</sup> gave a very broad definition of intervention. Intervention could be "direct" or "indirect"; it applied to internal affairs as well as external affairs. It not only concerned the use of armed force, but included "all other forms of interference or attempted threats" against another State (third principle). The

<sup>277</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>278</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>279</sup> See footnote 270 above.

<sup>280</sup> *I.C.J. Reports 1986*, p. 98, para. 185.

<sup>281</sup> *Ibid.*, p. 106, para. 202.

<sup>282</sup> See footnote 278 above.

Declaration drew on the Charter of OAS (Bogotá Charter),<sup>283</sup> article 18 of which provided:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

236. That very broad content, the Special Rapporteur pointed out, was also found in resolution 78 of 21 April 1972 of the General Assembly of OAS, which reaffirmed "the obligation of [member States] to refrain from applying economic, political or any other type of measures to coerce another State and obtain from it advantages of any kind" (para. 2).<sup>284</sup> That provision, which concerned coercive measures, was supplemented by another referring to acts of subversion and reaffirming the obligation "to refrain from organizing, supporting, promoting, financing, instigating or tolerating subversive, terrorist or armed activities against another State and from intervening in a civil war in another State or in its internal struggles" (para. 3).<sup>285</sup>

237. The Special Rapporteur pointed out that the ICJ had been called upon to consider the problem of the content of the concept of intervention, but only with reference to the elements which it considered relevant to the dispute before it in the *Nicaragua* case. In its judgment in that case, it had stated:

... A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. ...<sup>286</sup>

238. Further to those considerations, the Special Rapporteur noted that the concept of intervention was very complex and involved several types and degrees; but he pointed out that the 1954 draft code had referred to intervention only in connection with "coercive measures of an economic or political character" (art. 2, para. (9)). Yet intervention, in the Special Rapporteur's view, was not limited to such measures alone. It also covered, in addition to coercive measures, acts of subversion dealt with in separate provisions of the 1954 draft code, namely activities for the undertaking or encouragement of civil strife in another State (art. 2, para. (5)), and so on. It might therefore be asked why the 1954 draft code had used the expression "intervention ... in the

<sup>283</sup> Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (*ibid.*, vol. 721, p. 324) and by the "Cartagena Protocol" of 5 December 1985 (OAS, *Serie sobre Tratados No. 66* (OEA/Ser.A/41 (SEPF)) (Washington (D.C.), 1986), p. 23).

<sup>284</sup> Cited by the ICJ in the *Nicaragua* case, *I.C.J. Reports 1986*, p. 102, para. 192.

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*, p. 108, para. 205.

internal or external affairs of another State” only in connection with coercive acts of an economic or political character. Moreover, in the Special Rapporteur’s opinion, the forms of intervention enumerated in the 1954 draft code did not cover the whole subject. Many other forms of intervention deserved mention. The modern world experienced many other means of subversion, such as training at special camps, provision of arms and equipment, financing of internal movements, whatever their tendency, etc. The decision of the ICJ in the *Nicaragua* case had listed the most typical of those means, and the second alternative of paragraph 3 of draft article 11 submitted by the Special Rapporteur expressly enumerated various forms of subversion, including terrorist acts.

239. With reference to terminology, some members of the Commission expressed doubts regarding the distinction between lawful intervention and wrongful intervention. In their opinion, the term “intervention” should be used as a term of art for wrongful conduct and the concept should be distinguished from forms of relations between States which, since they did not include an element of coercion, did not fall within the definition of intervention.

240. The Special Rapporteur pointed out that he had used such a distinction in analysing the concept of intervention — as had the ICJ itself in the *Nicaragua* case — but the distinction had not been drawn in paragraph 3 of draft article 11, which dealt with intervention as a wrongful act.

241. Many members were of the view that the direct use of armed force by a State against another State was more a matter of aggression than of intervention in the proper sense. Some other members felt that the case of minor armed incidents which were not serious enough to constitute aggression under the 1974 Definition of Aggression should be left aside. Intervention consisted of coercion by one State of another State that was an obstacle to the free exercise of the latter’s sovereign rights, in other words the rights recognized by international law as falling exclusively within its national competence. Intervention had become the most common form of coercion and the customary expression of power relations in the world. It took on subtle forms to elude the sanctions on aggression, yet it sometimes led to the same results.

242. Some members pointed to particularly odious examples of intervention. One example was “intervention by consent” or “intervention by request”, in other words intervention by one State in the territory of another with the latter’s alleged consent expressed in a so-called agreement beforehand or afterwards. That kind of intervention had often been used in the past to prevent a people from adopting the political, economic or social régime of its choice. Another particularly odious example of intervention was the neo-colonial action whereby a State, while seemingly respecting the sovereignty of another State, actually took over from that State in regard to fundamental aspects of its activities, thereby affecting its identity.

243. Several members were of the view that, in its work on the crime of intervention, the Commission should

adopt as a guide the formulations contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, as well as Principle VI (Non-intervention in internal affairs) contained in the Helsinki Final Act of 1 August 1975.<sup>287</sup>

244. As to the two alternatives of paragraph 3 of draft article 11 submitted by the Special Rapporteur, many members found that the first was too vague and lacked precision and they expressed a preference for the second. Several of those members were of the opinion that the second alternative should be supplemented by reproducing the formulation contained in article 2, paragraph (9), of the 1954 draft code, which spoke of intervention “by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind”. Other members also criticized the second alternative as being too vague in referring to such notions as “unrest” and “activities against another State”. According to them, the wording should follow the definition of intervention contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

245. One member said that he was in favour of combining the alternatives proposed by the Special Rapporteur. Another was of the opinion that it was not necessary to include intervention in the code as a separate crime. The more serious acts included in the notion of intervention should be precisely described and each of them inserted in the code as a separate crime.

246. With regard to *terrorism*, specified as a form of intervention in paragraph 3 (ii) (second alternative) of draft article 11, the Special Rapporteur pointed out that the definition of terrorist acts contained in the proposed text reproduced the relevant terms of the Convention adopted by the International Conference on the Repression of Terrorism in 1937.<sup>288</sup>

247. In the course of the Commission’s discussion, a distinction was drawn between internal terrorism, carried out by individuals or local groups without any foreign support, and two types of international terrorism, namely State terrorism (operations financed, organized, encouraged, directed or supported, either individually or collectively, from a material or logistic point of view by a State or a group of States for the purpose of intimidating another State, person, group or organization) and terrorism by groups or organizations operating at the international level.

248. A consensus emerged in the Commission that acts of terrorism confined to a State without any foreign support did not fall within the part of the draft code

<sup>287</sup> See the Declaration on Principles Guiding Relations between Participating States contained in the chapter of the Final Act on “Questions relating to security in Europe” (*Final Act of the Conference on Security and Co-operation in Europe* (Lausanne, Imprimeries Réunies, [n.d.]), pp. 77 *et seq.*, sect. 1 (a)).

<sup>288</sup> Convention for the Prevention and Punishment of Terrorism, signed at Geneva on 16 November 1937 (League of Nations, document C.546.M.383.1937.V.).

dealing with crimes against peace. With regard to international terrorism, many members were of the opinion that the code should cover terrorism committed by a State against another State.

249. Some members were of the view that, in certain respects, terrorism could constitute not only a crime against peace, but also a crime against mankind and that the other kind of international terrorism, in other words terrorism by groups or organizations operating at the international level, should also be covered by the draft code. It was pointed out in that connection that the particularly immoral aspect of modern terrorism was that the perpetrators sought to terrorize public figures or the public at large by killing blindly, by taking hostages or by threatening the lives of innocent people, as was the case with hijackings of aircraft and bomb attacks in public places. Terrorism, it was pointed out, was taking on increasingly heinous forms. Nowadays, terrorism might well extend to the use of chemical, bacteriological or nuclear weapons and its targets be power-stations — including nuclear power-stations — irrigation facilities, reservoirs of drinking water, industrial plants, weapons depots — in short, a State's nerve-centres. In the opinion of these members, while terrorism was by its very purposes detrimental to peace, particularly when it was State-organized and State-directed, it could, in addition, because of the methods employed and its sometimes unlimited scale, and above all when it was used against an innocent population, have the character of a crime against mankind. It was also pointed out that the Commission, in the further elaboration of the definition and scope of international terrorism, should attach greater importance to treaties in force, as well as to the work of experts dealing with the subject.

250. While the efforts of the Special Rapporteur in defining international terrorism were commended, it was suggested that such a definition could usefully draw upon the example of several recent international conventions and treaties which adopted an enumerative technique, such as the Extradition Treaty between Canada and India of 6 February 1987.

251. Some reservations were expressed with regard to the definition of terrorist acts proposed by the Special Rapporteur.

252. For example, it was remarked that the 1937 Convention for the Prevention and Punishment of Terrorism, on which the Special Rapporteur had drawn, did not have the same purpose as the draft code. The 1937 Convention covered all acts of terrorism perpetrated by individuals, regardless of whether or not they were committed for political reasons and whether or not States took part in them. The draft code was intended to deal solely with acts of terrorism constituting crimes against the peace and security of mankind. Since the field covered by the 1937 Convention was much broader, the provisions derived from it were not always appropriate. For instance, subparagraph (ii) (b) ii of the second alternative of paragraph 3 of draft article 11 mentioned "Acts calculated to destroy or damage public property or

property devoted to a public purpose"; but, it was pointed out, it would be exaggerated to rank the act of damaging public property in one's own country as a crime against the peace and security of mankind. The presence of an international element was essential for an act to constitute a crime under the code. It was also remarked that there was some overlap between subparagraphs (ii) (b) i and (ii) (b) iii. The persons mentioned in the latter were also "charged with public functions or holding public positions" and were thus covered by the former. Furthermore, the seizure of aircraft and the taking of hostages were dealt with in special international instruments and did not always affect international peace and security. On the other hand, acts perpetrated against ships and airports did not seem to be covered by the proposed text. In the opinion of one member, further thought should be given to the phrase "violence directed against persons who enjoy international protection or diplomatic immunity", in subparagraph (ii) (b) iii, for it was difficult to conceive of a brawl with a diplomat as being a crime against mankind.

253. Some members were of the opinion that a degree of caution was required on the part of the Commission in the matter of international terrorism. They pointed out that terrorism could be inspired by the most diverse motives, particularly idealism.

254. The Special Rapporteur stated that, regardless of the motive for certain kinds of conduct, acts of terrorism should not be directed against innocent people and people alien to a conflict and that a distinction should be drawn between the legitimacy of a struggle and the ways and means employed in that struggle.

255. Not all acts of international terrorism necessarily constituted acts of intervention, since the author was not always a State, and certain members therefore suggested that international terrorism as an independent crime should form the subject of separate provisions.

#### 7. BREACH OF TREATIES DESIGNED TO ENSURE INTERNATIONAL PEACE AND SECURITY

256. With regard to draft article 11, paragraphs 4 and 5,<sup>289</sup> the Special Rapporteur said that paragraph 4 was based on article 2, paragraph (7), of the 1954 draft code. However, whereas the 1954 draft had covered only treaties concerning restrictions or limitations on armaments, military training or fortifications, or other res-

<sup>289</sup> Paragraphs 4 and 5 of draft article 11 submitted by the Special Rapporteur in his sixth report read:

*"Article 11. Acts constituting crimes against peace*

- " . . .
- "4. A breach of the obligations of a State under a treaty designed to ensure international peace and security, in particular by means of:
- "(i) prohibition of armaments, disarmament, or restriction or limitation of armaments;
- "(ii) restrictions on military training or on strategic structures or any other restrictions of the same character.
- "5. A breach of the obligations of a State under a treaty prohibiting the emplacement or testing of weapons in certain territories or in outer space."

trictions of the same kind, the present draft also covered, in paragraph 5, breaches of treaties prohibiting the emplacement or testing of weapons in certain territories or in outer space. The Special Rapporteur also observed that the term "fortifications", employed in article 2, paragraph (7), of the 1954 draft code, had been replaced in the proposed paragraph 4 by the expression "strategic structures", for the word "fortifications" reflected a vocabulary which had fallen into disuse and was not in line with the realities of today. In his comments on the proposed paragraphs 4 and 5 (A/CN.4/411, part III), the Special Rapporteur pointed out that the prohibition on the emplacement of weapons in areas under international protection was the subject of various international conventions. He mentioned in particular the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, of 5 August 1963,<sup>290</sup> and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, of 11 February 1971.<sup>291</sup>

257. The comments made by members of the Commission on paragraphs 4 and 5 of draft article 11 may be classified into three categories: on the nature of the obligations violated, on responsibility for the breach, and on matters of form.

258. With reference to the nature of the obligations violated, several members emphasized that paragraphs 4 and 5 should be better drafted so as to cover only the most serious breaches of treaty obligations, breaches which, in view of their scale or nature, constituted a threat to international peace and security. In the opinion of another member, the treaties mentioned by the Special Rapporteur in his comments on the two paragraphs (*ibid.*) could also include the Antarctic Treaty, of 1 December 1959,<sup>292</sup> and the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), of 14 February 1967.<sup>293</sup>

259. Some members stressed that care should be taken to ensure that States not parties to a treaty on the maintenance of peace and security should not be placed in an advantageous position in relation to States which signed such a treaty. One member, in particular, pointed out that, if a State had adopted wide-ranging disarmament measures well beyond what other States were ready to agree to, the agents of that State should not incur international responsibility for a breach of its commitments. According to another opinion, paragraph 4 should not provide encouragement to a potential aggressor or give the impression that the inherent right of self-defence under the Charter of the United Nations was being impaired.

260. Some members emphasized that the proposed paragraphs 4 and 5 raised once again the problem of the

relationship between the author of the crime and the act whereby his responsibility was incurred. It was suggested that the paragraphs should be recast so as to bring out that relationship better. According to those members, while it was true that only a State could be held responsible for failure to meet its obligations, it was individuals who played the crucial role in the decisions leading to a breach by a State of its international obligations. Those members also thought that it would be necessary to specify that not only the head of State, but also officials and other persons in the political and administrative hierarchy could be held responsible for such breaches.

261. With regard to form, several members suggested that paragraphs 4 and 5 could be merged into a single provision.

## 8. COLONIAL DOMINATION

262. The Special Rapporteur submitted two alternatives for paragraph 6 of draft article 11,<sup>294</sup> on colonial domination. He recalled that colonial domination as an international crime was expressly referred to in article 19, paragraph 3 (*b*), of part 1 of the draft articles on State responsibility.<sup>295</sup> He also referred to Article 76 (*b*) of the Charter of the United Nations, on the objectives of the international trusteeship system, and to the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>296</sup> and stressed that the Commission's earlier discussions had shown that the point at issue was not the principle of colonialism as a crime against peace, but simply the way in which it was expressed in legal terms. Two formulations were proposed by the Special Rapporteur in the form of the two alternatives of paragraph 6. The first alternative reproduced the wording used in article 19, paragraph 3 (*b*), of the draft on State responsibility, while the second was taken from paragraph 1 of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

263. Some members found the first alternative preferable. It was pointed out that "colonialism" was a familiar term and that, despite the advances in decolonization, remnants of old colonialism still existed and there was no assurance that new forms of colonialism would not appear. Moreover, the first alternative was in harmony with the wording of article 19 of part 1 of the draft articles on State responsibility adopted by the Commission on first reading, which it did not seem advisable to change without good reason.

<sup>294</sup> The two alternatives of paragraph 6 of draft article 11 submitted by the Special Rapporteur in his sixth report read:

"Article 11. Acts constituting crimes against peace

" . . .

"6. FIRST ALTERNATIVE

"The forcible establishment or maintenance of colonial domination."

"6. SECOND ALTERNATIVE

"The subjection of a people to alien subjugation, domination or exploitation."

<sup>295</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>296</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>290</sup> United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>291</sup> *Ibid.*, vol. 955, p. 115.

<sup>292</sup> *Ibid.*, vol. 402, p. 71.

<sup>293</sup> *Ibid.*, vol. 634, p. 281.

264. Other members said that they preferred the second alternative, because it was broad enough to cover not only the historical forms of colonialism, but also any other forms of domination. In addition, the second alternative was in keeping with the wording of the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and its 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.

265. Many members of the Commission stated that they were in favour of combining or merging the two alternatives of paragraph 6 proposed by the Special Rapporteur. In that connection, it was pointed out that the Commission did not have to make any distinction between colonialism and alien subjugation. Colonialism necessarily involved subjugation and national servitude led to colonization, in other words to a change in the national identity of the subjugated people. The fact that colonialism and alien subjugation were similar in many respects did not, however, mean that they were exactly the same. It should therefore not be necessary to choose between the two proposed alternatives; the only solution was to combine them.

266. It was also pointed out in support of merging the two alternatives that a rule of international law could be strong only if it could be uniformly and impartially applied. The principle of self-determination, proclaimed in the Charter of the United Nations as a universal principle, had been applied mainly in eradicating colonialism, but there were other cases in which it had been and could and should be used. By not tying it exclusively to colonial contexts, it could be applied much more widely. In that connection, all members of the Commission believed that the principle of self-determination was of universal application.

267. The Commission went on to discuss the scope of the principle of self-determination. Some members questioned whether a distinction should be made between the self-determination of peoples and the self-determination of States. One member said that self-determination was a perpetual, imprescriptible right which was contemplated by international law in both its internal and its external dimensions. It protected not only the acquisition and preservation of independence from alien domination, but also the right of any people, in any State, freely to choose and change at any time its political, economic and social status. Still other members drew attention to the fact that the expression "self-determination of peoples" might potentially contain the idea of secession in heterogeneous communities and stated that, in the framework of the question under consideration, namely colonialism, the concept of self-determination related only to the freedom of peoples subjected to colonial domination or alien exploitation. In the opinion of one member, paragraph 6 might be divided into two parts, the first dealing with the maintenance of colonial domination, and the second with the establishment of new exploitation or domination that could be classed as foreign. The commentary to article 11

might then make it clear that the crime of colonial domination applied only to the subjection of a non-metropolitan people which had not yet attained independence and that it did not cover the case of a minority wishing to secede from the national community.

## 9. MERCENARISM

268. Draft article 11, paragraph 7,<sup>297</sup> deals with mercenarism as a crime against peace. In his sixth report (A/CN.4/411, para. 43), the Special Rapporteur pointed out that the phenomenon of mercenarism was already covered in the 1974 Definition of Aggression (art. 3 (g)). He therefore questioned whether it was necessary to have a separate provision on the subject. He also pointed out that the study of mercenarism had been entrusted by the General Assembly to an *Ad Hoc* Committee, which had not yet completed its work. Any definition of the phenomenon within the framework of the draft code could therefore only be provisional. He added that the definition of a "mercenary" contained in the proposed paragraph 7 was the one found in article 47 of Additional Protocol I<sup>298</sup> to the 1949 Geneva Conventions.

269. The comments made by members of the Commission on mercenarism focused on three questions: whether the concept of mercenarism should be the subject of a separate provision in the draft code or be included in the definition of aggression as a crime against peace; whether the definition proposed by the Special Rapporteur was appropriate in the light of the objectives of the draft code; and whether the Commission should defer its consideration of these two questions until the *Ad Hoc* Committee established by the General Assembly had completed its work.

270. Some members were of the opinion that it would be more logical to deal with mercenarism within the general context of aggression. At the present time, when

<sup>297</sup> Paragraph 7 of draft article 11 submitted by the Special Rapporteur in his sixth report read:

*"Article 11. Acts constituting crimes against peace*

"

"7. The recruitment, organization, equipment and training of mercenaries or the provision of facilities to them in order to threaten the independence or security of States or to impede national liberation struggles.

"A mercenary is any person who:

"(a) is specially recruited locally or abroad in order to fight in an armed conflict;

"(b) does, in fact, take a direct part in the hostilities;

"(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

"(d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

"(e) is not a member of the armed forces of a party to the conflict;

"(f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces."

<sup>298</sup> Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

it was more difficult to resort to open forms of aggression, the same ends were being achieved by covert forms, including mercenarism. In the view of these members, it would be difficult to imagine a situation involving mercenaries that did not have a State or States behind it.

271. Most members, however, were of the opinion that mercenarism should form the subject of a separate provision in the draft code. It was pointed out that mercenarism involved not only an attack on the territorial integrity of a State, but also the infliction of serious harm on its population. Any person who organized the recruitment, equipment, training and use of mercenaries should be deemed guilty of a crime against peace. Recent practice showed that mercenarism was quite often carried out by private individuals or non-governmental organizations and that it might be difficult to prove direct State involvement, where it existed. In some cases, gangsters or drug traffickers, acting on their own initiative, organized, armed and used mercenaries to threaten the sovereignty and territorial integrity of the States in which they operated. Mercenarism therefore had to be made a crime distinct from aggression. It was also pointed out that, although reference was often made to recruitment and training, some mercenaries were former army officers who needed no training. Since they were unable to settle back into civilian life, they sought further adventure at the cost of many innocent victims. Mercenarism therefore had to be included in the draft code, despite difficulties relating to the criteria of recruitment, training and compensation.

272. As to the definition of a "mercenary" proposed by the Special Rapporteur, which was taken from Additional Protocol I to the 1949 Geneva Conventions, some members found that it was not entirely satisfactory, since, from the standpoint of humanitarian law, the Protocol applied only to mercenarism in time of war and not to mercenarism in time of peace, which was the type of mercenarism covered by the draft code. Other reservations with regard to the definition of a "mercenary" in the proposed paragraph 7 related to the concept of "compensation". It was pointed out that it was necessary to specify what was meant by such compensation or, rather, what criteria should be used to decide whether such compensation constituted a crime. It was noted that, according to the present wording, all a State had to do to prevent a mercenary from being regarded as such was to recruit him without openly giving him a substantial amount of pay, which could be referred to by some other name or be given secretly. One member expressed the view that, in defining a mercenary, "private gain" as a motivation should be regarded as an important element and that the exact amount of remuneration paid and the nationality of the person in question should not be over-emphasized.

273. Some members were of the opinion that, before defining the crime of mercenarism, the Commission had

to await the results of the work of the *Ad Hoc* Committee established by the General Assembly.

274. Most members nevertheless expressed the view that, while taking account of the work being done in parallel bodies such as the *Ad Hoc* Committee and the Third Committee of the General Assembly,<sup>299</sup> the Commission should continue its own work on the subject and try to complete the task assigned to it by the General Assembly as rapidly as possible.

#### 10. OTHER PROPOSED CRIMES AGAINST PEACE

275. Some members of the Commission proposed that other crimes should be included in the draft code as "crimes against peace". One member stated that acts such as "the massive expulsion by force of the population of a territory" invariably affected the peace and security of mankind and should be identified as a crime under the code. Another member was of the opinion that "the forcible transfer of populations" was a plague of the twentieth century and that no just world order could tolerate such grave abuses of political and military power. The forcible expulsion of a people from its traditional area of settlement amounted to a clear violation of the right to self-determination. Other members requested that the code should include the crime of implanting settlers in an occupied territory and changing the demographic composition of a foreign territory, as referred to in article 85, paragraph 4 (a), of Additional Protocol I to the 1949 Geneva Conventions.<sup>300</sup>

276. The Special Rapporteur, while agreeing with the principle that such situations warranted consideration, was of the opinion that they fell within the category of crimes against humanity and could be dealt with in that context.

277. A consensus took shape within the Commission that every crime qualifying as a "crime against peace" should form the subject of a separate article of the draft code, rather than a paragraph of one and the same draft article.

278. As already indicated (para. 212 above), the Commission decided at the end of its discussion to refer draft article 11 to the Drafting Committee.

#### C. Draft articles on the draft Code of Crimes against the Peace and Security of Mankind

##### 1. TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION

279. The texts of draft articles 1 to 8, 10, 11 and 12 provisionally adopted so far by the Commission are reproduced below.

<sup>299</sup> See General Assembly resolution 41/102 of 4 December 1986.

<sup>300</sup> See footnote 298 above.

## CHAPTER I

## INTRODUCTION

## PART I. DEFINITION AND CHARACTERIZATION

*Article 1. Definition*

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

*Article 2. Characterization*

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

## PART II. GENERAL PRINCIPLES

*Article 3. Responsibility and punishment*

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

*Article 4. Obligation to try or extradite*

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article do not prejudice the establishment and the jurisdiction of an international criminal court.\*

*Article 5. Non-applicability of statutory limitations*

No statutory limitation shall apply to crimes against the peace and security of mankind.

*Article 6. Judicial guarantees*

Any individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

1. He shall have the right to be presumed innocent until proved guilty.

2. He shall have the right:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

\* This paragraph will be deleted if an international criminal court is established.

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

*Article 7. Non bis in idem*

1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]

2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the act which was the subject of a trial and judgment as an ordinary crime corresponds to one of the crimes characterized in this Code.

4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:

(a) if the act which was the subject of the previous judgment took place in the territory of that State;

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.

*Article 8. Non-retroactivity*

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

*Article 10. Responsibility of the superior*

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

*Article 11. Official position and criminal responsibility*

The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.

## CHAPTER II

ACTS CONSTITUTING CRIMES AGAINST  
THE PEACE AND SECURITY OF MANKIND

## PART I. CRIMES AGAINST PEACE

*Article 12. Aggression*

1. Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace.

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

2. TEXTS OF DRAFT ARTICLES 4, 7, 8, 10, 11 AND 12, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION

280. The texts of draft articles 4, 7, 8, 10, 11 and 12,

with commentaries thereto, provisionally adopted by the Commission at its fortieth session are reproduced below.

## CHAPTER I

## INTRODUCTION

...

## PART II. GENERAL PRINCIPLES

...

*Article 4. Obligation to try or extradite*

1. Any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.

2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.

3. The provisions of paragraphs 1 and 2 of this article do not prejudice the establishment and the jurisdiction of an international criminal court.\*

*Commentary*

(1) Several possibilities were open to the Commission for ensuring the punishment of the crimes covered in the draft code: first, to give jurisdiction to an international criminal court; secondly, to make national courts competent for the prosecution of such crimes; thirdly, to have an international court coexist with national courts; and fourthly, to enforce the code through national courts to which would be added a judge from the jurisdiction of the accused and/or one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question. Without ruling out any of those solutions, which might be considered at a later stage, the Commission based its approach at the current stage on national courts. It also decided that article 4 would relate only to the general principles of jurisdiction and extradition. The formulation of more specific rules needed for the actual implementation of the code and to be included in an appropriate part of the draft code was left until a later stage.

(2) The category of international crimes such as genocide, *apartheid*, mercenarism, international terrorism, the taking of hostages, the unlawful seizure of aircraft, wrongful acts against the safety of civil aviation and offences against internationally protected persons is assuming growing importance. Many ordinary crimes also have international repercussions. There are, however, few conventions which give jurisdiction to an international criminal court. Only the Convention on the Prevention and Punishment of the Crime of Genocide<sup>301</sup> (art. VI) and the International Convention on

\* This paragraph will be deleted if an international criminal court is established.

<sup>301</sup> United Nations, *Treaty Series*, vol. 78, p. 277.

the Suppression and Punishment of the Crime of *Apartheid*<sup>302</sup> (art. V) do so. Such jurisdiction is, moreover, not exclusive; it coexists with the jurisdiction of national courts. The majority of the conventions that apply to the above-mentioned crimes rely on national jurisdiction (e.g. 1970 Convention for the Suppression of Unlawful Seizure of Aircraft<sup>303</sup> (art. 7); 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents<sup>304</sup> (art. 7); 1971 Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance<sup>305</sup> (art. 5); 1977 European Convention on the Suppression of Terrorism<sup>306</sup> (art. 7); and 1979 International Convention against the Taking of Hostages<sup>307</sup> (art. 8, para 1)).

(3) *Paragraph 1* of article 4 establishes the general principle that any State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present is bound either to try or to extradite him. This is the principle on which several of the conventions referred to in the preceding paragraph are based. It was pointed out in the Commission that the words "an individual alleged to have committed a crime" should be defined, perhaps in an article on the use of terms, in order to make it clear that they could apply to a person only on the basis of relevant facts, not on the basis of unfounded allegations or fragile evidence. The Commission also agreed that the word "try" was intended to cover all the stages of prosecution proceedings.

(4) *Paragraph 2* deals with the case in which the State in whose territory an individual alleged to have committed a crime is present receives several requests for extradition. Normally, a situation of that kind should be dealt with through the establishment of a list of priorities which would indicate the order in which the State concerned should consider such requests. But in the present case, the Commission had problems in drawing up such a list. The first problem was that, as indicated in paragraph (1) of the present commentary, no final choice with regard to jurisdiction had yet been made. The second problem was to find a compromise solution acceptable to those in favour of different principles relating to extradition: territoriality, the nationality of the victim, the proper administration of justice, the discretionary power of the State in whose territory the alleged offender is present, etc. Despite these problems, which discouraged the Commission from trying at the current stage to establish an order of priorities in respect of extradition, many members of the Commission were of the opinion that paragraph 2 should give preference to extradition to the State where the crime was committed.

<sup>302</sup> *Ibid.*, vol. 1015, p. 243.

<sup>303</sup> *Ibid.*, vol. 860, p. 105.

<sup>304</sup> *Ibid.*, vol. 1035, p. 167.

<sup>305</sup> OAS, *Treaty Series*, No. 37 (1971), p. 6.

<sup>306</sup> United Nations, *Treaty Series*, vol. 1137, p. 93.

<sup>307</sup> To be published in United Nations, *Treaty Series*, No. 21931.

Other members said that they were against such a preference, being instead in favour of the freedom of the State in whose territory an individual alleged to have committed a crime was present. It was also pointed out that the principle of giving preference to the State in whose territory the crime was committed would give rise to practical difficulties, in particular in the case of the crime of *apartheid*. Paragraph 2 as finally adopted is a compromise between the two positions, since it provides that special consideration will be given to the request of the State in whose territory the crime was committed. This wording, as provisionally adopted, does not establish any priority, but attaches special importance to the request of the State in whose territory the crime was committed; it nevertheless continued to give rise to reservations on the part of some members who would have liked to see a more clear-cut enunciation of the principle of territoriality and the establishment of a more definite order of priorities in respect of extradition. The members in question reserved their position with regard to the future formulation by the Commission of rules on extradition under the draft code.

(5) *Paragraph 3* deals with the possible establishment of an international criminal court and further reflects the fact that the provisions of article 4 are not yet final. It shows that the jurisdictional solution adopted in article 4 would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court. In that connection, one member pointed out that, under its current terms of reference, the Commission could undertake such a task right away without being expressly requested to do so by the General Assembly.

(6) One member of the Commission reserved his position on article 4 as a whole. Some members could not accept the general applicability of the principle of universal jurisdiction to the draft code.

#### *Article 7. Non bis in idem*

**[1. No one shall be liable to be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.]**

**2. Subject to paragraphs 3, 4 and 5 of this article, no one shall be liable to be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.**

**3. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished [by an international criminal court or] by a national court for a crime under this Code if the act which was the subject of a trial and judgment as an ordinary crime corresponds to one of the crimes characterized in this Code.**

**4. Notwithstanding the provisions of paragraph 2, an individual may be tried and punished by a national court of another State for a crime under this Code:**

(a) if the act which was the subject of the previous judgment took place in the territory of that State;

(b) if that State has been the main victim of the crime.

5. In the case of a subsequent conviction under this Code, the court, in passing sentence, shall deduct any penalty already imposed and implemented as a result of a previous conviction for the same act.

#### Commentary

(1) Article 7 envisages two situations: the application of the *non bis in idem* rule before an international criminal court and its application before national criminal courts. The article obviously does not cover the case in which the rule is applied within a national legal system. It thus relates only to the application of the rule at the international level, either as a result of the existence of an international criminal court or as a result of the involvement of the courts of several legal systems.

(2) Paragraph 1 provides that the *non bis in idem* principle would apply without exception to the decisions of an international criminal court. This paragraph has been placed in square brackets to take account of the possible establishment of an international criminal court, a possibility which has not been ruled out and which the Commission might consider at a later stage. In this connection, it was asked whether the expression "international criminal court" meant only an international criminal court of a universal character or whether it also took account of the possible existence of regional courts common to several States. More specifically, the question was whether the rule stated in paragraph 1 also applied to decisions by a regional court. Many members of the Commission were of the opinion that the rule should also apply to such decisions. It was explained that the words "international criminal court" should be understood as referring to an international court recognized by the international community of States and by the parties to the code. It was also agreed that the word "acquitted" meant an acquittal as a result of a judgment on the merits, not as a result of a discharge of proceedings.

(3) Paragraphs 2, 3 and 4 enunciate the *non bis in idem* principle and the exceptions to it in international criminal law when several national courts are involved. These three paragraphs are the result of a compromise between certain trends which emerged in the Commission in connection with this principle. It was pointed out that article 7 gave rise to theoretical and practical problems. In theoretical terms, it was noted that this principle was a rule applicable in internal law and that its implementation in relations between States gave rise to the problem of respect by one State of final judgments pronounced in another State, since international law did not make it an obligation for States to recognize a criminal judgment handed down in a foreign State. In practical terms, it was pointed out that a State could provide a shield for an individual who had committed a crime against the peace and security of mankind and who was present in

its territory by sentencing him to a penalty which was not at all commensurate with the seriousness of the crime, but which would enable him to avoid harsher penalties in another State, particularly in the State where the crime had been committed or in the State which had been the main victim. The view was expressed, however, that the *non bis in idem* rule was necessary in order to prevent a person who had committed a crime from being prosecuted more than once for the same acts and that, in that sense, it was a fundamental guarantee of the human person. Paragraphs 2, 3 and 4 are thus a compromise between these positions. When the first judgment has been handed down by a national court, the *non bis in idem* rule involves exceptions which are provided for in paragraph 2 and which limit its scope. Further proceedings may be instituted:

(a) when an act which has been tried in one State as an ordinary crime corresponds to one of the crimes characterized in the code, for example if an act has been characterized as murder whereas, in view of the circumstances in which it was committed, it constituted an act of genocide (paragraph 3);

(b) when the judgment is handed down by a court other than that of the State in which the crime was committed or that of the State which was the main victim, for example if these States consider that the decision does not correspond to a proper appraisal of the acts or to their seriousness (paragraph 4). The wording used clearly shows that the possibility of a new trial and judgment is an option available to the States concerned, but is in no way an obligation. In addition, paragraph 2 makes it clear that a general condition for the application of the *non bis in idem* principle in the case of a final judgment by a national court is that, in the event of conviction, the punishment should have been enforced or should be in the process of being enforced.

(4) It should also be noted that, according to paragraph 3, an international criminal court may again try and punish acts already tried by a national court if the acts were tried as ordinary crimes and corresponded to one of the crimes characterized in the code. The words "by an international criminal court or" appear in square brackets in order to take account of the possible establishment of an international criminal court. It was also explained in the Commission that the provisions of paragraph 3 did not affect the principle of non-retroactivity embodied in article 8.

(5) The reduction of penalty in the case of a subsequent conviction, as provided for in paragraph 5, is applicable in cases of subsequent conviction either by a national court or by an international criminal court.

#### Article 8. Non-retroactivity

1. No one shall be convicted under this Code for acts committed before its entry into force.

2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time

when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

#### Commentary

(1) The principle of the non-retroactivity of criminal law is embodied in a number of international instruments, such as the Universal Declaration of Human Rights<sup>308</sup> (art. 11, para. 2), the International Covenant on Civil and Political Rights<sup>309</sup> (art. 15, para. 1) and the European Convention on Human Rights<sup>310</sup> (art. 7, para. 1). This principle is, in fact, an application of the principle *nullum crimen sine lege*. The principle would be violated if the code were applied to crimes committed before the code's entry into force.

(2) Paragraph 1 of article 8 enunciates the principle of non-retroactivity by clearly specifying the limits of application, namely convictions "under this Code" for acts committed "before its entry into force". It was agreed in the Commission that the word "acts" should be interpreted as "acts or omissions". This interpretation of the term "act" would form the subject, in due course, of a special provision explaining the meaning of the term whenever it is employed in the draft code. By limiting the application of the principle to convictions "under this Code", article 8 leaves open the possibility of convictions on a basis other than that of crimes expressly covered by the code. This is the subject-matter of paragraph 2.

(3) The application of the principle of the non-retroactivity of criminal law has sometimes raised difficulties in international law. While there is a school of thought which interprets the word *lex* in the principle *nullum crimen sine lege* as relating to written law (conventions), another school attaches to it a much broader meaning, covering not only conventions, but also custom and general principles.

(4) In formulating paragraph 2, the Commission was guided by two fundamental considerations. On the one hand, it did not want the principle of non-retroactivity set out in the draft code to prejudice the possibility of prosecution, in the case of acts committed before the code's entry into force, on different legal grounds, for example a pre-existing convention to which a State was a party, or again, under customary international law. Hence the provision contained in paragraph 2. On the other hand, the Commission did not want this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that were too vague. For this reason, it preferred to use in paragraph 2 the expression "in accordance with international law" rather than a less concrete expression such as "in ac-

cordance with the general principles of international law". Similarly, in the event of a conviction on the basis of pre-existing domestic law, the Commission deemed it necessary to specify that such domestic law should be applicable "in conformity with international law".

#### Article 10. Responsibility of the superior

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

#### Commentary

(1) The principle of the responsibility of the superior for crimes against the peace and security of mankind committed by his subordinates has antecedents both in international judicial decisions and in texts on international criminal law adopted after the Second World War, for example article 86 (para. 2) of Additional Protocol I to the 1949 Geneva Conventions.<sup>311</sup>

(2) With regard to international judicial decisions in criminal cases, the United States Supreme Court, in the *Yamashita* case, gave an affirmative answer to the question whether the laws of war imposed on an army commander a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing acts in violation of the laws of war. The court held that General Yamashita was criminally responsible because he had failed to take such measures.<sup>312</sup> For its part, the Tokyo Tribunal decided that it was the duty of *all* those on whom responsibility rested to secure proper treatment of prisoners and to prevent their ill-treatment.<sup>313</sup> Similarly, in the *Hostage* case, the United States military tribunal stated that a corps commander must be held responsible for the acts of his subordinates in carrying out his orders and for acts which he knew or ought to have known about.<sup>314</sup>

(3) With the exception of a few minor drafting changes, article 10 is based on article 86, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions. The criminal responsibility of superiors is involved when the two conditions laid down in article 10 are fulfilled, namely:

<sup>311</sup> See footnote 298 above.

<sup>312</sup> See *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43; and *United States Reports* (Washington, D.C.), vol. 327 (1947), pp. 14-15.

<sup>313</sup> *Law Reports of Trials . . .*, vol. XV, p. 73.

<sup>314</sup> See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (15-volume series) (Washington (D.C.), U.S. Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

<sup>308</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>309</sup> United Nations, *Treaty Series*, vol. 999, p. 171.

<sup>310</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (*ibid.*, vol. 213, p. 221).

(a) The superiors knew or had information enabling them to conclude, in the circumstances at the time, that a crime was being committed or was going to be committed by a subordinate;

(b) They did not take all feasible measures within their power to prevent or repress the crime.

(4) Condition (a) establishes a link between the superior's responsibility and his knowledge that a crime was being committed or was going to be committed by the subordinate. The superior is presumed to know, a presumption that stems from the fact that he had information enabling him to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit the crime. The superior incurs criminal responsibility even if he has not examined the information sufficiently or, having examined it, has not drawn the obvious conclusions. In order to harmonize the various language versions, the Commission decided to bring the original English text of article 86, paragraph 2, of Additional Protocol I, whereby the information "should have enabled them to conclude", into line with the French wording, which speaks of information "enabling them to conclude". This is purely a drafting change and does not involve any intention on the part of the Commission to place on article 10 an interpretation different from that of article 86, paragraph 2, of the Protocol.

(5) As to condition (b), it was asked whether the "feasible measures within their power" referred to in article 10 alluded to the superior's legal competence, to his practical possibilities, or to both. The Commission decided that, for the superior to incur responsibility, he must have had the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures.

#### *Article 11. Official position and criminal responsibility*

**The official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility.**

#### *Commentary*

(1) The principle established by article 11 has precedents in the provisions of the charters of the International Military Tribunals established after the Second World War. For example, article 7 of the Charter of the Nürnberg Tribunal<sup>315</sup> states:

The official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

A provision establishing the same principle is to be found in the Charter of the Tokyo Tribunal<sup>316</sup> (art. 6).

<sup>315</sup> See footnote 272 above.

<sup>316</sup> See footnote 273 above.

(2) Subsequently, provisions containing the same principle were included in the Nürnberg Principles adopted by the Commission in 1950,<sup>317</sup> and in the draft code adopted by the Commission in 1954. Principle III of the Nürnberg Principles reads:

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Article 3 of the 1954 draft code provides:

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.

(3) The wording of article 11 contains elements from several of the provisions reproduced above. Although it refers expressly to heads of State or Government, since they have the greatest power of decision, the words "the official position of an individual . . . and particularly" show that the article also relates to other officials. The real effect of the principle is that the official position of an individual who commits a crime against peace and security can never be invoked as a circumstance absolving him from responsibility or conferring any immunity upon him, even if he claims that the acts constituting the crime were performed in the exercise of his functions.

(4) The words "he acts" apply to the exercise of both legal powers and factual powers. If a person was acting as though he were head of State or Government or a government official when in fact he was not, he would incur criminal responsibility just as much, if the acts he committed were criminal acts under the code.

## CHAPTER II

### ACTS CONSTITUTING CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

#### PART I. CRIMES AGAINST PEACE

#### *Article 12. Aggression*

**1. Any individual to whom responsibility for acts constituting aggression is attributed under this Code shall be liable to be tried and punished for a crime against peace.**

**2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.**

**3. The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.**

<sup>317</sup> See footnotes 247 and 249 above.

4. [In particular] any of the following acts, regardless of a declaration of war, constitutes an act of aggression, due regard being paid to paragraphs 2 and 3 of this article:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(h) any other acts determined by the Security Council as constituting acts of aggression under the provisions of the Charter.

[5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.]

6. Nothing in this article shall be interpreted as in any way enlarging or diminishing the scope of the Charter of the United Nations, including its provisions concerning cases in which the use of force is lawful.

7. Nothing in this article could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

### Commentary

(1) *Paragraph 1* of article 12 reflects the Commission's concern to establish a link between the act of aggression, which can be committed only by a State, and the individuals who are subject to criminal prosecution and punishment for acts of aggression under article 3. Paragraph 1 has been adopted provisionally and will have to be reviewed at a later stage in the elaboration of the code. It is provisional, first, because the question as to what category of individuals is involved is still unsettled. It remains to be decided whether only government officials are concerned, or also other persons having political and military responsibility and having participated in the organization and planning of aggression. It will also have to be decided whether article 12 applies to private persons who place their economic or financial power at the disposal of the authors of the aggression. In addition, that question is linked with the notions of complicity and conspiracy and will have to be studied later in relation to those notions. Secondly, the paragraph is provisional because it will be advisable later to draft a more general provision applying either to all crimes or to a category of crimes covered by the draft code. Lastly, some members of the Commission expressed doubts about the need for paragraph 1. In their view, the paragraph was an unnecessary repetition of article 3, paragraph 1, according to which "Any individual who commits a crime against the peace and security of mankind . . . is liable to punishment therefor". They considered that the latter provision, which related to the responsibility of anyone committing a crime against the peace and security of mankind, also applied to aggression.

(2) The other paragraphs of article 12 are largely taken from the 1974 Definition of Aggression.<sup>318</sup> The text of the article does not mention that Definition, however, in order to take account of the position of certain members of the Commission who felt that an instrument intended to serve as a guide for a political organ such as the Security Council could not be used as a basis for criminal prosecution before a judicial body.

(3) On that question, two schools of thought emerged in the Commission. According to the first, the international judicial function in criminal law should be clearly separated from the executive functions of the Security Council, which ensures the maintenance of international peace and security by recommendations and by the measures it takes against aggression or the threat of aggression. The object of the judicial function is to punish the authors of an aggression. Consequently, the advocates of the autonomy of the judicial organ considered that the 1974 Definition of Aggression should not be transferred *in toto* to a penal code. They advocated a definition of aggression independent of the 1974 text, or in any event one which did not reproduce all the elements of that text. While they agreed that the

<sup>318</sup> See footnote 267 above.

enumeration of acts of aggression contained in the 1974 Definition could be reproduced in the penal definition of aggression, they did not agree that the list should be exhaustive for the judge, who should remain free to characterize other acts as constituting aggression by referring to the general definition contained in paragraph 2 of article 12. They therefore wished to retain the words "In particular" in paragraph 4 and to delete paragraph 5. According to the second school of thought, the whole of the 1974 Definition of Aggression should be reproduced in the code. And not only should it be reproduced, but the decisions of the judicial organ should be subordinated to those of the Security Council in regard to resolutions determining the existence or non-existence of aggression. A number of members addressed the question whether a tribunal would be free to consider allegations of the crime of aggression in the absence of any consideration or finding by the Security Council. The text of article 12 provisionally adopted reflects these two schools of thought and leaves some questions in abeyance, as indicated by the words in square brackets.

(4) *Paragraphs 2 and 3* reproduce, respectively, articles 1 and 2 of the 1974 Definition of Aggression, with the exception of the explanatory note and the words "as set out in this Definition", which have been omitted from paragraph 2.

(5) *Paragraph 4* is based on article 3 of the Definition of Aggression. However, the words "In particular" in square brackets at the beginning of the paragraph reflect a point of disagreement already referred to in paragraph (3) of the present commentary. Some members of the Commission considered that national courts should be enabled to characterize as aggression acts other than those listed in paragraph

4, taking due account of paragraphs 2 and 3. Other members, however, considered that to accord such a faculty to national courts was inadmissible, since it would go far beyond the competence of an internal judicial organ. The acts listed in paragraph 4 (a) to (g) are the same as those listed in the corresponding subparagraphs of article 3 of the Definition of Aggression. Paragraph 4 (h) corresponds to article 4 of the Definition of Aggression and takes account of the power of the Security Council, under Article 39 of the Charter of the United Nations, to determine that other acts constitute acts of aggression under the provisions of the Charter.

(6) *Paragraph 5*, in square brackets, reflects another point of disagreement within the Commission, which has already been referred to in paragraph (3) of the present commentary. Some members, who were opposed to paragraph 5, maintained that to link the application of the code to the operation of the Security Council would render all the work of elaborating the code pointless. Other members thought that a determination made by the Security Council on the basis of Chapter VII of the Charter of the United Nations was binding on all Member States and *a fortiori* on their courts. Paragraph 5 applies only to national courts. The question of the relationship between the decisions of an international criminal court and those of the Security Council has been left in abeyance. It was understood in the Commission that the words "Any determination by the Security Council as to the existence of an act of aggression" referred both to a positive determination and to a negative determination.

(7) *Paragraphs 6 and 7* reproduce articles 6 and 7 of the 1974 Definition of Aggression.

## Chapter V

### STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

#### A. Introduction

281. The Commission began its consideration of the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" at its twenty-ninth session, in 1977, pursuant to General Assembly resolution 31/76 of 13 December 1976.

282. At its thirtieth session, in 1978, the Commission considered the report of the Working Group on the topic which it had established under the chairmanship of Mr. Abdullah El-Erian. The results of the study undertaken by the Working Group were submitted to the General Assembly at its thirty-third session, in 1978, in the Commission's report to the Assembly. In its resolution 33/139 of 19 December 1978, the General Assembly recommended that the Commission should continue the study concerning the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; and, in resolution 33/140 of 19 December 1978, the Assembly decided that it would give further consideration to this question when the Commission had submitted to it the results of its work on the possible elaboration of an appropriate legal instrument on the topic.

283. At its thirty-first session, in 1979, the Commission appointed Mr. Alexander Yankov Special Rapporteur for the topic and entrusted him with the preparation of a set of draft articles for an appropriate legal instrument.

284. From its thirty-second session (1980) to its thirty-eighth session (1986), the Commission considered the seven reports submitted by the Special Rapporteur,<sup>319</sup>

<sup>319</sup> The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335;

Second report: *Yearbook ... 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2;

Third report: *Yearbook ... 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1;

Fourth report: *Yearbook ... 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4;

Fifth report: *Yearbook ... 1984*, vol. II (Part One), p. 72, document A/CN.4/382;

Sixth report: *Yearbook ... 1985*, vol. II (Part One), p. 49, document A/CN.4/390;

Seventh report: *Yearbook ... 1986*, vol. II (Part One), p. 39, document A/CN.4/400.

which contained, among other matters, draft articles on the topic.<sup>320</sup>

285. By the end of its thirty-eighth session, in 1986, the Commission had completed the first reading of the draft articles on the topic, having provisionally adopted a complete set of 33 articles<sup>321</sup> and commentaries thereto.<sup>322</sup>

286. At the same session, the Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles provisionally adopted on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.<sup>323</sup>

287. The General Assembly, in paragraph 9 of its resolution 41/81 of 3 December 1986, and again in paragraph 10 of its resolution 42/156 of 7 December 1987, urged Governments to give full attention to the Commission's request for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

288. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated 25 February and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.

289. At the time of the Commission's consideration of the topic at the present session, written comments and observations had been received from 29 States and were reproduced by the Secretariat in document A/CN.4/409 and Add.1-5.

<sup>320</sup> For a complete historical review of the Commission's work on the topic, see:

(a) The reports of the Commission: (i) on its thirtieth session, *Yearbook ... 1978*, vol. II (Part Two), pp. 138 *et seq.*, chap. VI; (ii) on its thirty-first session, *Yearbook ... 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI; (iii) on its thirty-second session, *Yearbook ... 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iv) on its thirty-third session, *Yearbook ... 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; (v) on its thirty-fourth session, *Yearbook ... 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (vi) on its thirty-fifth session, *Yearbook ... 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vii) on its thirty-sixth session, *Yearbook ... 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III; (viii) on its thirty-seventh session, *Yearbook ... 1985*, vol. II (Part Two), pp. 28 *et seq.*, chap. IV; (ix) on its thirty-eighth session, *Yearbook ... 1986*, vol. II (Part Two), pp. 23 *et seq.*, chap. III.

(b) The reports of the Special Rapporteur (see footnote 319 above).

<sup>321</sup> For the texts, see *Yearbook ... 1986*, vol. II (Part Two), p. 24, chap. III, sect. D.1.

<sup>322</sup> *Ibid.*, footnote 72.

<sup>323</sup> *Ibid.*, para. 32.

## B. Consideration of the topic at the present session

290. At the present session, the Commission had before it the eighth report of the Special Rapporteur (A/CN.4/417). The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN.4/409 and Add.1-5).

291. In his report the Special Rapporteur analysed the written comments and observations received from Governments. For each article he summarized the main trends and the proposals made by Governments in their comments and observations, and on the basis of these proposed either to revise the text of the article concerned, to merge it with another article, to retain the article as adopted on first reading or to delete it.

292. The Commission considered the Special Rapporteur's eighth report at its 2069th, 2070th, 2072nd and 2076th to 2080th meetings, on 28 and 29 June, 1 July and from 8 to 15 July 1988. After hearing the introduction by the Special Rapporteur, the Commission discussed the proposals made by him for the second reading of the draft articles. At the end of the discussion, the Commission decided to refer the draft articles to the Drafting Committee for second reading, together with the proposals made by the Special Rapporteur and those formulated in plenary during the discussion, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee, if he deemed it appropriate, on the basis of the comments and observations made in the Commission and those that might be made in the Sixth Committee of the General Assembly.

293. Before introducing his observations and suggestions with regard to specific articles, the Special Rapporteur referred to some methodological questions dealt with in his report. He stressed the need for adopting in the elaboration of the draft articles a comprehensive approach leading to a coherent and, in so far as possible, uniform régime governing the status of all kinds of couriers and bags. He also emphasized the significance which should be attached to functional necessity as the basic factor in determining the status of all kinds of couriers and bags. As regards the form of the draft, he favoured the adoption of a convention as a distinct legal instrument which should retain an appropriate legal relationship with the four multilateral conventions in the field of diplomatic and consular law adopted under the auspices of the United Nations.<sup>324</sup>

<sup>324</sup> These conventions, hereinafter referred to as the "codification conventions", are:

1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95);

1963 Vienna Convention on Consular Relations (*ibid.*, vol. 596, p. 261);

1969 Convention on Special Missions (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125);

1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87), hereinafter referred to as "1975 Vienna Convention on the Representation of States".

294. Although no extensive general debate was held on the above-mentioned matters, the observations and suggestions made by the Special Rapporteur were generally shared by the Commission.

295. The following paragraphs reflect the indications and proposals on the draft articles made by the Special Rapporteur on the basis of the written comments and observations of Governments as well as the reaction of members of the Commission to those comments and observations and to the suggestions made by the Special Rapporteur. In this connection, many members stated that they would not comment on all the provisions of the draft but only on what they considered its most significant aspects, such as its scope, the facilities, privileges and immunities accorded to the courier, the protection of the diplomatic bag and some miscellaneous provisions.

### 1. DRAFT ARTICLES PROVISIONALLY ADOPTED ON FIRST READING

#### (a) PART I. GENERAL PROVISIONS

ARTICLE 1 (Scope of the present articles) *and*

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

296. Articles 1 and 2, as provisionally adopted by the Commission on first reading, read as follows:

#### *Article 1. Scope of the present articles*

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

#### *Article 2. Couriers and bags not within the scope of the present articles*

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

297. In his oral presentation, the Special Rapporteur noted that identical comments had been made by two Governments to the effect that the official communications referred to in *article 1* should be confined to those between the central Government of a sending State and its missions or consular posts abroad, the communications of missions or consular post of that State with each other being excluded. Those two Governments proposed the deletion of the final words "or with each other" from article 1.

298. The Special Rapporteur observed that the words "or with each other", which provided for the *inter se* communications between missions and consular posts of the same sending State, were grounded on reasons of practical necessity and on existing legal provisions. He recalled that article 27, paragraph 1, of the 1961 Vienna

Convention on Diplomatic Relations provided, *inter alia*, that: "In communicating with the Government and the other missions and consulates of the sending States, wherever situated, the missions may employ all appropriate means, including diplomatic couriers and messages in code or cipher." Similar provisions were contained in article 35, paragraph 1, of the 1963 Vienna Convention on Consular Relations; article 28, paragraph 1, of the 1969 Convention on Special Missions; and article 27, paragraph 1, and article 57, paragraph 1, of the 1975 Vienna Convention on the Representation of States.

299. On the basis of the foregoing and of the fact that the Commission's discussion had evidenced no difficulties with the words "or with each other", the Special Rapporteur proposed the retention of those words in article 1.

300. The Special Rapporteur indicated that one Government had suggested confining the scope of the draft articles to the status of diplomatic (*stricto sensu*) and consular couriers and bags. He pointed out that the adoption of such a proposal might run counter to the main purpose of the draft, which was to establish a comprehensive and uniform approach to all couriers and bags. Nothing indicated that the relatively small number of ratifications of the 1969 Convention on Special Missions (which was already in force) and of the 1975 Vienna Convention on the Representation of States was related to the régime of couriers and bags contained therein. Furthermore, the comprehensive and uniform approach to couriers and bags did not imply a blanket adoption of all provisions contained in those two conventions.

301. During the Commission's discussion, the view was expressed that the draft articles should be confined to diplomatic and consular couriers and bags. As an alternative to article 33, flexibility could be attained by providing in separate optional protocols for application to the couriers and bags referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States.

302. With regard to *article 2*, the Special Rapporteur pointed out that, while some Governments, in their written comments and observations, had been in favour of restricting the scope of the draft articles to couriers and bags of States, others were in favour of extending the scope to couriers and bags of international organizations. He pointed out that article III (sect. 10) of the 1946 Convention on the Privileges and Immunities of the United Nations<sup>325</sup> explicitly stated:

The United Nations shall have the right to use codes and to dispatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

An identical provision was embodied in article IV (sect. 12) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.<sup>326</sup> Similar texts,

assimilating the status of the couriers and bags of international organizations to that of diplomatic couriers and bags could be found in legal instruments relating to the privileges and immunities of other intergovernmental organizations.

303. In the light of those considerations and of the comprehensive and uniform approach on which the draft articles were based, the Special Rapporteur suggested adding a paragraph 2 to article 1, reading:

"2. The present articles apply also to the couriers and bags employed for the official communications of an international organization with States or with other international organizations."

304. Without wishing to detract from the political importance of national liberation movements or organizations recognized by the United Nations and the respective regional organizations, the Special Rapporteur suggested that those entities not be included within the scope of the draft articles as their number was very limited and their official communications very restricted, so as not to require legal regulation in an instrument of a general character.

305. The Special Rapporteur indicated that, if the proposed addition to article 1 were adopted, several consequential amendments would have to be introduced. Article 2 would be deleted and subparagraphs (1) and (2) of paragraph 1 of article 3 (Use of terms) would be amended by adding references, respectively, to the courier and to the bag of international organizations. The exact wording of those amendments would be considered in connection with article 3 (see para. 315 below).

306. The discussion in the Commission revealed conflicting views with regard to the possible extension of the scope of the draft articles to international organizations.

307. Some members were reluctant to accept the possibility of such an extension. States and international organizations, they said, were different subjects of international law and that had already led to the adoption of two separate conventions in the area of the law of treaties. Furthermore, no two international organizations were alike, and that would render the task of extending the scope of the draft very difficult. Some host countries, it was also remarked, might be reluctant to accept the fact that international organizations situated in their territory maintained communications with States or regional organizations hostile to the host country. It was also maintained that the proposal to extend the scope came at a rather late stage and would entail an in-depth re-examination of the draft articles. Furthermore, practice had so far not shown any serious problems regarding the functioning of couriers and bags of international organizations which might warrant their being dealt with in the draft. The proposed extension might alter the carefully achieved balance of the draft articles and jeopardize their acceptability.

308. A great number of members, on the other hand, were in favour of extending the scope of the draft ar-

<sup>325</sup> United Nations, *Treaty Series*, vol. 1, p. 15.

<sup>326</sup> *Ibid.*, vol. 33, p. 261.

ticles to international organizations. It was maintained that the insistent differentiation made by some between States and international organizations was particularly unwelcome in this case. States had created international organizations and the latter used couriers and bags. The general Conventions on the privileges and immunities of the United Nations and on those of the specialized agencies, as well as many headquarters agreements, contained specific provisions to that effect. Furthermore, if the Commission did not undertake this task at the present juncture, it would still be asked to do so at a later stage, as had been the case with the law of treaties, thus redoubling the amount of time and money spent (appointment of a new special rapporteur, etc.) and detracting from the attention given to other topics. The extension of the scope could easily be done by means of either an optional provision or an optional additional protocol.

309. Many of the members who supported the extension of the scope of the draft articles to international organizations believed that the extension should be made only in respect of international organizations of a universal character within the meaning of the 1975 Vienna Convention on the Representation of States, namely "the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a worldwide scale" (art. 1, para. 1 (2)). Some of these members also felt that the extension should cover couriers and bags employed for official communications between organizations or between the headquarters of an organization and its different offices or between those offices.

310. As to the possible extension of the scope of the draft articles to the couriers and bags of national liberation movements, most members felt that such an extension would be inadvisable as national liberation movements were essentially temporary in nature and would later be subsumed into State structures. Furthermore, such an extension would greatly detract from the acceptability of the draft articles. This matter should be left for special agreements between States and the movements concerned.

311. Some members felt that an extension of the scope to national liberation movements recognized by the United Nations and by some regional organizations was in order, as many States had already upgraded the missions of these movements to the status of full diplomatic missions. Furthermore, the extension could easily be done by means of an optional additional protocol.

312. The Special Rapporteur indicated that all suggestions made during the discussion should be carefully considered and the reaction by Governments further scrutinized before a final decision was made on the matter.

#### ARTICLE 3 (Use of terms)

313. Article 3, as provisionally adopted by the Commission on first reading, reads as follows:

#### Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, and documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

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

314. The Special Rapporteur indicated that no substantive written comments or proposals had been made by Governments on article 3.

315. The Special Rapporteur suggested that, if the proposal was accepted to extend the scope of the draft by adding to article 1 a provision on the couriers and bags of international organizations (see para. 303 above), then the following new subparagraph (e) should be added to paragraph 1 (1) of article 3:

“(e) a courier employed by an international organization for official communications with States and other international organizations;”

and the following new subparagraph (e) should be added to paragraph 1 (2) of article 3:

“(e) a bag of an international organization used for its official communications with States and other international organizations;”

316. No specific suggestions concerning article 3 were made during the Commission's discussion.

#### ARTICLE 4 (Freedom of official communications)

#### ARTICLE 5 (Duty to respect the laws and regulations of the receiving State and the transit State) and

#### ARTICLE 6 (Non-discrimination and reciprocity)

317. Articles 4, 5 and 6 provisionally adopted by the Commission on first reading deal with general principles of diplomatic law relevant to the functioning of official communications. They read as follows:

##### *Article 4. Freedom of official communications*

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

##### *Article 5. Duty to respect the laws and regulations of the receiving State and the transit State*

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

##### *Article 6. Non-discrimination and reciprocity*

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

318. The Special Rapporteur indicated that, in the view of one Government, articles 4 and 5 were unnecessary since their subject-matter appeared to be already adequately dealt with by the provisions of earlier instruments such as the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

319. In the Special Rapporteur's view, although it was true that the three general principles embodied in articles 4, 5 and 6 derived from the relevant provisions of the four codification conventions, their present wording took into account the purpose of the exercise, which was the freedom of official communications through couriers and bags. The three articles contained substantive elements particularly relevant to the status of the diplomatic courier and the diplomatic bag, determining in general terms the balance between the rights and obligations of the sending State, the receiving State and the transit State, as well as the non-discrimination and reciprocity in their legal relationship. The general and specific practical significance of these provisions should not be overlooked in a set of articles on the status of all categories of couriers and bags used for official communications.

320. *Article 4* did not elicit any specific suggestions or drafting proposals in the written comments and observations of Governments. Accordingly, the Special Rapporteur proposed the retention of the existing text. No specific reference was made to article 4 in the Commission's discussion.

321. With regard to *article 5*, the Special Rapporteur indicated that two Governments had proposed the deletion of the second sentence of paragraph 2, referring to the duty of the diplomatic courier not to interfere in the internal affairs of the receiving State or the transit State. The Special Rapporteur was of the view that this proposal could be accepted, on the understanding that the duty of the courier to respect the laws and regulations of the receiving State and the transit State implied also the duty not to interfere in their internal affairs. He also suggested that, in order to simplify the text, the words “as the case may be” at the end of the first sentence of paragraph 2 could be deleted.

322. During the Commission's discussion, some members opposed the deletion of the second sentence of paragraph 2 of article 5. In their view, the sentence was necessary as it added some balance to the provision and protected the interests of the receiving State. Another member was in favour of the deletion of the sentence.

323. With regard to *article 6*, the Special Rapporteur indicated that one Government had proposed the deletion of the words “provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States” from paragraph 2 (b), arguing that that provision limited for no valid reason the contractual freedom of States. The Special Rapporteur explained that paragraph 2 (b) was a safeguard clause intended to maintain certain international standards and stability regarding the

extent of the facilities, privileges and immunities granted to the diplomatic courier and the diplomatic bag. He admitted, however, that the text could be simplified by taking as a model article 47 (para. 2 (b)) of the 1961 Vienna Convention on Diplomatic Relations and article 72 (para. 2 (b)) of the 1963 Vienna Convention on Consular Relations, rather than article 49 (para. 2 (b)) of the 1969 Convention on Special Missions. He therefore proposed the following revised text for paragraph 2 (b) of article 6:

“2. However, discrimination shall not be regarded as taking place:

“ ...

“(b) where States by custom or agreement extend to their diplomatic couriers and diplomatic bags more favourable treatment than is required by the provisions of the present articles, provided that such extension is not incompatible with the object and purpose of the present articles.”

324. During the Commission's discussion, one member supported the above-mentioned proposal by one Government to delete part of paragraph 2 (b). In his view, States did not need to be admonished as to what was in their best interests. Another member also supported the deletion of the phrase in question and suggested that subparagraph (b) should be reworded as follows:

“(b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.”

Still another member, supporting the explanation given by the Special Rapporteur, preferred the formulation of paragraph 2 (b) as provisionally adopted by the Commission on first reading.

(b) PART II. STATUS OF THE DIPLOMATIC COURIER AND THE CAPTAIN OF A SHIP OR AIRCRAFT ENTRUSTED WITH THE DIPLOMATIC BAG

ARTICLE 7 (Appointment of the diplomatic courier)

325. Article 7, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 7. Appointment of the diplomatic courier*

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

326. The Special Rapporteur indicated that no specific proposals had been made on article 7 in the written comments and observations received from Governments. One Government, however, had pointed out that the article was unnecessary, since it was among those enunciating matters which had so far not been regulated by international agreement and which had not caused any practical problems requiring such regulation.

327. The Special Rapporteur explained that, in his view, such an article had its place in a set of rules on

the status of the diplomatic courier and the diplomatic bag. It codified a rule which had been established in State practice. The cross-reference to article 9 (Nationality of the diplomatic courier) and article 12 (The diplomatic courier declared *persona non grata* or not acceptable) indicated the significance of the appointment of the courier by the competent authorities of the sending State and its international legal implications. When a courier was exercising his functions on behalf of several States, as might be the case in State practice, the act of appointing him might be relevant to the legal relationship between the courier and the sending State. The Special Rapporteur therefore proposed the retention of article 7 as a logical element in a system of rules relating to the status of the courier and the bag.

328. During the Commission's debate, one member wondered how many conventions or national rules or regulations contained a provision of the nature of article 7. Another member proposed the deletion of the article.

ARTICLE 8 (Documentation of the diplomatic courier)

329. Article 8, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 8. Documentation of the diplomatic courier*

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

330. The Special Rapporteur indicated that article 8 had elicited a substantive proposal from one Government. It had been suggested that the documentation of the courier should include not only an indication of his status and the number of packages constituting the diplomatic bag, but also essential personal data about the courier and particulars concerning the packages constituting the bag, such as serial number, destination, size and weight.

331. The Special Rapporteur shared the view that the official document of the courier could also contain some essential personal data, as well as the serial numbers of the packages and their destination. However, as far as the size and weight of the bag were concerned, that question has already been considered on several previous occasions. The prevailing view both in the Commission and in the Sixth Committee of the General Assembly had been that the draft articles should not establish any limitation on size or weight, since to do so would introduce some rigidity and restrictiveness in the system regulating the bag and would not adequately meet the practical requirements of official communications. However, in the commentary to article 24 (Identification of the diplomatic bag), the Commission had agreed that “it was advisable to determine by agreement between the sending State and the receiving State the maximum size or weight of the diplomatic bag and that that procedure was supported by widespread State practice”.<sup>327</sup>

<sup>327</sup> *Yearbook ... 1985*, vol. II (Part Two), p. 48, para. (8) of the commentary.

332. In the light of the above considerations, the Special Rapporteur proposed the following revised text of article 8:

*“Article 8. Documentation of the diplomatic courier*

“The diplomatic courier shall be provided with an official document indicating his status and essential personal data about him, including his name, official position or rank, as well as the number of packages constituting the diplomatic bag which is accompanied by him, their serial numbers and destination.”

333. During the Commission’s discussion, several members supported the proposed revised text.

ARTICLE 9 (Nationality of the diplomatic courier)

334. Article 9, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 9. Nationality of the diplomatic courier*

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

335. The Special Rapporteur indicated that one Government had made a general comment to the effect that article 9 should be deleted, since it fell within the category of matters which had not caused any practical problems such as to require specific regulation. Another general comment contained a suggestion to delete paragraphs 2 and 3 of article 9 as being unrealistic, since they assumed that the diplomatic courier was a person called upon to reside permanently in a receiving State, whereas in fact, in the majority of cases, the receiving State had no advance knowledge of his appointment or arrival.

336. The Special Rapporteur pointed out that the question of the nationality of the diplomatic courier had to be the subject of regulation in order to achieve a coherent and uniform régime. To date only the 1963 Vienna Convention on Consular Relations contained a special provision (art. 22) on the nationality of the consular courier. As to paragraphs 2 and 3 of article 9, they were a logical elaboration of rules relating to situations constituting exceptions to the general rule in paragraph 1 according to which “the diplomatic courier should in principle be of the nationality of the sending State”. The fact that paragraphs 2 and 3 dealt with exceptional cases could not as such justify their deletion.

337. The Special Rapporteur also indicated that two Governments, in their comments and observations, had referred to the timing of the withdrawal of consent by the receiving State in the case of appointment as

diplomatic couriers of nationals of the receiving State, nationals of the sending State who were permanent residents of the receiving State, or nationals of a third State who were not also nationals of the sending State. It had been suggested in those comments that the consent of the receiving State should not be withdrawn during the performance of the courier’s mission or prior to its completion.

338. The Special Rapporteur agreed that the withdrawal of consent, as the Commission had indicated in the commentary to article 9, should proceed only in serious circumstances, such as those related to grave abuses of the facilities, privileges and immunities granted to the courier,<sup>328</sup> and that in all cases the protection of the diplomatic bag entrusted to the courier and its safe delivery to its recipient had to be ensured. In the light of the above considerations, the Special Rapporteur proposed the addition of a second sentence to paragraph 2 of article 9, reading:

“However, when the diplomatic courier is performing his functions in the territory of the receiving State, the withdrawal of consent shall not have effect until the diplomatic courier has delivered the diplomatic bag to its final destination.”

339. During the Commission’s discussion, one member wondered how paragraphs 1 and 2 of article 9 would apply to a person having the nationality of both the receiving State and the sending State. He felt that that point should be clarified either in the text of the article or in the commentary.

340. One member proposed the deletion of article 9. Another member indicated that, if the article were retained, he would support the amendment proposed by the Special Rapporteur; but, on the whole, he found the article unnecessary, as couriers were not diplomats or consular officers and the whole matter could be dealt with in the commentary. Furthermore, he was of the view that the rules set out in paragraph 3 of article 9 did not appear to be compatible with the corresponding rules in respect of consular couriers contained in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations.

341. Regarding the latter observation, the Special Rapporteur stated that the difference in question seemed to be of a purely drafting nature. Article 35, paragraph 5, of the 1963 Vienna Convention referred to “a national of the sending State, a permanent resident of the receiving State”, as did paragraph 3 (a) of article 9 of the draft. He submitted that the formulation in the latter provision was more precise, and therefore preferable.

ARTICLE 10 (Functions of the diplomatic courier)

342. Article 10, as provisionally adopted by the Commission on first reading, reads as follows:

<sup>328</sup> *Yearbook . . . 1984*, vol. II (Part Two), p. 46, para. (3) *in fine* of the commentary.

*Article 10. Functions of the diplomatic courier*

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

343. The Special Rapporteur indicated that article 10 had not elicited any specific substantive or drafting comments by Governments, other than a general observation by one Government to the effect that the article should be deleted, since it fell within the category of rules which had not caused any practical problems such as to require specific regulation.

344. In that connection, the Special Rapporteur briefly recalled considerations already expressed by him with regard to other provisions, concerning the purpose of the draft articles and the adoption of a comprehensive approach to their elaboration. He stressed that it would be hard to formulate a set of draft articles on the status of the diplomatic courier without trying to define his official functions. He therefore suggested retaining article 10 in its present form.

345. No observations regarding article 10 were made during the Commission's discussion, apart from a proposal by one member that it be deleted.

**ARTICLE 11 (End of the functions of the diplomatic courier)**

346. Article 11, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 11. End of the functions of the diplomatic courier*

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

347. The Special Rapporteur indicated that some Governments, in their written comments and observations, had proposed adding to article 11 a new subparagraph (a) stipulating the fulfilment of the functions of the diplomatic courier or his return to his country of origin as facts determining the end of his functions. The Special Rapporteur recalled that the original text of the draft article<sup>329</sup> had contained a similar provision. But as a result of the discussions in the Commission and the Drafting Committee, that provision had been deleted. Nevertheless, in the commentary to article 11, the Commission had pointed out that, as evidenced by the words "*inter alia*" in its introductory phrase, the article did not intend to present an exhaustive rehearsal of all the possible reasons leading to the end of the courier's functions. The commentary had further indicated that the most frequent and usual fact having such an effect was the fulfilment of the courier's mission.<sup>330</sup>

<sup>329</sup> Then draft article 13 (*Yearbook ... 1982*, vol. II (Part Two), p. 119, footnote 329).

<sup>330</sup> *Yearbook ... 1984*, vol. II (Part Two), p. 48, para. (5) of the commentary.

348. In the light of the above considerations, the Special Rapporteur felt that it might be appropriate to add, before the present two subparagraphs of article 11, a new subparagraph (a) dealing with the fulfilment of the functions of the diplomatic courier, which would read:

"(a) the fulfilment of the functions of the diplomatic courier or his return to the country of origin;"

349. If that amendment were adopted, the present subparagraphs (a) and (b) would accordingly become subparagraphs (b) and (c).

350. In the course of the Commission's discussion, one member expressly supported the proposed amendment.

351. Another member felt that the present subparagraph (a), as provisionally adopted by the Commission, was not clear enough as to the moment when the courier ceased to be a courier. As to the present subparagraph (b), he felt that its proper location would be in article 12.

**ARTICLE 12 (The diplomatic courier declared *persona non grata* or not acceptable)**

352. Article 12, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 12. The diplomatic courier declared persona non grata or not acceptable*

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.

353. The Special Rapporteur indicated that the only two points on article 12 raised in the written comments and observations by Governments were in connection with paragraph 2 and touched upon the protection of the diplomatic bag when the courier was obliged to leave the territory of the receiving State. One Government had suggested that sufficient time should be provided to a courier declared *persona non grata* or not acceptable to deliver the bag to the recipient. It had been proposed to add a paragraph 3 to that effect.

354. The Special Rapporteur pointed out that, although that concern seemed well justified, it might not be appropriate to include an additional paragraph, since, in paragraph 2 of article 12, "a reasonable period" of time was contemplated within which the delivery of the bag could be made; furthermore, the relevant protective measures ensuring the integrity of the bag were provided for in article 30. He therefore proposed retaining the present formulation of article 12.

355. During the Commission's discussion, one member expressly supported the proposed amendment referred to above (para. 353).

ARTICLE 13 (Facilities accorded to the diplomatic courier)

356. Article 13, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 13. Facilities accorded to the diplomatic courier*

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

357. The Special Rapporteur pointed out that only two general comments by Governments had been made on article 13. One comment was that the article was too vague and could be interpreted much too broadly, making it difficult to accept: the article could thus be deleted altogether or at least be redrafted so as to lay down only the general duty of the receiving or transit State to assist the diplomatic courier in the performance of his functions. The other comment expressed doubt that any provision of this kind was necessary, since paragraph 1 was vague and unsatisfactory, while paragraph 2 would impose a heavy and unjustifiable burden on receiving States and, in particular, transit States.

358. The Special Rapporteur recalled that article 13 was based on draft articles 15, 18 and 19 as originally submitted in 1983,<sup>331</sup> dealing, respectively, with general facilities, facilities for communications and facilities for temporary accommodation. Many members of the Commission had thought that the draft articles on facilities submitted by the Special Rapporteur were too long and too many, and it had therefore been agreed to combine them, with certain modifications, in a more concise form into one article proposed by the Drafting Committee. The commentary to article 13<sup>332</sup> elucidated the content and purpose of the article and, in the Special Rapporteur's view, provided convincing evidence of its practical significance. In the light of these considerations, the Special Rapporteur proposed retaining the present text of article 13 with one drafting amendment, namely the deletion, for the sake of brevity, of the unnecessary words "as the case may be" in paragraphs 1 and 2.

359. In the course of the Commission's discussion, some members supported the comments by Governments referred to above (para. 357). They did not see the need for article 13, particularly in the light of article 30, and felt that difficulties of interpretation as to the extent of the obligations involved might lead to disputes between the sending State and the receiving State.

ARTICLE 14 (Entry into the territory of the receiving State or the transit State)

<sup>331</sup> See *Yearbook* ... 1983, vol. II (Part Two), pp. 48-49, footnotes 202, 205 and 206.

<sup>332</sup> *Yearbook* ... 1984, vol. II (Part Two), pp. 50-51.

360. Article 14, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 14. Entry into the territory of the receiving State or the transit State*

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

361. The Special Rapporteur indicated that article 14 had elicited only one observation from one Government, namely that the following text should be added at the end of paragraph 2:

"duly taking into account the practice of the sending State in relation to the granting of visas to the diplomatic courier of the State from which the visa is being requested, or, if this latter State does not normally use diplomatic couriers, the practice of the sending State in relation to the granting of visas to the nationals of the State from which the visa is being requested".

362. The Special Rapporteur felt that, although that proposal had its merits, the suggested text was more appropriate for inclusion in the commentary, since it elaborated in more specific terms the general provision already embodied in article 14. Moreover, the observation indirectly referred to the principle of reciprocity contemplated in article 6. He therefore suggested retaining article 14 in its present form.

363. No specific reference was made to article 14 during the Commission's discussion.

ARTICLE 15 (Freedom of movement)

364. Article 15, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 15. Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

365. The Special Rapporteur pointed out that only one general observation had been made on article 15. One Government had stated that, while not objecting to the article itself, it could not accept the implication in the commentary that "in exceptional circumstances" a receiving or transit State had an obligation to assist the courier "to obtain an appropriate means of transportation when he has to face insurmountable obstacles which may delay his journey and which could be overcome, to the extent practicable, with the help or co-operation of the local authorities".<sup>333</sup>

366. The Special Rapporteur said it was obvious from the commentary cited that, as a rule, the courier had to make his own travel arrangements and that only in

<sup>333</sup> *Ibid.*, p. 52, para. (2) *in fine* of the commentary.

exceptional circumstances, when facing serious difficulties, might he turn to the local authorities of the receiving or transit State for assistance. He therefore proposed that article 15 be retained with only a small amendment, namely the deletion of the words "as the case may be".

367. No comments were made on article 15 during the Commission's discussion.

#### ARTICLE 16 (Personal protection and inviolability)

368. Article 16, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 16. Personal protection and inviolability*

The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

369. The Special Rapporteur indicated that one Government, in its general written comments, had expressed the view that article 16 was unnecessary, since its substance appeared to be adequately dealt with by the 1961 and 1963 Vienna Conventions on diplomatic and on consular relations. He pointed out, however, that the commentary to the article contained convincing arguments in favour of its retention and illuminated the pertinent aspects of the content and scope of the obligations of the receiving State or transit State with regard to the courier in the performance of his functions. The Special Rapporteur did not deem it necessary to elaborate further on the purpose and practical significance of this provision as evidenced by the four codification conventions and a significant body of bilateral agreements and national legislation. The article had an important place in a coherent set of rules governing the status of the diplomatic courier. He therefore suggested retaining article 16 with only one drafting amendment, namely the deletion of the words "as the case may be", which were not necessary.

370. Several members of the Commission supported article 16 and were in favour of its retention. One member was in favour of further elaborating the provision in order better to determine the scope of the personal protection accorded to the courier.

#### ARTICLE 17 (Inviolability of temporary accommodation)

371. Article 17, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 17. Inviolability of temporary accommodation*

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State, may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

372. The Special Rapporteur pointed out that widely divergent views had been expressed on article 17 in the comments and observations of Governments. Two main opposing trends had emerged. One was characterized by strong objections to the present text, considering it to be unnecessary, unrealistic, not practicable and excessive. Consequently, according to this point of view, article 17 should be deleted altogether. The other view was expressed in equally strong terms and, while emphasizing the practical significance of article 17, favoured strengthening the concept of inviolability of the temporary accommodation. Critical observations were made to the effect that paragraph 3 of the article, permitting inspection of the temporary accommodation of the courier under certain conditions, was inconsistent with paragraph 1, based on the principle of inviolability, which should be the guiding rule. In that connection, one Government had suggested adding the following phrase at the end of paragraph 1: "provided that all necessary measures are taken to ensure the protection of the diplomatic bag, as stipulated in article 28, paragraph 1". It had also proposed amending paragraph 3 to the effect that the receiving State or the transit State be under the obligation, in the event of inspection or search of the accommodation of the diplomatic courier, to guarantee him the opportunity to communicate with the mission of the sending State so that its representative could be present during such inspection or search. Between those two main trends, the Special Rapporteur added, there had been some comments and proposals in favour of strengthening the compromise provision built into paragraph 3 with a view to making article 17 more acceptable.

373. While recognizing that article 17 could impose a certain burden on the receiving or transit State, the Special Rapporteur felt that the present text was an acceptable compromise solution, striking a reasonable balance between the need for appropriate legal protection of the courier and bag in certain circumstances and the interests of the receiving or transit State. The Commission would have to decide. The deletion of article 17 would inevitably create a *lacuna* in a coherent system of rules governing the legal status of the courier and bag. The Special Rapporteur considered that, on the whole, it would be desirable to retain the article.

374. During the Commission's discussion, some members strongly supported article 17. They felt that the personal inviolability of the courier was practically conditioned by the inviolability of his accommodation. The rationale for according inviolability to the courier's temporary accommodation was an extension of his per-

sonal inviolability as provided for in article 16 and not only the protection of the bag. In their view, article 17 was not excessive and established an adequate balance between the interests of the sending State and those of the receiving or transit State. Its approach was strictly functional. One member supporting the article thought that it might be reformulated so that paragraph 1 laid down the principle of inviolability of the temporary accommodation and paragraph 2 the exceptions contained in the present paragraphs 1 and 3, the present paragraph 2 becoming paragraph 3.

375. Other members were strongly opposed to article 17 and favoured its deletion. They felt that the protection of the courier was already sufficiently covered by article 16 and that of the bag by article 30 and that there was no functional need for article 17. Reality showed that no practical problems had arisen with the temporary accommodation of the courier and that there was therefore no need for specific regulation. Furthermore, article 17, as presently drafted, did not even require that a courier be accompanying the bag in order to qualify for the additional protection. The article would place an undue burden on States with a large traffic of couriers and bags and would have the undesirable effect of detracting from the acceptability of the draft articles as a whole.

376. Some members, while not opposing article 17 in principle, felt that some compromise solution could be found so as to allay the fears of those opposing it and increase its acceptability. They proposed the deletion of the first sentence of paragraph 1, referring to the inviolability of the temporary accommodation; the rest of the article would remain unchanged.

377. One member expressly supported the amendment to paragraph 3 proposed by one Government (see para. 372 above), provided that the new text did not refer to the representative of the sending State being present during the inspection or search.

378. The Special Rapporteur was of the view that the text of article 17 adopted on first reading without any formal reservations provided the basis for an appropriate provision, but that the question deserved further study in order to find a formulation offering better prospects of acceptance.

#### ARTICLE 18 (Immunity from jurisdiction)

379. Article 18, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 18. Immunity from jurisdiction*

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

380. In his oral presentation, the Special Rapporteur pointed out that the subject-matter covered by article 18 was one of the most disputed issues of the present topic and that the text of the article constituted a compromise based on a functional approach leading to a qualified immunity from jurisdiction. In his eighth report (A/CN.4/417, paras. 149 *et seq.*), he had analysed extensively the comments and observations received from Governments on this article. Briefly stated, three main trends could be identified. The first trend was represented by a significant number of States which acquiesced in the functional approach and recognized that the present text of article 18 provided a middle ground for agreement. According to the second trend, paragraph 1 of the article was superfluous, since under article 16 the courier would enjoy personal inviolability. The third trend was that the courier should be granted full immunity from the criminal jurisdiction of the receiving State or transit State and that the functional approach adopted in paragraph 1 should be abandoned. Some drafting amendments had also been proposed.

381. While expressing a preference for a simple, unqualified formulation on immunity from jurisdiction, the Special Rapporteur felt that the merits of a more restrictive concept of functional and qualified immunity could not be overlooked if considerations of realism and pragmatism were taken into account. On the other hand, the deletion of article 18 would result in a gap as regards substantive elements of the couriers' legal status having a bearing on the exercise of his functions. He therefore proposed retaining article 18 in its present compromise form, with one addition and some purely drafting changes. Endorsing the proposal by one Government, he suggested adding the following sentence at the end of paragraph 2:

“Pursuant to the laws and other legal regulations of the receiving or transit State, the courier when driving a motor vehicle shall be required to have insurance coverage against third-party risks.”

He also proposed the deletion of the word “all” before the word “acts” in paragraphs 1 and 2 as well as of the words “as the case may be” in both paragraphs.

382. During the Commission's discussion, a great number of members supported article 18 as a carefully balanced provision which constituted a good compromise formulation between the divergent views which had been expressed. Support was also voiced by several members for the addition to paragraph 2 proposed by the Special

Rapporteur, as well as for his other drafting suggestions. In that connection, some members noted that article 78 of the 1975 Vienna Convention on the Representation of States, concerning insurance against third-party risks, had some relevance to paragraph 2 of article 18.

383. One member wondered, in connection with paragraph 2, whether the receiving or transit State was always prevented from bringing suit against the courier before doing so against the insurance company. Another member expressed doubts about the need for paragraph 5. Still another member proposed the deletion of paragraphs 2, 3 and 4 of the article.

384. Finally, one member was unconvinced of the need for article 18 as a whole, particularly in the light of article 16, and felt that the article might impede the effective and smooth administration of justice in the receiving or transit State.

385. The Special Rapporteur stated that, in the light of the discussion, article 18, with the proposed amendments, seemed to be acceptable to a great number of the Commission's members. As regards the question put in connection with paragraph 2 (see para. 383 above), he pointed out that the courier's immunity from the jurisdiction of the receiving or transit State was in respect of acts performed by him in the exercise of his functions. However, his immunity from civil and administrative jurisdiction did not extend to an action for damages arising from an accident caused by a vehicle the use of which might have involved his liability where those damages were not recoverable from insurance. In such a case, a civil action against the courier might be instituted if the insurance company could not pay the damages. In addition, it had been suggested to include a provision to the effect that the courier be required to have insurance coverage against third-party risks. With regard to the doubts expressed by one member about paragraph 5, the Special Rapporteur stated that that paragraph embodied an almost standard rule in diplomatic and consular law, constituting a safeguard provision which might have a preventive effect and, in certain circumstances, an actual application.

ARTICLE 19 (Exemption from personal examination, customs duties and inspection) *and*

ARTICLE 20 (Exemption from dues and taxes)

386. Articles 19 and 20, as provisionally adopted by the Commission on first reading, read as follows:

*Article 19. Exemption from personal examination, customs duties and inspection*

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

*Article 20. Exemption from dues and taxes*

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

387. The Special Rapporteur pointed out that some Governments had expressed the view that articles 19 and 20 should be deleted. Two main arguments had been advanced to that effect. The objection to the retention of paragraph 1 of article 19 had been based on the argument that the provision for the courier to enjoy personal inviolability under article 16 made his exemption from personal examination unnecessary. The other exemptions provided for in paragraphs 2 and 3 of article 19 and in article 20 had also been considered unnecessary by some Governments due to the short duration and transitory nature of the courier's stay.

388. The Special Rapporteur was of the view that the Commission might find it possible to dispense with paragraph 1 of article 19, in view of the above-mentioned interpretation of article 16 on personal inviolability. However, it seemed that the transitory nature of the courier's status as such did not justify the deletion of a specific provision relating to exemptions to be accorded to the courier in order to facilitate the performance of his functions and assist him in his journey. The courier was an official of the sending State who was entitled to enjoy certain facilities when entering or leaving the territory of the receiving or transit State, facilities which were accorded to any member of the administrative or technical staff of a mission or consular post who was not a national of the receiving or transit State. The fact that the courier would stay for a limited time should not affect his right as a person on an official mission to be granted certain exemptions from customs duties and other dues and taxes which would facilitate his customs clearance at the frontier, thus providing him with favourable conditions for the exercise of his official functions without undue formalities, in order to ensure the speedy delivery of the diplomatic bag. This was indeed a functional necessity.

389. In the light of all the above considerations, the Special Rapporteur proposed the deletion of paragraph 1 of article 19 and the merger of paragraphs 2 and 3 with the text of article 20. He also proposed the deletion of the words "as the case may be" from the present paragraph 2 of article 19 — which would become the first paragraph of the new article 19 — as well as from the present paragraph 3 and from article 20. The new combined text would read as follows:

“Article 19. Exemption from customs duties and other dues and taxes

“1. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

“2. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

“3. The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.”

390. During the Commission's discussion, several members expressed support for the merger of articles 19 and 20, as proposed by the Special Rapporteur. One member proposed the deletion of article 20 (para. 3 of the combined text).

ARTICLE 21 (Duration of privileges and immunities)

391. Article 21, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 21. Duration of privileges and immunities*

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

392. The Special Rapporteur indicated that article 21 had elicited from Governments comments and observations in two categories, namely a general assessment of its necessity and specific substantive and drafting proposals regarding paragraph 1.

393. As regards the need for the article, one Government declared in general terms that it could not support

it because it spelled out in a somewhat complicated manner what was already clearly implicit in other provisions of the draft articles (e.g. arts. 12 and 16) or what was expressly stated in provisions of the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. The same Government was opposed to the article, including paragraph 3, in view of its objection in principle to conferring any immunity from jurisdiction on the courier.

394. Turning to the specific substantive and drafting comments on paragraph 1, the Special Rapporteur indicated that they related to two distinct issues: first, the precise moment or fact determining the beginning or the end of the privileges and immunities enjoyed by the diplomatic courier, and secondly, the duration of privileges and immunities granted to the courier *ad hoc*.

395. Addressing the comments and observations received from Governments, the Special Rapporteur indicated that it would not be sufficient in a coherent set of articles on the status of the diplomatic courier to consider that such an important problem as the duration of functions should be covered implicitly by provisions dealing with *persona non grata* (art. 12) or protection and inviolability of the courier (art. 16). As to the reference to the 1961 and 1963 Vienna Conventions, there were no specific provisions in those instruments on the duration of privileges and immunities accorded to the courier. Article 21 had been inspired by the relevant provisions of the codification conventions, but it was specifically addressed to the particular legal features of the status of the courier and the transitory nature of his functions. That was why it was so relevant for the courier's status to indicate the precise moment or fact (event) determining the beginning or the end of the privileges and immunities enjoyed by the courier and to indicate the duration of the privileges and immunities accorded to the courier *ad hoc* as a special case when he was resident in the receiving State.

396. In the Special Rapporteur's view, a precise indication of the actual moment from which the courier enjoyed privileges and immunities in the case when he was already in the territory of the receiving State was very important. That moment should be clearly spelled out in the text. It might be the moment of the courier's appointment or the moment at which he took custody of the bag. The moment of appointment and receipt by the courier of the documentation indicating his status was very relevant.

397. The Special Rapporteur felt that the present text of paragraph 1 needed further precision and should stipulate that the courier would enjoy privileges and immunities from the moment he entered the territory of the receiving or transit State in order to perform his functions, or, if he was already in the territory of the receiving State, from the moment of his appointment and receipt of the document referred to in article 8. Special reference should be made to the end of the privileges and immunities of the courier *ad hoc* only in the case when he was a resident in the receiving State.

398. The Special Rapporteur therefore proposed retaining the present text of paragraphs 2 and 3 of article 21, which had not given rise to specific comments or observations, and revising paragraph 1 as follows (changes in italics):

“1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment of *his appointment and receipt of the document referred to in article 8*. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc who is a resident in the receiving State* shall cease at the moment when *he* has delivered to the consignee the diplomatic bag in his charge.”

399. During the Commission’s discussion, several members supported the revised text of paragraph 1 proposed by the Special Rapporteur.

#### ARTICLE 22 (Waiver of immunities)

400. Article 22, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 22. Waiver of immunities*

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

401. The Special Rapporteur indicated that one Government which had opposed the granting of jurisdictional immunity to the diplomatic courier had, on that ground, expressed reservations about article 22. No other written comments and observations had been made on the article. He therefore proposed retaining it in its present form.

402. In the course of the Commission’s discussion, the only specific reference to article 22 was a proposal by one member that it be deleted.

#### ARTICLE 23 (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

403. Article 23, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag*

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

404. In his oral presentation, the Special Rapporteur indicated that one Government had proposed that a captain of a ship or aircraft entrusted with a diplomatic bag should be granted the same status as a diplomatic courier or a courier *ad hoc*. In that connection, the Special Rapporteur was of the view that there was no valid reason in fact or in law to change the generally recognized rule, embodied in article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the other codification conventions, according to which a captain entrusted with a diplomatic bag would not be considered to be a diplomatic courier.

405. The Special Rapporteur also pointed out that another substantive point raised in the written comments of one Government had been that the bag might also be entrusted to a member of the crew of a ship or aircraft, rather than to the captain. He added that that possibility had already been considered in his previous reports, but that reactions to it in the Commission and in the Drafting Committee had been divided. Nevertheless, after adopting the present text of article 23, the Commission had pointed out in the commentary that the wording of paragraph 1 “did not preclude the existing practice of several States to entrust the unaccompanied bag to a member of the crew of the ship or aircraft, either by decision of the central authorities of the State or by delegation from the captain of the ship or aircraft to the crew member”.<sup>334</sup>

406. The Special Rapporteur felt that this question should probably be reconsidered. He therefore proposed amending the title and paragraphs 1, 2 and 3 of article 23 by inserting the words “or [an] [the] authorized member of the crew”, as appropriate, after the word “captain” in each case. The rest of the article would remain unchanged.

407. During the Commission’s discussion, one member supported the proposed changes. Another member expressed doubts about them.

#### (c) PART III. STATUS OF THE DIPLOMATIC BAG

##### ARTICLE 24 (Identification of the diplomatic bag)

408. Article 24, as provisionally adopted by the Commission on first reading, reads as follows:

<sup>334</sup> *Yearbook* ... 1985, vol. II (Part Two) p. 46, para. (5) of the commentary.

*Article 24. Identification of the diplomatic bag*

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.
2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

409. The Special Rapporteur indicated that the written comments and observations made on article 24 had been of a very general nature, namely that the article should contain more precise and specific rules. No concrete proposals had, however, been advanced.

410. In that connection, the Special Rapporteur felt that the proposed revised text of article 8 (see para. 332 above), together with article 24, could provide the basis for a more detailed identification of the diplomatic bag. He therefore suggested retaining the present text of article 24.

411. During the Commission's discussion, no specific reference was made to article 24.

## ARTICLE 25 (Content of the diplomatic bag)

412. Article 25, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 25. Content of the diplomatic bag*

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.
2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

413. The Special Rapporteur stated that the text of article 25, adopted after thorough discussion, reflected the legitimate concern about certain abusive practices involving the diplomatic bag which had occurred recently. The purpose of the article, as indicated in the commentary, was to define the permissible content of the bag by emphasizing that it could contain only official correspondence, and documents or articles intended exclusively for official use.<sup>335</sup> Moreover, in order to strengthen the obligation of the sending State to respect the rule governing the permissible content of the bag, a provision of a preventive character was included in paragraph 2 of the article.

414. One Government had observed that the bag must not contain any article whose importation or possession was prohibited by the law of the receiving or transit State. In that connection, the Special Rapporteur pointed out that none of the corresponding provisions of the four codification conventions contained such a clause. The proposed restriction went beyond the meaning of those provisions. Furthermore, the present formulation of paragraph 1 of article 25, which was modelled on article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations, might well serve the same purpose without exceeding the well-established rules embodied in the codification conventions with regard to the content of the bag.

<sup>335</sup> *Ibid.*, p. 48, paras. (2)-(3) of the commentary.

415. Two other observations had referred to the need to determine the size and weight of the bag within reasonable dimensions proportional to the importance of the mission, consular post or delegation of the sending State. Another similar proposal was to keep the weight of the bag within limits considered to be reasonable and normal having regard to the size and needs of the particular mission.

416. The Special Rapporteur was of the view that those two proposals, which dealt with matters touched upon in connection with article 8, contained expressions relating to the size and weight of the bag which could give rise to subjective and contradictory interpretations that might be considered incompatible with the principle of sovereign equality of States.

417. In the light of the above considerations, the Special Rapporteur proposed retaining the present text of article 25.

418. In the course of the Commission's discussion, one member supported the observation by one Government referred to above (para. 414) concerning articles whose importation or possession was prohibited by the law of the receiving State. In that connection, another member pointed out that, in the light of article 5 on the duty to respect the laws and regulations of the receiving State and the transit State, it would be inappropriate to define the content of the diplomatic bag further in article 25, since all the provisions of the draft should be interpreted in an integrated manner, taking into account all the articles.

## ARTICLE 26 (Transmission of the diplomatic bag by postal service or by any mode of transport)

419. Article 26, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport*

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

420. The Special Rapporteur indicated that only a few written observations on article 26 had been received from Governments, advocating that the text should somehow provide that the best possible conditions must be ensured for the expeditious transmission of the bag and the avoidance of lengthy delays. He stressed that the idea of accelerating transmission and providing for special treatment for the diplomatic bag by the postal service or by any other mode of transport had been reflected in the article only in general terms, because the handling of the bag was dependent on the procedures followed by the respective administrations or agencies. In that connection, he recalled that a proposal to introduce a new category of postal items under the denomination of "diplomatic bags" in the international postal service by

amending article 18 of the international regulations of the Universal Postal Union had been rejected by the UPU Congress held at Rio de Janeiro in 1979.<sup>336</sup> Consequently, the diplomatic bag had to be treated in the same way as other letter-post items, unless the postal administrations could enter into bilateral or multilateral agreements for a more favourable treatment of diplomatic bags conveyed by the postal service. In fact, he added, there were already a number of such bilateral agreements. The Special Rapporteur was of the view that the Commission's present work on the topic might well provide the basis for a general legal framework for the transmission of diplomatic bags through postal channels.

421. In the light of the comments and observations made by some Governments, the Special Rapporteur proposed the following revised text of article 26:

*“Article 26. Transmission of the diplomatic bag by postal service or by any other mode of transport*

*“The relevant international or national rules governing the use of the postal service or of any mode of transport shall apply to the transmission of the packages constituting the diplomatic bag, under the best possible conditions.”*

422. Some members of the Commission stressed that the greatest number of diplomatic and consular bags circulating in official communications between States were of the kind referred to in article 26. However, the elaborate system of protection for the diplomatic bag established in the draft articles did not seem to extend to this specific type of bag. Cases of loss, partial destruction and disregard for this kind of bag, including delays and other difficulties, were unfortunately not unheard of. These members felt that the provision regarding the protection of such bags should be more elaborate.

423. The Special Rapporteur reiterated the remarks he had made in introducing the proposed revised text of article 26. He admitted that the concern expressed by some members was very legitimate and relevant, and he was conscious of the fact that the proposed revised text did not meet this genuine concern in all aspects. Yet, as he had explained, the proposal to obtain more favourable treatment of the diplomatic bag by national postal administrations had not been accepted by the competent organs of UPU. Consequently, further attempts should be made to render the text more adequate with regard to this type of unaccompanied bag by providing for certain bilateral or multilateral arrangements to ensure its safe and rapid transmission.

#### ARTICLE 27 (Facilities accorded to the diplomatic bag)

424. Article 27, as provisionally adopted by the Commission on first reading, reads as follows:

<sup>336</sup> See in this connection the Special Rapporteur's fourth report, *Yearbook ... 1983*, vol. II (Part One), p. 121, document A/CN.4/374 and Add.1-4, paras. 316-317.

#### *Article 27. Facilities accorded to the diplomatic bag*

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

425. The Special Rapporteur indicated that some comments and observations from Governments had been critical of article 27 as being too general and vague. In that connection, he recalled that the commentary to the article stated that “it would seem neither advisable nor possible to provide a complete listing of the facilities to be accorded to the diplomatic bag”.<sup>337</sup> The commentary further indicated that the obligations of the receiving or transit State might include “favourable treatment in case of transportation problems or, again, the speeding up of the clearance procedures and formalities applied to incoming and outgoing consignments”.<sup>338</sup> The Special Rapporteur added that the sending State was also under an obligation to take all appropriate measures to avoid any difficulties which might contribute to possible complications regarding the unimpeded and rapid transmission and delivery of the bag.

426. Furthermore, the Special Rapporteur pointed out that one Government had proposed amending article 27 by inserting, after the word “shall”, the words “as permitted by local circumstances”.

427. In the light of the above considerations and proposals, the Special Rapporteur proposed the following revised text of article 27:

*“Article 27. Facilities accorded to the diplomatic bag*

*“The receiving State or the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag and shall prevent technical and other formalities which may cause unreasonable delays. The sending State for its part shall make adequate arrangements for ensuring the rapid transmission or delivery of its diplomatic bags.”*

428. During the Commission's discussion, there were very few specific references to article 27. One member did not agree with the proposed amendments; another member proposed the deletion of the article.

#### ARTICLE 28 (Protection of the diplomatic bag)

429. Article 28, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 28. Protection of the diplomatic bag*

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such

<sup>337</sup> *Yearbook ... 1985*, vol. II (Part Two), p. 50, para. (4) of the commentary.

<sup>338</sup> *Ibid.*, para. (5) of the commentary.

examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

430. In his oral presentation, the Special Rapporteur indicated that article 28 had been discussed extensively and that divergent points of view had been expressed on it throughout the Commission's work on the topic. The main reason for the special attention given to the article had been the realization that it was a key provision, involving basic rules which should lay down an acceptable balance between the confidentiality of the contents of the bag and the prevention of possible abuses. The written comments and observations received from Governments had confirmed that assessment. A wide range of political, legal and methodological problems had been raised therein, most of them already considered by the Commission and the Sixth Committee of the General Assembly. In the Special Rapporteur's view, the main issues involved in both paragraphs of article 28 were:

(a) The concept of inviolability of the diplomatic bag and its relevance to article 28;

(b) The admissibility of scanning of the bag;

(c) Whether a comprehensive and uniform approach would be applicable to all categories of bags or whether there should be a differentiated treatment of bags in strict compliance with the relevant provisions, on the one hand, of the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, and, on the other hand, of the 1963 Vienna Convention on Consular Relations;

(d) If a comprehensive and uniform approach was followed, whether the treatment of all kinds of bags should be governed by article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, or by article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations;

(e) Whether the transit State should have the same rights as the receiving State with regard to the treatment of the bag, especially if the option to request the opening of the bag were provided.

431. With regard to question (a) above, the Special Rapporteur indicated that Governments, in their written comments and observations, had expressed divergent views. Some Governments had claimed that the concept of inviolability was inconsistent with the need for observance of any laws and regulations adopted by receiving States with a view to the protection of their legitimate interests. This approach was questioned by other Governments on the ground that inviolability of the bag would be a logical extension of the inviolability of archives, documents and official correspondence, as provided for in article 24 and article 27, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. This latter view was shared by the Special Rapporteur, who felt that the inviolability of the bag was a basic requirement

for ensuring the confidentiality of its contents and the proper functioning of official communications.

432. As regards question (b) above, the Special Rapporteur indicated that a significant number of Governments, in their written comments and observations, had raised serious reservations and objections to the examination of the bag directly or through electronic or other technical devices. It had therefore been proposed that the words in square brackets in paragraph 1 of article 28 be retained and the brackets deleted.

433. Some Governments saw no obstacles in subjecting the bag to non-intrusive security checks, such as the use of sniffer dogs or other methods of external examination, but were opposed to electronic scanning as that might jeopardize the bag's inviolability. Other Governments, however, had expressed the view that examination by electronic scanning might be permissible in exceptional cases and under certain conditions. In that connection, one Government had proposed the following revised text for paragraph 2 of article 28:

"2. If the competent authorities of the receiving or transit State have serious reasons to believe that the diplomatic bag contains *any articles which are not intended for official use only and which heavily endanger either the public security of the receiving or transit State or the safety of individuals*, they may, after giving the sending State *sufficient opportunity to dissipate suspicion*, request that the bag be subjected to examination through electronic or other technical devices.

*"Examination may only take place if the sending State consents and a representative of the sending State is invited to be present. The examination may in no circumstances jeopardize the confidentiality of the documents and other legitimate articles in the bag.*

"If such examination does not satisfy the competent authorities of the receiving or transit State, they may further request that the bag be opened in their presence by an authorized representative of the sending State.

*"If either request is refused by the authorities of the sending State, the competent authorities of the receiving or transit State may require that the bag be returned to its place of origin."*

434. Commenting on the above-mentioned proposals, the Special Rapporteur observed that sniffer dogs could not jeopardize the confidentiality of the bag's contents. As to electronic scanning, it was very difficult to prove that recourse to scanning would not affect the integrity and secrecy of documents and articles for official use. Only States which had comparable technological means at their disposal could be satisfied with such a provision. But in the foreseeable future the great majority of States would not possess scanning technology comparable to that of the technologically most advanced States.

435. With regard to questions (c) and (d) above, the Special Rapporteur indicated that some Governments had proposed adopting the text of paragraph 1 of article 28 without square brackets and deleting paragraph 2 altogether. Some other Governments, maintaining that

it would not be possible to overlook the existence, under the 1963 Vienna Convention on Consular Relations, of a different treatment for the consular bag, proposed adopting a differentiated approach to be reflected in paragraph 2, which should, in their view, deal only with the consular bag in accordance with article 35, paragraph 3, of the 1963 Vienna Convention. Still other Governments considered that the present formulation on scanning did not provide adequate safeguards with respect to the confidentiality of the correspondence, but were prepared to agree to the proposal to apply the treatment provided for in article 35, paragraph 3, of the 1963 Vienna Convention not only to consular bags, but to all categories of bags, including the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations.

436. As for question (e) above, the Special Rapporteur indicated that, while some Governments had been in favour of the concept that transit States were equally entitled to the rights referred to in article 28, paragraph 2, other Governments had expressed reservations and objections. In that respect, the Special Rapporteur pointed out that the problem should not create much difficulty in view of the fact that, in practice, if the examination or the opening of the bag were accepted, the transit State would seldom request to exercise its rights. On the other hand, it must also be borne in mind that, in most instances, transit States were on an equal footing with receiving States as far as their obligations regarding the bag were concerned, and that might be viewed by some Governments as justifying the attribution of the same rights to transit States as to receiving States.

437. Finally, the Special Rapporteur drew attention to an observation addressed to the Commission in 1987 by the International Conference on Drug Abuse and Illicit Trafficking, in which 138 States and a great number of organizations had been represented. Paragraph 248 of the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control,<sup>339</sup> adopted by the Conference by consensus, contained a special reference to the topic under consideration, stating:

248. If conclusive evidence comes to light of illicit trafficking being carried on by means of the misuse of the diplomatic bag or of the diplomatic status, or of the consular status, it is open to the Government of the receiving State to take measures for halting this traffic and for dealing with the diplomatic or consular staff involved in strict conformity with the provisions of the Vienna Conventions on Diplomatic and Consular Relations. The Conference draws the attention of the International Law Commission to possible misuse of the diplomatic bag for illicit drug trafficking, so that the Commission could study the matter under the topic relating to the status of the diplomatic bag.

438. The same Conference had adopted by acclamation a Declaration,<sup>340</sup> in paragraph 9 of which it requested the Secretary-General of the United Nations to keep under constant review the activities referred to in the Declaration and in the Comprehensive Multidisciplinary

Outline. In paragraph 8 of General Assembly resolution 42/112 of 7 December 1987 on the International Conference on Drug Abuse and Illicit Trafficking, the Secretary-General was requested to report to the Assembly at its forty-third session, in 1988, on the implementation of that resolution.

439. The Special Rapporteur felt that the above recommendations deserved special attention and should be taken into consideration when the Commission proceeded to the second reading of article 28. He recalled that, in their written comments and observations, some Governments, while not referring particularly to possible abuse relating to drug trafficking, most probably had that in mind when suggesting that non-intrusive external security examination such as the use of sniffer dogs and other similar methods of external examination should not be excluded.

440. In the light of all the above considerations, the Special Rapporteur proposed the following three alternative revised texts of article 28:

#### ALTERNATIVE A

##### *"Article 28. Protection of the diplomatic bag*

"The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices."

#### ALTERNATIVE B

##### *"Article 28. Protection of the diplomatic bag*

"1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

"2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the consular bag contains something other than the correspondence, documents or articles referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin."

#### ALTERNATIVE C

##### *"Article 28. Protection of the diplomatic bag*

"1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other technical devices.

"2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious

<sup>339</sup> *Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A.

<sup>340</sup> *Ibid.*, sect. B.

reasons to believe that the bag contains something other than the correspondence, documents or articles referred to in article 25, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the competent authorities of the receiving State or the transit State may request that the bag be returned to its place of origin.”

441. During the Commission’s discussion, some members strongly supported alternative A submitted by the Special Rapporteur. They felt that its formulation reflected existing law on the matter. The inviolability of the bag enshrined therein was a natural and logical extension of the inviolability of the archives and documents of a mission recognized by the 1961 Vienna Convention on Diplomatic Relations. The other two alternatives were not acceptable as they brought the régime of the diplomatic bag down to that of the consular bag. One member was of the view that alternative A should contain a subvariant, which would exclude from it the concept of inviolability.

442. One member expressed a preference for alternative B, which in his view was a good compromise solution. Its paragraph 2 was based on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, although it extended to the transit State the same rights accorded to the receiving State. It was also pointed out that alternative B was closer to the codification conventions; but an objection was nevertheless raised against according to the transit State the same rights as those of the receiving State.

443. Some other members expressed a preference for the revised text of paragraph 2 of article 28 proposed by one Government in its written comments (see para. 433 above). That text, in cases of suspicion, would allow the receiving State or the transit State, with the consent of the sending State and in the presence of its representative, to subject the bag to examination through electronic or other technical devices, provided that in no circumstances would the examination jeopardize the confidentiality of the documents and other legitimate articles in the bag. One member supported that formulation in general, but not its aspects concerning possible electronic examination of the bag and the extension of the rights in question to transit States.

444. In connection with that proposal, a discussion arose about the permissibility of electronic scanning of the bag. Some members were in favour of allowing electronic scanning of the bag, bearing in mind the safety concerns of receiving and transit States. In their view, electronic scanning could be done without necessarily affecting the confidentiality of the bag’s contents. Furthermore, most airport check-points were controlled not by State authorities but by private transportation companies, which had an obvious interest in ensuring the safety of their aircraft and passengers. These members

also argued that electronic scanning was not actually forbidden by existing international law concerning the bag.

445. Other members were strongly opposed to any examination of the bag by electronic or other technical devices. They felt that, if a bag was subjected to electronic scanning, there was absolutely no way to be sure that the receiving or transit State using such means would not abuse its right and intentionally violate the confidentiality of the contents, which was perfectly possible with present-day technology. Reciprocity would not serve as a restraining factor, since such technology was at the disposal of only a few developed States: developing countries did not possess it. These members felt that it was the duty of States to ensure that private transportation companies complied with provisions concerning the inviolability of the bag and the confidentiality of its contents, since internal law could not be invoked for non-compliance with international law. They were more favourably inclined towards non-intrusive means of examination, such as sniffer dogs. These means could be considered permissible in the light of present-day international law, did not violate the contents of the bag, and could meet the legitimate concerns expressed by the International Conference on Drug Abuse and Illicit Trafficking regarding the possible misuse of the diplomatic bag for drug trafficking (see para. 437 above).

446. A great number of members supported alternative C of article 28 submitted by the Special Rapporteur. They felt that it offered the necessary flexibility and struck the right balance between the need to ensure the inviolability of the bag and the confidentiality of its contents, on the one hand, and the legitimate security concerns of the receiving State and transit State, on the other. They welcomed it as a realistic solution which contained preventive and safeguard provisions.

447. However, a view was also expressed that alternative C did not constitute a compromise, since it provided that transit States as well as receiving States would have the right to request the return of both the diplomatic bag and the consular bag to their places of origin. That would amount to a revision of the existing conventions, namely the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.

448. One member of the Commission, while supporting alternative C in general, proposed that paragraph 1 should be amended to read:

“1. The diplomatic bag shall be inviolable wherever it may be: it shall not be opened or detained, subject to paragraph 2, and its contents shall be exempt from examination directly or through electronic or other technical devices.”

The intention in introducing the words “its contents” was to make it clear that external examination of the bag would be permitted. With the link provided by the words “subject to paragraph 2”, the word “Nevertheless” could be deleted from paragraph 2. This member also

suggested that the words "something other than the correspondence, documents or articles referred to in article 25", in paragraph 2, should be qualified by the words "and which seriously endangers the public security of the receiving State or transit State or the safety of the individual".

449. Some members of the Commission expressed reservations about the extension to transit States of the same rights accorded to receiving States under paragraph 2 of alternative C.

450. The Special Rapporteur said that the discussion in the Commission had offered the basis for further reflection. The easiest solution, apparently, would be to adhere to the proposed alternative B, leading to a double régime with regard to the protection of the bag: one for the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, and another for the diplomatic bag and other bags employed for official communications, on the basis of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. That approach would, however, constitute a deviation from the objective of establishing a coherent and uniform régime. Such a provision, though not devoid of legal foundation in the existing conventional law, had however not obtained sufficient support during the discussion held at the present session. There were several other proposals, including the bracketed text of article 28 adopted by the Commission on first reading, alternatives A and C as submitted by the Special Rapporteur, the revised text of paragraph 2 proposed by one Government (see para. 433 above) and other proposals advanced during the discussion, including the amended text of alternative C suggested by one member (see para. 448 above).

451. All those proposals deserved meticulous examination and reflection as to their implications. It might be advisable to take into account the discussion that would be held on the Commission's report in the Sixth Committee at the forty-third session of the General Assembly and any additional written comments and observations received from Governments. It might therefore be appropriate to exercise more patience and prudence at the present stage, although the current debate seemed to have indicated a trend in favour of alternative C.

452. Another point concerning the treatment of the bag related to the position of the transit State with regard to its option to request the opening of a bag in transit. Some members of the Commission had been of the view that the transit State should not enjoy the same position as that of the receiving State, in the case when a request for examination or opening of the bag was admissible. Without overlooking the legitimate interests of the transit State, the Special Rapporteur also felt that such a procedure might lead to unreasonable delays and impediments in the rapid transmission or delivery of the bag. It therefore seemed that the views of these members might be justified.

#### ARTICLE 29 (Exemption from customs duties, dues and taxes)

453. Article 29, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 29. Exemption from customs duties, dues and taxes*

The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.

454. The Special Rapporteur indicated that article 29 had not elicited any substantive or drafting comments, although one Government had expressed doubt as to whether there was a need for such a provision.

455. The Special Rapporteur said that the reasons for including article 29 had been well explained by the Commission in the commentary to the article.<sup>341</sup> He added that, in the absence of special provisions on exemption from customs and other fiscal dues and taxes and related charges for customs clearance or other formalities, there might be instances where such requirements would be imposed by the law of a receiving or transit State. Article 29 could therefore be conceived at least as a safeguard provision.

456. In the light of the above considerations, the Special Rapporteur proposed retaining the present text of article 29, with the deletion of the words "as the case may be".

457. During the Commission's discussion, no specific reference was made to article 29.

#### (d) PART IV. MISCELLANEOUS PROVISIONS

##### ARTICLE 30 (Protective measures in case of *force majeure* or other circumstances)

458. Article 30, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 30. Protective measures in case of force majeure or other circumstances*

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

459. The Special Rapporteur indicated that one Government, in its written comments and observations, while accepting that in the circumstances referred to in

<sup>341</sup> *Yearbook* . . . 1986, vol. II (Part Two), p. 30, paras. (2)-(3) of the commentary to article 29.

paragraph 1 of article 30 the obligations of a receiving or transit State in respect of the bag did not cease to apply, did not think it reasonable that additional and positive obligations should be imposed on such States.

460. Citing the relevant parts of the commentary to article 30,<sup>342</sup> the Special Rapporteur pointed out that paragraph 1 clearly referred to situations such as death, serious illness or an accident suffered by the courier or the captain of a ship or aircraft and was not intended to cover the case of loss of or mishaps to the diplomatic bag transmitted by postal service or by any mode of transport. It was also clear from the commentary that the obligations in question might arise for the receiving State or transit State only if they had knowledge of the existence of the special circumstances referred to in paragraph 1 and when there was no one to take custody of the bag. As to paragraph 2, the obligations therein contemplated would arise only in cases of *force majeure* or other exceptional or unforeseen circumstances, such as adverse weather conditions, the forced landing of an aircraft or other events beyond the control of the courier or the carrier of the bag.

461. In the Special Rapporteur's view, it was difficult to conceive how, in an interdependent world in which international co-operation and solidarity among States had acquired ever-growing significance, a provision stating that assistance must be rendered in the case of distress or in exceptional conditions could be considered excessive and therefore not acceptable, particularly since similar provisions could be found in the relevant articles of the four codification conventions.

462. The Special Rapporteur also indicated that one Government had suggested adding the words "or other circumstances" after the words "*force majeure*" in paragraph 2, in order to align that paragraph with paragraph 1, where the same expression was used.

463. The Special Rapporteur proposed that article 30 be amended to incorporate that drafting suggestion. In addition, he himself proposed the deletion of the words "as the case may be" in paragraph 1.

464. During the Commission's discussion, no specific reference was made to article 30.

#### ARTICLE 31 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

465. Article 31, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations*

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

466. The Special Rapporteur indicated that article 31 had elicited from Governments several written comments

and observations of both a substantive and a drafting nature. In some of those observations, the scope of the article in its present form had been criticized as being too broad and not in conformity with international law and State practice. In that connection, the suggestion had been made to confine article 31 to cases of non-recognition of the sending State or of its Government or non-existence of diplomatic or consular relations between that State and a receiving State which was the host State of an international organization or an international conference. Another observation contained a proposal to mention also special missions in the article, in order that it would also apply to the couriers and bags of such missions.

467. In the light of the above-mentioned comments and observations and the suggestions made by Governments, the Special Rapporteur proposed the following revised text of article 31 (added text in italics):

*"Article 31. Non-recognition of States or Governments or absence of diplomatic or consular relations*

*"The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations between that State and the receiving State in whose territory an international organization has its seat or office, or an international conference takes place, or where a special mission of the sending State is present."*

468. During the Commission's discussion, no specific reference was made to article 31, other than the doubt expressed by one member as to whether it was necessary.

#### ARTICLE 32 (Relationship between the present articles and existing bilateral and regional agreements)

469. Article 32, as provisionally adopted by the Commission on first reading, reads as follows:

*Article 32. Relationship between the present articles and existing bilateral and regional agreements*

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

470. The Special Rapporteur indicated that the comments and observations received from Governments had focused on the relationship between the present draft articles and three categories of agreements:

(a) the bilateral and multilateral agreements on the same subject-matter in force as between the parties to them other than the four codification conventions adopted under the auspices of the United Nations;<sup>343</sup>

(b) the four codification conventions;

(c) future agreements on the same subject-matter.

<sup>342</sup> *Ibid.*, pp. 30-31.

<sup>343</sup> See footnote 324 above.

471. With regard to agreements in category (a) above, the Special Rapporteur indicated that the term "regional" used in article 32 had been questioned by one Government. He himself was of the view that that term should be deleted from the title and the text, since it might create certain confusion with the notion of agreements confined to a specific geographical area as contemplated in Article 52 of the Charter of the United Nations.

472. With regard to agreements in category (b) above, the Special Rapporteur pointed out that, in its written comments, one Government had expressed the view that the draft articles might be considered as a basis for the elaboration and adoption of a universal multilateral convention, which in its capacity as a special law (*lex specialis*) would have precedence over the general conventional norms of diplomatic and consular law. In that connection, the Special Rapporteur explained that it might be appropriate to indicate explicitly the relationship between the draft articles and the four codification conventions. The main purpose of the draft articles was to establish a coherent régime governing the status of all categories of couriers and bags through the harmonization of existing provisions in the codification conventions and further elaboration of additional concrete rules. The codification conventions should constitute the legal basis for the draft articles on the status of the courier and the bag. Therefore, as the Commission had pointed out in the commentary to article 32, the draft articles would complement the provisions on the courier and the bag contained in those conventions.<sup>344</sup> However, if the comprehensive and uniform approach was to be carried out in a coherent manner, some of the provisions of those conventions, particularly on the treatment of the bag, might be affected.

473. As to the relationship between the draft articles and future agreements on the same subject-matter, the Special Rapporteur said it was clear that that problem was settled by paragraph 2 (b) of article 6 as adopted on first reading and would also be settled by the revised text of that subparagraph which he had proposed (see para. 323 above).

474. Taking into consideration the comments and observations received from Governments, and with a view to clarifying the relationship between the draft articles and the agreements on the same subject-matter in force as between States parties to them, including the relationship with the four codification conventions, the Special Rapporteur proposed the following revised text of article 32:

*"Article 32. Relationship between the present articles and other agreements and conventions"*

"The provisions of the present articles shall not affect other international agreements in force as between parties to them and shall complement the conventions listed in article 3, paragraph 1 (1) and (2)."

<sup>344</sup> *Yearbook ... 1986*, vol. II (Part Two), p. 32, para. (3) of the commentary.

475. During the Commission's discussion, a great number of members expressed dissatisfaction with article 32 as adopted on first reading, characterizing it as insufficient and confusing.

476. As to the revised text proposed by the Special Rapporteur, some reservations were also expressed. In the view of some members, the word "complement" did not adequately reflect the relationship between the draft articles and the four codification conventions, since, in some cases, the draft articles really intended to modify certain provisions of those conventions and should, as *lex specialis*, take precedence over them. It was observed in that connection that the proposed reformulation did not seem to be fully in accordance with article 30 of the 1969 Vienna Convention on the Law of Treaties.<sup>345</sup>

477. Several members suggested that article 32 should be drafted along the lines of article 311 of the 1982 United Nations Convention on the Law of the Sea.<sup>346</sup>

478. One member, on the other hand, expressed a preference for the text submitted by the Special Rapporteur in his seventh report, in 1986,<sup>347</sup> which had contained three main elements: (a) the draft articles would complement the provisions on the courier and the bag in the four codification conventions; (b) the draft articles would be without prejudice to other international agreements in force as between States parties to them; (c) nothing in the draft articles would preclude States from concluding international agreements relating to the status of the courier and the bag and from modifying the provisions thereof, provided that such modifications were in conformity with article 6 of the draft.

479. The Special Rapporteur observed that there was a need for further reflection on the most adequate formulation of the complex relationships covered by article 32. There were divergent starting-points with regard to the scope and legal implications of the aim of the draft articles, which was to harmonize and unify existing rules and at the same time develop specific and more precise rules not fully covered by the codification conventions, i.e. to complement those conventions. Reference had been made to article 311 of the 1982 United Nations Convention on the Law of the Sea. The Special Rapporteur had had that provision in mind both when he had submitted his first draft of the article, in 1983,<sup>348</sup> and in the subsequent debates in the Commission and in the Drafting Committee. Account had also been taken of the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, particularly articles 30 and 41. In the case of the present draft articles, the doctrine of *lex posterior* or *lex specialis* had to be considered with

<sup>345</sup> United Nations, *Treaty Series*, vol. 1155, p. 331.

<sup>346</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

<sup>347</sup> Then draft article 42 (*Yearbook ... 1986*, vol. II (Part One), p. 50, document A/CN.4/400, para. 62).

<sup>348</sup> Then draft article 42, submitted in the Special Rapporteur's fourth report (*Yearbook ... 1983*, vol. II (Part One), p. 134, document A/CN.4/374 and Add.1-4, para. 403).

great caution and prudence. The draft was based on the four codification conventions but, in the case of some provisions, particularly with regard to the legal protection of the bag, and to a lesser extent in other cases, it went further than those conventions. The Special Rapporteur thought it might be useful to examine some precedents in order to draw certain conclusions that might be relevant to the case of the draft articles. Such a study had to be made with caution, taking into account the specific legal features involved in each particular case. There were many differences between the situations envisaged in article 311 of the United Nations Convention on the Law of the Sea and the one dealt with in article 32 of the present draft. In fact they were completely different. The Convention on the Law of the Sea 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. That function was specifically indicated in article 237, paragraph 2, of the Convention with regard to special conventions on the protection and preservation of the marine environment, it being stipulated that "specific obligations assumed by States under special conventions . . . should be carried out in a manner consistent with the general principles and objectives of this Convention". 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". That rule and the other provisions were inspired by Article 103 of the Charter of the United Nations and, taken together, had an effect similar to that Article, according to which, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement, the Charter prevailed. The present draft articles, on the contrary, had a modest role: they were designed to be a special convention, based on the four codification conventions, with certain provisions intended to harmonize and unify existing rules and supplement them with some specific rules.

480. It was obvious that the problem required further scrutiny in order to arrive at a formulation which would be as precise as possible and could obtain wide acceptance.

#### ARTICLE 33 (Optional declaration)

481. Article 33, as provisionally adopted by the Commission on first reading, reads as follows:

##### *Article 33. Optional declaration*

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State.

Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

482. In his oral presentation, the Special Rapporteur explained that the main objective of article 33 was to introduce a certain measure of flexibility into the draft articles in order to offer better prospects of acceptance by States for the set of rules as a whole. The article offered States the possibility of exercising a legal option through a declaration specifying any category of courier and bag to which they would not apply the present articles. Initially, during the discussion in the Commission and in the Sixth Committee of the General Assembly, this provision was considered to be a necessary and acceptable compromise solution; but there had also been serious reservations and objections on the grounds that article 33 might create a plurality of régimes and cause confusion in the applicable law.

483. In their written comments and observations, Governments had, with one exception, expressed serious doubts about the necessity and viability of article 33 and had therefore proposed its deletion.

484. In view of the insignificant support obtained by article 33 and of the substantial reservations and objections it had aroused, the Special Rapporteur proposed its deletion.

485. In the course of the Commission's discussion, a large number of members supported the proposed deletion of article 33. In their view, this provision ran directly counter to one of the main purposes of the draft articles, namely the establishment of a uniform régime for all couriers and bags. They spoke of the "atomization" or "fragmentation" in the legal system governing couriers and bags that article 33 would introduce if retained, the effect of which would be to undermine the solidity of the future instrument to be adopted on the topic. The need for flexibility in the future convention should not lead to a situation in which the difficulties the article would create would outweigh any possible advantages it might present. The analogy that some had drawn between article 33 and article 298 of the 1982 United Nations Convention on the Law of the Sea<sup>349</sup> was not appropriate, since article 298 referred only to the system for peaceful settlement of disputes, whereas article 33 would affect the whole functioning of the draft articles as a coherent set of rules on couriers and bags. Flexibility, some members added, could be introduced by other established means under the international law of treaties, such as reservations or a separate optional protocol. Perhaps it could also be made clear, somewhere in the draft or the commentaries, that the acceptance

<sup>349</sup> See footnote 346 above.

of a uniform régime for all couriers and bags did not imply blanket acceptance of all provisions of the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States for those States which had not become parties to those conventions. The argument was also advanced that article 33 should be deleted because, in present-day international relations, the distinction between different types of couriers and bags had become academic.

486. Some members favoured retaining article 33 in its present form. In their view, the article was an expression of the flexibility that multilateral treaties should have. Since many States had not become parties to the two above-mentioned codification conventions of 1969 and 1975 and continued to make a distinction between different categories of bags, it was essential to offer them the possibility of derogating from article 28. Even though the uniform approach of the draft articles might suffer somewhat from a provision such as article 33, the draft would still be useful for the States which had become parties to all four codification conventions, and also in a more limited way for those which had not, as guidelines for a future possible wider consensus on a uniform approach. Article 33 was, in the final analysis, the price to be paid to ensure wider acceptability of the draft articles.

487. The view was also expressed that the objective of article 33 could be achieved by providing for optional protocols dealing with couriers and bags under the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States.

488. The Special Rapporteur indicated that the majority trend which had emerged from the Commission's discussion was clearly that article 33 should be deleted. Nevertheless, the arguments invoked to support the other view—namely that the grounds must be provided for wider acceptance of the draft articles—should not be overlooked. Perhaps further efforts could be made to achieve the same results through other provisions of the draft.

## 2. PROVISIONS ON THE PEACEFUL SETTLEMENT OF DISPUTES

489. In introducing his eighth report, the Special Rapporteur indicated that, in their written comments and

observations, two Governments had suggested respectively (a) that it might be desirable, if the draft articles were incorporated in a treaty, to include a special chapter or provisions containing binding regulations concerning the settlement of disputes as to its interpretation or application; and (b) that, if such a chapter were decided upon, it should be of a flexible nature and should supplement the settlement machinery in the form of negotiations between States through the diplomatic channel.

490. The Special Rapporteur added that, since this was the first time the question of the settlement of disputes had been raised in connection with the present topic, he would seek the advice and guidance of the Commission, for the problem was a very important one and deserved special consideration.

491. In the course of the Commission's discussion, a number of members referred to this question. They were generally in favour of contemplating provisions on the peaceful settlement of disputes relating to the application or interpretation of the present articles. Most of them were of the view that such provisions should be included in an optional additional protocol annexed to the future instrument by which the articles would be adopted. In support of that view, they pointed out that that was the solution adopted in the matter of the peaceful settlement of disputes in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

492. The Special Rapporteur said that the discussion on this issue had been very useful and would provide the basis for an acceptable solution. With regard to the idea of an additional protocol, he said that the approach adopted in the codification conventions could serve as an indication of the attitude of States on such matters, particularly if account were taken of the number of States which had become parties to such protocols in the case of the above-mentioned conventions of 1961, 1963 and 1969. A different course had been adopted in the 1975 Vienna Convention on the Representation of States, by providing for the settlement of disputes through consultations (art. 84) and conciliation (art. 85). Such options could also be considered.

493. The Special Rapporteur suggested that further consideration should be given to the most appropriate approach to be adopted on this matter for the purposes of the draft articles.

## Chapter VI

### JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

#### A. Introduction

494. The topic “Jurisdictional immunities of States and their property” was included in the Commission’s current programme of work by decision of the Commission at its thirtieth session, in 1978, on the recommendation of the Working Group which it had established to commence work on the topic<sup>350</sup> and in response to General Assembly resolution 32/151 of 19 December 1977 (para. 7).

495. At its thirty-first session, in 1979, the Commission had before it the preliminary report<sup>351</sup> of the Special Rapporteur, Mr. Sompong Sucharitkul. The Commission decided at the same session that a questionnaire should be circulated to States Members of the United Nations to obtain further information and the views of Governments. The materials received in response to the questionnaire were submitted to the Commission at its thirty-third session, in 1981.<sup>352</sup>

496. From its thirty-second session to its thirty-eighth session (1986), the Commission received seven further reports of the Special Rapporteur,<sup>353</sup> which contained draft articles arranged in five parts, as follows: part I (Introduction); part II (General principles); part III (Exceptions to State immunity); part IV (State immunity in respect of property from attachment and execution); and part V (Miscellaneous provisions).<sup>354</sup>

<sup>350</sup> See *Yearbook* ... 1978, vol. II (Part Two), pp. 152-153, paras. 179-190.

<sup>351</sup> *Yearbook* ... 1979, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>352</sup> Those materials, together with certain further materials prepared by the Secretariat, were later published in the volume of the United Nations Legislative Series entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10).

<sup>353</sup> These seven further reports of the Special Rapporteur are reproduced as follows:

Second report: *Yearbook* ... 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1;

Third report: *Yearbook* ... 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1;

Fourth report: *Yearbook* ... 1982, vol. II (Part One), p. 199, document A/CN.4/357;

Fifth report: *Yearbook* ... 1983, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1;

Sixth report: *Yearbook* ... 1984, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2;

Seventh report: *Yearbook* ... 1985, vol. II (Part One), p. 21, document A/CN.4/388;

Eighth report: *Yearbook* ... 1986, vol. II (Part One), p. 21, document A/CN.4/396.

<sup>354</sup> For a complete historical review of the Commission’s work on the topic, see *Yearbook* ... 1985, vol. II (Part Two), pp. 51 *et seq.*, paras. 205-247; and *Yearbook* ... 1986, vol. II (Part Two), pp. 7-8, paras. 15-22.

497. After long deliberations over eight years, the Commission, at its thirty-eighth session in 1986, completed the first reading of the draft articles on the topic, having provisionally adopted a complete set of 28 articles<sup>355</sup> and commentaries thereto.<sup>356</sup> At the same session, the Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles provisionally adopted on first reading should be transmitted through the Secretary-General to the Governments of Member States for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1988.<sup>357</sup>

At its thirty-ninth session, in 1987, the Commission appointed Mr. Motoo Ogiso Special Rapporteur for the topic “Jurisdictional immunities of States and their property”.

#### B. Consideration of the topic at the present session

498. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/415). In his report, the Special Rapporteur analysed the written comments and observations on the draft articles received from 23 Member States and Switzerland, which, together with those received from five other Member States during the present session, were reproduced in document A/CN.4/410 and Add.1-5.

499. Due to lack of time, however, the Commission was unable to consider the topic at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce his report, in order to expedite work on the topic at future sessions.

500. The Special Rapporteur introduced his preliminary report at the Commission’s 2081st meeting, on 19 July 1988.

501. The Special Rapporteur first made comments of a general nature concerning the distinction between two kinds of acts of States, namely *acta jure imperii* and *acta jure gestionis*. He noted that there were fundamental differences of view in both the Commission and the Sixth Committee of the General Assembly, as well as in the comments and observations received from Governments, on the conclusion that jurisdictional immunity could apply only to *acta jure imperii* and not

<sup>355</sup> For the texts, see *Yearbook* ... 1986, vol. II (Part Two), p. 8, chap. II, sect. D.1.

<sup>356</sup> *Ibid.*, pp. 8 *et seq.*, footnotes 7 to 35.

<sup>357</sup> *Ibid.*, p. 8, para. 21.

to *acta jure gestionis*. The theoretical differences of view were between those countries which favoured the so-called "restrictive" theory of State immunity and those which supported the theory of "absolute" immunity.

502. The Special Rapporteur pointed out that some Governments, in their comments and observations, had expressed the view that recent international law and national practice of States, which tended to limit the immunity of a State from the jurisdiction of the courts of another State, should be reflected in the draft article. Other States, however, were of the view that the goal of the future convention was to reaffirm and strengthen the concept of jurisdictional immunities of States, with clearly stated exceptions. According to these States, replacing that principle by the concept of so-called "functional" immunity would considerably weaken the effectiveness of the principle of State immunity. The number of exceptions, in the view of these States, should also be kept to a minimum.

503. In the Special Rapporteur's view, the general consensus which seemed to have emerged during the first reading of the draft articles was that it would not be appropriate to plunge too deeply into a theoretical exercise to determine which of the two doctrines was preferable. Attention should rather be focused on concrete problems, so as to arrive at a consensus as to what activities of a State should enjoy immunity and what activities should not enjoy immunity from the jurisdiction of another State. Even though that approach was likely to leave a grey area, it was, in his view, the only way towards a possible conciliation between the two opposing positions.

504. In connection with *article 6*,<sup>358</sup> on the principle of State immunity, the Special Rapporteur indicated that the concrete question raised was whether to retain or delete the words appearing in square brackets, "[and the relevant rules of general international law]". A number of Governments supported the retention of those words, in order to maintain sufficient flexibility and accommodate any further developments in State practice and the corresponding adaptation of general international law. Other Governments favoured the deletion of the words in question, since, in their view, reference to "the relevant rules of general international law" could be interpreted unilaterally.

505. The Special Rapporteur stated in that connection his belief that reference to "the relevant rules of general international law" could perpetuate controversy, not only on matters in the grey area but also on matters relating to limitations or exceptions under the future convention. For that reason, he proposed the deletion of the words in square brackets in *article 6*.

<sup>358</sup> Article 6 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 6. State immunity"*

"A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law]."

506. With regard to the title of part III of the draft,<sup>359</sup> and the question whether the expression "*Limitations on State immunity*" or "*Exceptions to State immunity*" should be used, the Special Rapporteur noted that some Governments preferred the former wording, since, according to them, in the area dealt with in part III international law did not recognize that a State had jurisdictional immunity. Other Governments preferred the latter wording, since it seemed to them to be a logical consequence of the doctrine that State immunity was an absolute principle. The Special Rapporteur was, however, of the view that undue weight had been given to this problem during first reading, and that a choice of either wording could now be made without prejudice to the various doctrinal positions, provided the main issues involved had been settled along the lines he had indicated (see para. 503 above).

507. Referring to *articles 2 and 3*,<sup>360</sup> on definitions, the Special Rapporteur said that he accepted the proposal made by some Governments to combine the two articles into one. The new combined text would read as follows:

<sup>359</sup> The title of part III of the draft as provisionally adopted by the Commission on first reading reads as follows:

"PART III

"[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY"

<sup>360</sup> Articles 2 and 3 as provisionally adopted by the Commission on first reading read as follows:

*"Article 2. Use of terms"*

"1. For the purposes of the present articles:

"(a) 'court' means any organ of a State, however named, entitled to exercise judicial functions;

"(b) 'commercial contract' means:

"(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

"(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

"(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

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

*"Article 3. Interpretative provisions"*

"1. The expression 'State' as used in the present articles is to be understood as comprehending:

"(a) the State and its various organs of government;

"(b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

"(c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

"(d) representatives of the State acting in that capacity.

"2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract."

“Article 2. Use of terms

“1. For the purposes of the present articles:

“(a) ‘court’ means any organ of a State, however named, entitled to exercise judicial functions;

“(b) ‘State’ means:

“(i) the State and its various organs of government;

“(ii) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

“(iii) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

“(iv) representatives of the State acting in that capacity;

“(c) ‘commercial contract’ means:

“(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

“(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

“(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

“2. The provisions of paragraph 1 (a), (b) and (c) regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

“3. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract.”

As to the issues to be settled, namely the definition of the term “State” (para. 1 of former article 3) and of the expression “commercial contract” (para. 1 (b) of former article 2 and para. 2 of former article 3), the Special Rapporteur said that certain salient problems had been raised by some Governments. Regarding the definition of the term “State”, the issues raised were: the treatment of federal States; the conditions under which political subdivisions of a State, or agencies or instrumentalities of a State, would enjoy immunity; and the treatment of State enterprises with segregated State property. The Special Rapporteur said that he would have no objection to the future convention covering the constituent parts of a federal State, if such was the wish of the Commission.

508. With regard to the conditions under which political subdivisions or agencies or instrumentalities of a State would enjoy jurisdictional immunity, the Special Rap-

porteur said that he could accept either of the interpretations made by Governments, namely that such entities could invoke immunity only when acting in the exercise of sovereign authority (*acta jure imperii*), or that any such entity became invested, *ratione personae*, with sovereign immunity if it was invested with sovereign authority. His acceptance of either interpretation, however, would be on the understanding that his proposal for a new article 11 *bis* dealing with the question of State enterprises with segregated State property (see para. 512 below) could be accommodated in the draft articles. In that case, he would then add the following text at the end of paragraph 1 (b) (iii) of the new article 2:

“... provided that a State enterprise which is distinct from the State, which has the right to possess and dispose of segregated State property and which is capable of suing or being sued shall not be included in the agencies or instrumentalities of that State, even if that State enterprise has been entrusted with public functions”.

509. As to the definition of the expression “commercial contract”, the Special Rapporteur said that it was necessary to determine criteria according to which it would be decided whether a specific contract was a commercial contract or not. Paragraph 2 of former article 3 provided for reference to the purpose of the contract, in addition to the nature of the contract. That provision had been criticized in the comments and observations of a number of Governments, which were of the view that reference should be made only to the nature of the contract and not to its purpose.

510. The Special Rapporteur said that, while he had no difficulty in eliminating the purpose test from the provision, leaving only the nature test, he was not sure whether such a course of action, though legally tenable, would not raise further difficulties in the Sixth Committee of the General Assembly. In his view, the best solution would be to reformulate the purpose test, as he had done in paragraph 3 of the new article 2 (see para. 507 above), as follows:

“... if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract”.

511. Regarding article 11,<sup>361</sup> which stipulated the most

<sup>361</sup> Article 11 as provisionally adopted by the Commission on first reading reads as follows:

“Article 11. Commercial contracts

“1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

“2. Paragraph 1 does not apply:

“(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

“(b) if the parties to the commercial contract have otherwise expressly agreed.”

important exception to State immunity, the Special Rapporteur considered that there were no fundamental difficulties with the text, subject to some drafting changes. He proposed replacing the last part of paragraph 1, from the words "the State is considered to have consented to the exercise of that jurisdiction . . .", by the phrase "the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial contract".

512. In the light of comments made by some Governments, especially those of socialist States, the Special Rapporteur proposed a new article 11 *bis* dealing with the question of State enterprises with segregated State property. The new article would read as follows:

*"Article 11 bis. Segregated State property"*

"If a State enterprise enters into a commercial contract on behalf of a State with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the former State cannot invoke immunity from jurisdiction in a proceeding arising out of that commercial contract unless the State enterprise, being a party to the contract on behalf of the State, with a right to possess and dispose of segregated State property, is subject to the same rules of liability relating to a commercial contract as a natural or juridical person."

He hoped that formulating the principle in this way might strike a proper balance between the "restrictive" and "absolute" theories of State immunity as regards the exception (or limitation) of "commercial contracts", without prejudice to either of the doctrinal positions.

513. With regard to *article 12*,<sup>362</sup> on contracts of em-

<sup>362</sup> Article 12 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 12. Contracts of employment"*

"1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

"2. Paragraph 1 does not apply if:

"(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

"(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

"(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

"(d) the employee is a national of the employer State at the time the proceeding is instituted;

"(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding."

ployment, the Special Rapporteur, in the light of comments made by some Governments, recommended that the reference to social security provisions at the end of paragraph 1 be deleted, as well as subparagraphs (a) and (b) of paragraph 2. Similarly, the Special Rapporteur proposed the deletion from *article 13*,<sup>363</sup> on personal injuries and damage to property, of the reference to the presence of the author of the act or omission in the territory of the State of the forum at the time of the deed, since that could not, in his view, legitimately be viewed as a necessary criterion for exclusion of State immunity.

514. Regarding *article 14*,<sup>364</sup> on ownership, possession and use of property, the Special Rapporteur expressed doubts as to whether paragraph 1 (c), (d) and (e) reflected universal practice. If the Commission's intention was to let the practice of the common-law countries prevail, he would propose amending subparagraphs (c), (d) and (e); but if the Commission thought that subparagraphs (b), (c), (d) and (e) could open the door to foreign jurisdiction even in the absence of any link between the property in question and the forum State, he would agree to the deletion of those four subparagraphs.

<sup>363</sup> Article 13 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 13. Personal injuries and damage to property"*

"Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission."

<sup>364</sup> Article 14 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 14. Ownership, possession and use of property"*

"1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

"(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

"(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

"(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

"(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

"(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

"2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

"(a) which is in the possession or control of the State; or

"(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence."

515. As for *articles 15 to 17*,<sup>365</sup> the Special Rapporteur noted that they appeared to be generally acceptable, subject to some drafting changes.

516. With regard to *article 18*,<sup>366</sup> on State-owned or State-operated ships engaged in commercial service, the Special Rapporteur proposed the deletion of the term "non-governmental" in square brackets in paragraphs 1 and 4, in the light of comments made by Governments, since that term, in his view, made the meaning of paragraph 1 ambiguous and could become an unnecessary source of controversy. He referred in that connection to article 3 of the 1926 Brussels Convention<sup>367</sup> and to articles 32, 96 and 236 of the 1982 United Nations Convention on the Law of the Sea,<sup>368</sup> which had drawn a distinction between State-owned commercial and non-commercial vessels, but not between government vessels and non-government vessels.

<sup>365</sup> For the texts provisionally adopted by the Commission on first reading, see *Yearbook . . . 1986*, vol. II (Part Two), p. 11.

<sup>366</sup> Article 18 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 18. State-owned or State-operated ships engaged in commercial service"*

"1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

"2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

"3. For the purposes of this article, the expression 'proceeding relating to the operation of that ship' shall mean, *inter alia*, any proceeding involving the determination of:

"(a) a claim in respect of collision or other accidents of navigation;

"(b) a claim in respect of assistance, salvage and general average;

"(c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

"4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

"5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

"6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

"7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo."

<sup>367</sup> International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and Additional Protocol (Brussels, 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .* (see footnote 352 above), pp. 173 et seq.).

<sup>368</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

517. Commenting on *article 19*,<sup>369</sup> on the effect of an arbitration agreement, the Special Rapporteur proposed that the words "that State cannot invoke immunity from jurisdiction" be replaced by "that State is considered to have consented to the exercise of jurisdiction". As for the words appearing in square brackets, i.e. "commercial contract" and "civil or commercial matter", he stated his preference for the expression "civil or commercial matter", in the light of comments made by several Governments. The Special Rapporteur further proposed that the court of the forum State must be construed as a court of another State on the territory—or according to the law—of which the arbitration had taken or would take place in respect of the relevant proceeding. Moreover, he noted that the proceeding in question had to relate to the three matters, (a), (b) and (c), listed in article 19.

518. In *article 21*,<sup>370</sup> on State immunity from measures of constraint, and in *article 23*,<sup>371</sup> on specific

<sup>369</sup> Article 19 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 19. Effect of an arbitration agreement"*

"If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

"(a) the validity or interpretation of the arbitration agreement;

"(b) the arbitration procedure;

"(c) the setting aside of the award,

unless the arbitration agreement otherwise provides."

<sup>370</sup> Article 21 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 21. State immunity from measures of constraint"*

"A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

"(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

"(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding."

<sup>371</sup> Article 23 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 23. Specific categories of property"*

"1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (a) of article 21:

"(a) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

"(b) property of a military character or used or intended for use for military purposes;

"(c) property of the central bank or other monetary authority of the State which is in the territory of another State;

"(d) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

categories of property not subject to measures of constraint, the Special Rapporteur proposed the deletion of the term "non-governmental" appearing in square brackets, for the same reason as that given in connection with article 18 (see para. 516 above). He also proposed the deletion of the phrase "or property in which it has a legally protected interest" which appeared in square brackets in article 21 and *article 22*,<sup>372</sup> on con-

"(e) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

"2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22."

<sup>372</sup> Article 22 as provisionally adopted by the Commission on first reading reads as follows:

*"Article 22. Consent to measures of constraint"*

"1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

"(a) by international agreement;

"(b) in a written contract; or

"(c) by a declaration before the court in a specific case.

"2. Consent to the exercise of jurisdiction under article 8 shall

sent to measures of constraint, and which he considered vague.

519. In addition, with regard to article 23, the Special Rapporteur noted that the provision had originally been proposed in order to protect developing countries from giving consent to measures of constraint on property in the categories in question due to a misunderstanding. To clarify this point, he proposed that paragraph 2 of the article be amended to the effect that the property listed in paragraph 1 (a)-(e) would not be subject to enforcement measures, even with the consent of the defendant State. The amended text would read as follows:

"2. Notwithstanding the provisions of article 22, a category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State unless the State in question has allocated or earmarked that property within the meaning of subparagraph (b) of article 21."

520. Finally, in order to make it clear that not all property of a central bank would automatically enjoy immunity, the Special Rapporteur proposed adding the words "and serves monetary purposes" at the end of paragraph 1 (c) of article 23.

not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary."

## Chapter VII

### STATE RESPONSIBILITY

#### A. Introduction

521. The general plan adopted by the Commission at its twenty-seventh session, in 1975, for the draft articles on the topic "State responsibility" envisaged the structure of the draft as follows: part 1 would concern the origin of international responsibility; part 2 would concern the content, forms and degrees of international responsibility; and a possible part 3, which the Commission might decide to include, could concern the question of the settlement of disputes and the "implementation" (*mise en œuvre*) of international responsibility.<sup>373</sup>

522. At its thirty-second session, in 1980, the Commission provisionally adopted on first reading *part 1* of the draft articles, on the "Origin of international responsibility".<sup>374</sup>

523. At the same session, the Commission also began its consideration of *part 2* of the draft articles, on the "Content, forms and degrees of international responsibility".

524. From its thirty-second session to its thirty-eighth session (1986), the Commission considered seven reports submitted by the Special Rapporteur, Mr. Willem Riphagen, relating to part 2 of the draft and *part 3* of the draft ("Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes).<sup>375</sup> The seventh report contained a section (which was neither introduced nor discussed at the thirty-eighth session) on the preparation of the second reading of part 1 of the draft articles and dealing with the written comments of Governments on the articles of part 1.

<sup>373</sup> *Yearbook* ... 1975, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

<sup>374</sup> *Yearbook* ... 1980, vol. II (Part Two), pp. 30 *et seq.*

<sup>375</sup> The seven reports of the Special Rapporteur are reproduced as follows:

Preliminary report: *Yearbook* ... 1980, vol. II (Part One), p. 107, document A/CN.4/330;

Second report: *Yearbook* ... 1981, vol. II (Part One), p. 79, document A/CN.4/344;

Third report: *Yearbook* ... 1982, vol. II (Part One), p. 22, document A/CN.4/354 and Add.1 and 2;

Fourth report: *Yearbook* ... 1983, vol. II (Part One), p. 3, document A/CN.4/366 and Add.1;

Fifth report: *Yearbook* ... 1984, vol. II (Part One), p. 1, document A/CN.4/380;

Sixth report: *Yearbook* ... 1985, vol. II (Part One), p. 3, document A/CN.4/389;

Seventh report: *Yearbook* ... 1986, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

25. By the end of its thirty-eighth session, in 1986, the Commission had reached the following stage in its work on parts 2 and 3 of the draft articles. It had: (a) provisionally adopted articles 1 to 5 of part 2 on first reading;<sup>376</sup> (b) referred draft articles 6 to 16 of part 2<sup>377</sup> to the Drafting Committee; (c) referred draft articles 1 to 5 and the annex of part 3<sup>378</sup> to the Drafting Committee.<sup>379</sup>

526. At its thirty-ninth session, in 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic "State responsibility".

#### B. Consideration of the topic at the present session

527. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/416 and Add.1). The Commission also had before it comments and observations received from one Government on the articles of part 1 of the draft (A/CN.4/414).

528. Due to lack of time, however, the Commission was unable to consider the topic at the present session. It nevertheless deemed it advisable for the Special Rapporteur to introduce his report, in order to expedite work on the topic at its next session.

529. The Special Rapporteur introduced his preliminary report at the Commission's 2081st and 2082nd meetings, on 19 and 20 July 1988.

530. The Special Rapporteur pointed out that, in his preliminary report, his intention was to present to the Commission his approach to the remaining parts 2 and 3 of the draft articles and to re-examine draft articles 6 and 7 of part 2 currently before the Drafting Committee.<sup>380</sup>

531. With regard to his approach to the remaining parts 2 and 3 of the draft, the Special Rapporteur said that, while keeping roughly to the order in which the subject-matter had been dealt with so far by the previous Spe-

<sup>376</sup> For the texts, see sect. C of the present chapter below.

<sup>377</sup> For the texts, see *Yearbook* ... 1985, vol. II (Part Two), pp. 20-21, footnote 66.

<sup>378</sup> For the texts, see *Yearbook* ... 1986, vol. II (Part Two), pp. 35-36, footnote 86.

<sup>379</sup> For a complete historical review of the Commission's work on the topic, see *Yearbook* ... 1985, vol. II (Part Two), pp. 19 *et seq.*, paras. 102-163; and *Yearbook* ... 1986, vol. II (Part Two), pp. 35 *et seq.*, paras. 40-65.

<sup>380</sup> See footnote 377 above.

cial Rapporteur and the Commission, he proposed to depart from it for reasons of method on three points.

532. First, the distinction between international delicts and international crimes established in article 19 of part 1 of the draft<sup>381</sup> made it advisable, in the Special Rapporteur's view, to deal separately with the legal consequences of the two sets of wrongful acts.

533. Secondly, a different approach was also necessary because of the distinction between such substantive legal consequences of a wrongful act as the rights and obligations of States pertaining to cessation and the various forms of reparation, on the one hand, and those "procedural" consequences represented by the rights or *facultés* of the injured State to resort to measures intended to secure cessation or reparation, or to inflict punishment, on the other. That distinction should apply, as a matter of method, to the treatment of delicts as well as to the treatment of crimes. The two chapters of part 2 of the draft dealing with delicts and with crimes, respectively, should therefore each be divided into two sections, corresponding to substantive consequences and to procedural consequences, respectively.

534. Thirdly, part 3 of the draft articles as submitted by the previous Special Rapporteur<sup>382</sup> covered under the title "'Implementation' (*mise en œuvre*)" not only the pre-conditions and *onera* to be fulfilled by injured States before resorting to measures, but also dispute-settlement procedures. While provisions concerning the former seemed to be an integral part of the rules covering the applicable measures, any rules on settlement procedures should be dealt with separately. In addition to the differences in subject-matter, the rules relating to dispute settlement might well have to be partly non-mandatory, whereas the rules governing the pre-conditions and *onera* to be fulfilled before resorting to measures should all be mandatory. The latter rules belonged, together with the provisions on measures, in part 2 of the draft. Part 3 should thus cover only dispute settlement.

535. Accordingly, the Special Rapporteur proposed the following tentative summary outline for parts 2 and 3 of the draft articles:

- Part 2. Content, forms and degrees of State responsibility
  - Chapter I. General principles (arts. 1-5 as adopted on first reading)
  - Chapter II. Legal consequences deriving from an international delict
    - Section 1. Substantive rights of the injured State and corresponding obligations of the "author" State
      - (a) Cessation
      - (b) Reparation in its various forms
        - (i) Restitution in kind
        - (ii) Reparation by equivalent
        - (iii) Satisfaction (and "punitive damages")
      - (c) Guarantees against repetition
    - Section 2. Measures to which resort may be had in order to secure cessation, reparation and guarantees against repetition
  - Chapter III. Legal consequences deriving from an international crime
    - Section 1. Rights and corresponding obligations deriving from an international crime
    - Section 2. Applicable measures
  - Chapter IV. Final provisions

<sup>381</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 32.

<sup>382</sup> See footnote 378 above.

Part 3. Peaceful settlement of disputes arising from an alleged internationally wrongful act

536. Turning to draft articles 6 and 7 of part 2 currently before the Drafting Committee, the Special Rapporteur said he believed that, apart from their merits, they did not deal in adequate depth with the substantive consequences of an internationally wrongful act. In his opinion, the rights and obligations concerning discontinuance of the wrongful conduct, the various forms of reparation (restitution in kind, pecuniary compensation, satisfaction) and guarantees of non-repetition could be dealt with more satisfactorily in a series of articles. In his preliminary report, he proposed a new article 6 on cessation (see para. 539 below) and a new article 7 on restitution in kind (see para. 546 below). The latter article was to replace draft article 7 currently before the Drafting Committee.

#### 1. CESSATION OF THE WRONGFUL ACT

537. The need to cover cessation among the consequences of internationally wrongful acts of a continuing character arose, according to the Special Rapporteur, from the fact that any wrongful act of a State not only caused injury to another State, but also created a threat to the rule infringed by the wrongdoing State's unlawful conduct. In a system in which the making, modification and abrogation of rules rested upon the will of States, any act of a State not in conformity with an existing rule represented a threat not only to the effectiveness, but also to the validity and thus to the very existence of the infringed rule. That was particularly true in the case of unlawful conduct extending in time. A rule on cessation was thus desirable not only in the interest of the injured State or States, but also in the interest of any other State which might wish to rely on the rule infringed and in the general interest of preserving the rule of law. Hence an article on cessation should bind the wrongdoing State to desist, without prejudice to the responsibility it had already incurred, from its wrongful conduct. Such a provision should cover any wrongful act extending in time, whether it consisted of "omissive" or "commissive" conduct.

538. In the Special Rapporteur's view, the unique function of cessation as distinguished from any form of reparation warranted its treatment in a separate article. A further reason was the fact that cessation was not subject to the exceptions applicable to forms of reparation such as restitution in kind.

539. On the basis of the above analysis, the Special Rapporteur proposed the following new article 6 on cessation for part 2 of the draft:

*Article 6. Cessation of an internationally wrongful act of a continuing character*

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

## 2. RESTITUTION IN KIND

540. The Special Rapporteur said that, unlike cessation, restitution in kind followed unlawful conduct in order to make good, either by itself or in combination with other forms of redress, the injurious consequences. Restitution applied, therefore, to any wrongful act: "commissive" or "omissive"; instantaneous or extending in time. A study of doctrine and practice indicated that there was an almost even division of opinion on the concept of restitution. According to one definition, restitution would consist in re-establishing the situation which had existed prior to the occurrence of the wrongful act, namely the *status quo ante*. According to the other, restitution in kind consisted in re-establishing the situation that would have existed if the wrongful act had not been committed. Despite the division between the two concepts—with regard to which the Special Rapporteur, although preferring the second, did not wish to take a final stand—doctrine and practice were almost unanimous in considering restitution in kind as the primary form of redress that should in principle prevail over any other mode of reparation. At the same time, doctrine and practice almost unanimously indicated that, notwithstanding that pre-eminence, restitution in kind did not necessarily constitute the complete and self-sufficient form of reparation for the consequences of any internationally wrongful act. Statistically, among the various forms of reparation the sort most frequently resorted to was pecuniary compensation (i.e. reparation by equivalent). In fact, whether or not a given form of redress was actually suitable could only be determined in each particular case, with a view to achieving as complete as possible a "satisfaction" of the injured State's interest in removing all the injurious consequences of the wrongful act. As the most "natural" form of redress, restitution in kind remained, however, logically and chronologically the primary remedy.

541. Turning to the scope of restitution, the Special Rapporteur noted that it was applicable to any kind of wrongful act. Exceptions to the obligation to provide restitution in kind were not directly dependent on the nature of the wrongful act or of the interests protected by the infringed rule, but rather on the nature and circumstances of the specific injury and the means actually available to effect restitution. It would therefore be inappropriate to identify *a priori* categories of wrongful acts as excluded *per se* from the obligation to provide restitutive redress. In particular, the Special Rapporteur felt unable to share the view that internationally wrongful acts against foreign nationals should be the subject of any exception to the general rule of the primacy of restitution in kind. The idea of codifying a less stringent régime for wrongful acts committed to the detriment of foreign nationals seemed to be based on an arbitrary distinction between "direct" and "indirect" injury to States and on a classification of injury to aliens as "indirect" injury to their States.

542. The Special Rapporteur then turned to the exceptions to the obligation to provide restitution in kind,

generally defined by doctrine as physical impossibility, impossibility deriving from legal obstacles in international law and impossibility deriving from legal obstacles in municipal law.

(a) The Special Rapporteur said that no doubts should arise with regard to the lawfulness of the wrongdoing State substituting pecuniary compensation for *restitutio* in the case of the physical impossibility of the latter.

(b) As regards legal impediments deriving from international law, the Special Rapporteur noted that they were considerably reduced by the high degree of relativity of international legal relations. For example, a wrongdoing State A could not avail itself of an incompatible treaty obligation towards State C in order to evade its obligation to provide *restitutio* for injured State B. The only hypothesis in which an international legal impediment could validly be invoked by a wrongdoing State would be the case in which the action necessary to provide restitution in kind would be incompatible with a superior international legal rule (Charter of the United Nations or peremptory norm). It was in particular the Special Rapporteur's view that no legally valid obstacle to restitution in kind could derive from the principle of domestic jurisdiction. The exception of domestic jurisdiction could, of course, come into play in order to condemn as unlawful the measures contemplated or taken by an injured State in order to obtain reparation. As for the substantive right of the injured State to obtain reparation, however, the very existence of such a "secondary" right and the corresponding obligation of the wrongdoing State (as well as the existence of the "primary" right whose infringement gave rise to the "secondary" relationship) clearly excluded any possibility that the domestic jurisdiction limitation might come into play.

(c) According to the Special Rapporteur, the so-called legal impediments deriving from municipal law were problematic. The complex structure of any State made it hardly possible for it to comply with any international obligation (including the duty to provide restitution) without setting into motion some mechanism within its internal legal system. For a State to return an unlawfully annexed territory, withdraw a boundary line unlawfully advanced or restore to freedom a person unlawfully detained, legal provision must be made at the constitutional, legislative, judicial and/or administrative level. In that sense any restitution to be effected by a State was, first and foremost, from the point of view of its internal legal system, a *legal* restitution. Material restitution would normally be a mere *execution* of legal provisions of the wrongdoing State's internal system. International law, on the other hand, while constitutionally unfit directly to invalidate or annul any national legal rules imposing an obstacle to compliance by a State with an international obligation, should not fail to exert its primacy at the level of inter-State relations. Consequently, one could not recognize as valid, under international law, excuses which the wrongdoing State might draw from its internal legal system in order to evade a duty to provide restitution in kind. Indeed, impediments

to restitution deriving from municipal law were not quite *legal* obstacles justifying exceptions to the international legal obligation to provide restitution in kind. They could only qualify as factual impediments. As to the question whether any such internal obstacles would justify failure to provide restitution in kind (and consequent substitutive resort—total or partial—to pecuniary compensation), it would be a matter of factual evaluation of the burden the wrongdoing State would have to sustain in order to overcome them and thus be in a position to effect restitution in kind. Only if that burden would reach the level of excessive onerousness would failure to provide restitution be internationally justified.

543. With regard to excessive onerousness, the Special Rapporteur said that that would be a feature of restitutive measures that could, within limits, justify non-compliance with the obligation to provide restitution and substitutive resort to pecuniary compensation. The main example would be a situation in which the effectuation of restitution in kind would very seriously affect the political, economic or social system of the wrongdoing State.

544. The Special Rapporteur thought it necessary, however, to draw the Commission's attention to the doubts he still entertained with regard to the exact definition of the exception of excessive onerousness. Care would have to be taken, in the final drafting of the article on restitution in kind, not to leave too many loopholes in the wrongdoing State's obligation to provide specific reparation. Even the relatively more severe formulation he proposed was perhaps too lenient towards the wrongdoing State.

545. Doctrine and practice seemed to indicate that the ultimate choice between a claim for restitution and a total or partial claim for pecuniary compensation should be left to the injured State, and the Special Rapporteur said he agreed with that position. It would surely be improper to leave any choice in that respect to the wrongdoing State. On the other hand, the right of choice of the injured State should not be unlimited. One limit (apart from the above-mentioned impediments) would certainly be the incompatibility of the choice with an obligation deriving from a peremptory norm of international law. Another limit would be the fact that the injured State's choice would result in an unjust advantage for the claimant to the detriment of the wrongdoing State.

546. In the light of the above explanations, the Special Rapporteur proposed the following new article 7 on restitution in kind for part 2 of the draft:

*Article 7. Restitution in kind*

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

(a) represent a burden out of proportion with the injury caused by the wrongful act;

(b) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (c) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.

### C. Draft articles on State responsibility

#### *Part 2. Content, forms and degrees of international responsibility*

##### TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION <sup>383</sup>

547. The texts of articles 1 to 5 of part 2 of the draft provisionally adopted so far by the Commission are reproduced below.

*Article 1* <sup>384</sup>

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

*Article 2* <sup>385</sup>

Without prejudice to the provisions of articles 4 and [12], the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

*Article 3* <sup>386</sup>

Without prejudice to the provisions of articles 4 and [12], the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

<sup>383</sup> As a result of the provisional adoption of article 5 at its thirty-seventh session, the Commission decided to modify articles 2, 3 and 5 provisionally adopted at the thirty-fifth session (see *Yearbook . . . 1985*, vol. II (Part Two), p. 20, para. 106) as follows: in articles 2 and 3, the reference to "articles [4] and 5" was replaced by a reference to "articles 4 and [12]"; and article "5" was renumbered article "4".

<sup>384</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, see *Yearbook . . . 1983*, vol. II (Part Two), p. 42.

<sup>385</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, pp. 42-43.

<sup>386</sup> Provisionally adopted by the Commission at its thirty-fifth session; for the commentary, *ibid.*, p. 43.

*Article 4*<sup>387</sup>

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

*Article 5*<sup>388</sup>

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

<sup>387</sup> Provisionally adopted by the Commission at its thirty-fifth session (then article 5); for the commentary, *ibid.*

<sup>388</sup> Provisionally adopted by the Commission at its thirty-seventh session; for the commentary, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 25 *et seq.*

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour;

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

## Chapter VIII

### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

#### A. Programme, procedures and working methods of the Commission, and its documentation

548. At its 2042nd meeting, on 9 May 1988, the Commission noted that, in paragraph 5 of its resolution 42/156 of 7 December 1987, the General Assembly had requested it:

(a) To keep under review the planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;

(b) To consider further its methods of work in all their aspects, bearing in mind that the staggering of the consideration of some topics might contribute to the attainment of the goals referred to in paragraph 3 above and also to a more effective consideration of its report in the Sixth Committee;

(c) To indicate in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;

549. The Commission decided that that request should be taken up under item 9 of its agenda, entitled "Programme, procedures and working methods of the Commission, and its documentation".

550. The Commission devoted its 2046th meeting, held on 17 May 1988, to the consideration of that agenda item and referred it to the Planning Group of the Enlarged Bureau.

551. The Planning Group of the Enlarged Bureau was composed as indicated in chapter I (para. 4). Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

552. The Planning Group held five meetings, on 17 and 30 May and on 6, 13 and 20 June 1988. It had before it, in addition to the section of the topical summary of the discussion held in the Sixth Committee during the forty-second session of the General Assembly entitled "Programme, procedures and working methods of the Commission, and its documentation" (A/CN.4/L.420, paras. 251-262), a number of proposals submitted by members of the Commission.

553. The Enlarged Bureau considered the report of the Planning Group on 27 June 1988. At its 2094th meeting, on 29 July 1988, the Commission adopted the following views on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

#### *Planning of activities*

554. The Commission, in considering the planning of its activities for the remainder of the five-year term of office of its members, bore in mind paragraph 5 (a) of General Assembly resolution 42/156 (see para. 548 above), in which the Assembly stressed the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics, as well as paragraph 5 (b), in which the Assembly pointed out that staggering of the consideration of some topics might contribute to the attainment of the goals indicated by the Commission in paragraph 232 of its report on its thirtieth session.<sup>389</sup>

555. The Commission observed that the two topics on which it could in the course of the next three years achieve maximum progress in the preparation of draft articles were clearly those on which complete drafts had already been provisionally adopted on first reading, namely the topic "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" and the topic "Jurisdictional immunities of States and their property". As a result of late receipt of comments from Governments, however, those topics could not be taken up on time at the current session. It will therefore be impossible to complete the second reading of the two drafts in question in 1988 and 1989, respectively, as had initially been envisaged. The Commission therefore concluded that it should concentrate in 1989 and 1990, respectively, on the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and of the draft articles on jurisdictional immunities of States and their property, without excluding other topics. The organization of work both in plenary and in the Drafting Committee will take due account of the Commission's intentions in respect of those two drafts, in particular through the allocation of sufficient time to the Drafting Committee.

556. Also bearing in mind the criterion set forth in paragraph 5 (a) of General Assembly resolution 42/156, and taking into account the progress achieved so far on the various other topics before the Commission, the Commission agreed that it should reiterate the intentions it expressed in paragraph 232 of its report on its thirtieth session.<sup>390</sup> The Commission will accordingly endeavour to complete by 1991 the first reading of the draft

<sup>389</sup> *Yearbook* ... 1987, vol. II (Part Two), p. 54.

<sup>390</sup> *Ibid.*

articles on the draft Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on the law of the non-navigational uses of international watercourses. It will also during the same period endeavour to make substantial progress on the topic of State responsibility and the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and will continue consideration of the second part of the topic of relations between States and international organizations.

#### *Future programme of work*

557. The Commission noted that attainment of the goals indicated in paragraphs 555 and 556 above would result in a reduction of the number of topics on its agenda. It is convinced that streamlining of its agenda will be conducive to higher productivity in its work. At the same time, it deems it necessary to identify topics which could possibly be included in a long-term programme of future work. To that end, it intends to establish a small working group which will be entrusted at the next two sessions with the task of formulating appropriate proposals.

558. The Commission noted with satisfaction that, in paragraph 11 of its resolution 42/156, the General Assembly had requested the Secretary-General to update in a timely manner the 1971 "Survey of international law"<sup>391</sup> and to make the updated version available to the Commission, and to bear in mind the desirability of updating it every five years thereafter. The Commission would appreciate it if the preparation of the updated version of the Survey could be speeded up.

#### *Methods of work*

559. The Commission considered various *methodological questions* related to its substantive work.

560. The Commission underlines that the general acceptability of its drafts largely depends on the extent to which they reflect the views and practice of all States and groups of States and take into account the various legal systems of the world, as well as the new requirements of international life. It draws attention to the importance of relying on as juridically diverse and geographically broad-based sources as possible and of clearly identifying the various sources relied upon in support of the articles proposed for the progressive development and codification of international law.

561. As regards the legal nature of the instruments to be adopted on the basis of its drafts, the Commission wishes to recall that it consistently aims at producing texts sufficiently precise and tightly drawn to be capable of forming the basis of a convention or other legal instrument, in order to leave unimpaired the freedom of action of the General Assembly in deciding on the form

which the end-product of the Commission's work will eventually take. The Commission is aware that the decision in question can be arrived at only after sufficient progress has been made in the consideration of a topic. It wishes to point out, however, that, should the General Assembly find it possible in certain cases to provide in advance an indication of its intentions in that respect, the work of the Commission would be facilitated and its efficiency enhanced.

562. The Commission thoroughly discussed ways and means of facilitating the work of the *Drafting Committee*, which plays a major role both in the formulation of texts and in the reconciliation of different points of view.

563. As indicated in paragraph 239 of its report on its thirty-ninth session,<sup>392</sup> the Commission is aware that draft articles should not be prematurely referred to the Drafting Committee, either at the stage of first reading or at that of second reading. It intends to continue to bear in mind the desirability of striking an appropriate balance between the need to let the discussion in plenary develop sufficiently to provide the Drafting Committee with clear guidelines and the desire to achieve concrete results in the form of generally acceptable articles at a relatively early stage.

564. The Commission is furthermore of the view that the Drafting Committee should be given all the facilities necessary for disposing of its work-load in due time. It wishes to point out, in that connection, that the considerable backlog which existed in the Drafting Committee at the beginning of the current session in relation to some topics has been substantially reduced because more time was made available to the Committee, which permitted full utilization of the conference service facilities available to the Commission. The Commission intends to maintain this practice in the future whenever it deems it appropriate and feasible.

565. The Commission organized its work at the current session so as to enable the Drafting Committee to present its reports in plenary in a staggered manner, thereby providing optimum conditions not only for the consideration and adoption in plenary of the texts in question, but also for the preparation by special rapporteurs of commentaries to those texts. The Commission will bear in mind the possibility of proceeding in the same way at future sessions.

566. The Commission is aware that commentaries to articles are of crucial importance for the analysis and interpretation of the texts themselves. It therefore considers it essential that commentaries should duly reflect the collective understanding of members. As a way of facilitating the achievement of that goal, the Commission encourages special rapporteurs to hold appropriate consultations in the framework of the Drafting Committee before draft commentaries are submitted in plenary.

567. As indicated in paragraph 240 of its report on its thirty-ninth session,<sup>393</sup> the Commission considers as

<sup>391</sup> *Yearbook ... 1971*, vol. II (Part Two), p. 1, document A/CN.4/245.

<sup>392</sup> *Yearbook ... 1987*, vol. II (Part Two), p. 55.

<sup>393</sup> *Ibid.*

worthy of further examination the possibility of providing the Drafting Committee with computerized assistance. At the moment, however, it does not have sufficient information to assess the feasibility and potential advantages of such technology in relation to the work of the Drafting Committee. It intends to revert to this question at a later stage.

568. The Commission also considered the question of the composition of the Drafting Committee. It draws attention in that connection to the two criteria referred to in paragraph 238 of its report on its thirty-ninth session,<sup>394</sup> namely ensuring equitable representation in the Committee of the principal legal systems and the various languages, and keeping the size of the Committee within limits compatible with its drafting responsibilities. The Commission believes that, while the composition of the Drafting Committee should remain governed by those two criteria, due account should be taken of the particular interest of certain members of the Committee to participate in the deliberations on specific topics only.

#### *Duration of the session*

569. The Commission notes with appreciation that, notwithstanding the financial crisis, the normal arrangements for a 12-week session have been restored, and reiterates its view, as endorsed by the General Assembly in paragraph 7 of resolution 42/156, that the requirements of the work on the progressive development of international law and its codification and the magnitude and complexity of the subjects on the Commission's agenda make it desirable that the usual duration of its sessions be maintained. It should be noted that the Commission made full use of the time and services made available to it during the 12 weeks of its current session.

#### *Documentation*

570. The Commission wishes to stress that the task of its members would be facilitated if they were kept regularly informed of international law-making activities within and outside the United Nations. To that end, the Codification Division of the Office of Legal Affairs should, to the extent allowed by existing resources and United Nations directives on control and limitation of documentation, gather and circulate in a timely manner material relevant to the topics in the Commission's current programme of work originating in the United Nations, the specialized agencies and IAEA, and non-governmental organizations concerned with international law. Such material would consist of international treaties elaborated in the framework of the above-mentioned organizations, resolutions or decisions of their principal organs, and studies or reports prepared by or for such organs or organizations.

571. The Commission draws attention to the point made in paragraph 244 of its report on its thirty-ninth

session<sup>395</sup> that an important condition for the *reports of special rapporteurs* to meet their purpose — namely to lay the ground for a systematic and meaningful consideration of the topics on the agenda — is that they be submitted and distributed sufficiently early. The Commission is aware that the views expressed in the Sixth Committee of the General Assembly are an essential ingredient in the preparation of the reports in question, which can therefore not be completed until several months after the conclusion of the Assembly's session. It is, however, concerned at the negative effects which the late circulation of essential documents has on its proceedings. In order to ease the time constraints under which special rapporteurs have to work, the Commission expresses the wish that, as a way of making up for the unavoidable delays in the issuance of the relevant summary records, the texts of statements delivered in the Sixth Committee on the items concerning the report of the Commission and the draft Code of Crimes against the Peace and Security of Mankind be made available to the special rapporteurs as soon as possible. The Commission noted with satisfaction that, for its current session, the topical summary of the discussion held in the Sixth Committee on the above-mentioned items had been completed and made available to special rapporteurs in a provisional form earlier than usual and that the Codification Division intended to make every effort to abide by the same arrangements in the future.

572. The Commission draws attention to the fact that the deadline which it had set for the presentation by Governments of comments and observations on the draft articles on jurisdictional immunities of States and their property and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier<sup>396</sup> was observed by very few States and that the Special Rapporteurs concerned were as a result unable to produce their reports sufficiently early for the Commission to abide by the calendar of work it had set itself in relation to those two topics (see para. 555 above).

573. In setting deadlines for the presentation by Governments of comments and observations on draft articles adopted on first reading, the Commission will in future be guided by two considerations: on the one hand, it will leave sufficient leeway to Governments for the preparation of their comments and observations; and on the other hand, it will take into account not only the time needed by special rapporteurs to analyse the communications in question and propose revised texts, but also the time required for translating and processing those communications and the unavoidable and sometimes substantial delays which may occur in their transmission.

574. The Commission noted with satisfaction that the fourth edition of the publication *The Work of the International Law Commission* had been issued in English prior to the opening of the fortieth session. It wishes to express its appreciation to the Codification Division and

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*, p. 53, paras. 222-223.

<sup>394</sup> *Ibid.*

other competent services of the Secretariat for having thus made available to diplomatic and academic circles a highly informative publication, and at the same time to voice the hope that the other language versions will be issued in the near future.

575. The Commission noted that some delays were expected in the publication of volume I and volume II (Part Two) of the 1987 *Yearbook of the International Law Commission*. It also noted with concern that neither the 1985 nor the 1986 edition of the *Yearbook* had yet been published in Russian. While realizing that the financial crisis has unavoidable effects on publishing and printing programmes of the Secretariat, the Commission hopes that established schedules for the publication of the *Yearbook* will be adhered to as faithfully as possible. The Commission further noted that the *Yearbook* had never been published in Chinese. It hopes that every effort will be made, in conformity with General Assembly resolution 42/207 C of 11 December 1987, to ensure respect for equal treatment of the official languages of the United Nations in the publication of the *Yearbook*.

576. With regard to *summary records*, the Commission, taking into account, in particular, the request addressed to the Secretary-General in paragraph 1 of General Assembly resolution 42/207 C to ensure respect for equal treatment of the official languages of the United Nations, is of the view that statements made in plenary should be summarized for the purpose of the records on the basis of the language of delivery, rather than on the basis of an interpretation from the original. The Commission observes in that connection that, irrespective of the skills of *précis*-writers, any retranslation process inevitably results in inaccuracies and distortions, particularly when applied to matters of a highly specialized nature involving the use of complex terminology.

577. The Commission noted that, as a result of financial constraints, a special policy was applied at the United Nations Office at Geneva in relation to the issuance of the summary records of United Nations bodies meeting in Geneva from May to July. While the production of the original English or French version of each summary record keeps pace with the calendar of meetings of the organ concerned, the same does not apply to the production of the other language versions, which can in the case of some languages lag seriously behind. The Commission regrets this departure from the principle of equal treatment of all the official languages of the United Nations. It wishes to emphasize that all the language versions of the summary records should be issued in a timely and orderly manner, avoiding skips in the normal sequence, and that records should not be published in final form in any language until all the corrections members may find necessary to submit have been received. It also requests that the summary records issued after the conclusion of the session be dispatched to members without delay.

578. While noting with appreciation that the deadline for the submission of corrections to the provisional sum-

mary records had been extended from three days to two weeks, the Commission observes that the two-week period begins on the date appearing on the cover page of each summary record and that this date often precedes the actual date of release by several days, if not weeks. In order for the time-limit of two weeks to be a meaningful one, the Commission believes that the various language versions of the summary records should bear a date roughly corresponding to the date of release. The Commission also feels that, in the case of summary records issued after the conclusion of the session, the deadline for the submission of corrections should be further extended or applied with maximum flexibility, taking into account in particular the transmission delays to and from members' places of residence.

579. The Commission has often insisted on the importance it attaches to a meaningful dialogue with its parent body; thus, at the current session, it considered various ways of strengthening its relationship with the General Assembly. With a view to making it easier for delegations in the Sixth Committee to acquaint themselves with the content of its report, the Commission decided that the general description of its work appearing in chapter I of its report should henceforth be expanded and include an indication of the concrete results achieved on the various topics in the course of the session, accompanied by footnote references to the meetings at which each topic was considered. In the Commission's opinion, this expanded treatment of the general description of the work accomplished during the session meets the purpose of the first of the two proposals referred to in paragraph 246 of its report on its thirty-ninth session.<sup>397</sup> As for the second of those proposals, the Commission concluded that, for practical reasons, it would be difficult to circulate in advance the introductory statement by the Chairman of the Commission.

580. The Commission is aware that delegations to the General Assembly have little time to study the Commission's report before it is taken up by the Sixth Committee. While an obvious remedy would be to expedite the production of the report, there is little the Commission can do to that end.

581. The Commission is of the view that, as long as the current time frame is maintained for its session, the only way of allowing delegations to the General Assembly more time for studying the report would be for the Sixth Committee to defer consideration of the corresponding agenda items to a later stage in the Assembly's session.

582. Also with a view to strengthening its relationship with the General Assembly, the Commission considered the possibility of enabling special rapporteurs to attend the Sixth Committee's debate on the report of the Commission so as to give them the opportunity to acquire a more comprehensive view of existing positions, to take note of observations made and to begin preparing their reports at an earlier stage. The Commission is of the view

<sup>397</sup> *Ibid.*, p. 55.

that this question, as well as the question dealt with in paragraph 581 above, could usefully be examined in the Sixth Committee at the forty-third session of the General Assembly.

583. In order to facilitate the task of Governments in preparing their comments and observations on draft articles adopted on first reading, the Commission asks the Secretariat to accompany its request for such comments and observations with a consolidated compilation of all the articles and relevant commentaries, which are often scattered throughout several reports and therefore not easily accessible.

584. Finally, the Commission wishes to place on record its satisfaction at the overall quality of the services provided by the Secretariat and expresses its thanks to the Codification Division particularly for the help provided to special rapporteurs.

#### **B. Co-operation with other bodies**

585. The Commission was represented at the May 1988 session of the European Committee on Legal Co-operation in Strasbourg by Mr. Emmanuel J. Roucounas, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Mr. Frits Hondius. Mr. Hondius addressed the Commission at its 2071st meeting, on 30 June 1988; his statement is recorded in the summary record of that meeting.

586. The Commission was represented at the August 1987 session of the Inter-American Juridical Committee in Rio de Janeiro by the outgoing Chairman of the Commission, Mr. Stephen C. McCaffrey, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Jorge Reinaldo A. Vanossi. Mr. Vanossi addressed the Commission at its 2047th meeting, on 18 May 1988; his statement is recorded in the summary record of that meeting.

587. The Commission was represented at the March 1988 session of the Asian-African Legal Consultative Committee in Singapore by the outgoing Chairman of the Commission, Mr. Stephen C. McCaffrey, who attended as Observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. Frank X. Njenga. Mr. Njenga addressed the Commission at its 2076th meeting, on 8 July 1988; his statement is recorded in the summary record of that meeting.

#### **C. Date and place of the forty-first session**

588. The Commission decided to hold its next session at the United Nations Office at Geneva from 8 May to 28 July 1989.

#### **D. Representation at the forty-third session of the General Assembly**

589. The Commission decided that it should be represented at the forty-third session of the General Assembly by its Chairman, Mr. Leonardo Díaz González.

#### **E. International Law Seminar**

590. Pursuant to General Assembly resolution 42/156 of 7 December 1987, the United Nations Office at Geneva organized the twenty-fourth session of the International Law Seminar during the present session of the Commission. The Seminar is intended for postgraduate students of international law and young professors or government officials dealing with questions of international law in the course of their work.

591. A selection committee under the chairmanship of Professor Philippe Cahier (Graduate Institute of International Studies, Geneva) met on 31 March 1988 and, after having considered more than 50 applications for participation in the Seminar, selected 24 candidates of different nationalities and mostly from developing countries. Eighteen of the selected candidates, as well as four UNITAR fellowship holders, were able to participate in this session of the Seminar.<sup>398</sup>

592. The session of the Seminar was held at the Palais des Nations from 6 to 24 June 1988 under the direction of Ms. Meike Noll-Wagenfeld, United Nations Office at Geneva. During the three weeks of the session, the participants in the Seminar attended the meetings of the Commission and lectures specifically organized for them. Several lectures were given by members of the Commission, as follows: Mr. Gaetano Arangio-Ruiz: "The International Court of Justice" (two lectures); Mr. Julio Barboza: "International liability for injurious consequences arising out of acts not prohibited by international law"; Mr. Stephen C. McCaffrey: "The work of

<sup>398</sup> The participants in the twenty-fourth session of the International Law Seminar were: Mr. Abderrachid Abdessemed (Algeria); Ms. Frida Armas Pflirter (Argentina); Mr. Samuel Blay (Australia); Mr. Ali Bojji (Morocco); Mr. Javier Brito Moncada (UNITAR fellowship holder) (Mexico); Mr. Ayigan-Ayi D'Almeida (Togo); Ms. Neile Fanana (Lesotho); Mr. Carlos Garcia Carranza (Honduras); Mr. Philippe Gautier (Belgium); Ms. Daw Hla Myo Nwe (UNITAR fellowship holder) (Burma); Mr. Robert Hunja (Kenya); Mr. Chinnasamy Jayaraj (India); Mr. Abdu Muntari Kaita (UNITAR fellowship holder) (Nigeria); Mr. Tuomas Kuokkanen (Finland); Mr. Raul Pangalangan (Philippines); Mr. Otavio Sa Ricarte (UNITAR fellowship holder) (Brazil); Mr. Hernan Salinas-Burgos (Chile); Mr. Oscar Schiappa-Pietra Cubas (Peru); Ms. Lena Stenwall (Sweden); Ms. Milena Tabakova (Bulgaria); Ms. Susanne Wasum-Rainer (Federal Republic of Germany); Mr. Thusantha Wijemanna (Sri Lanka).

the International Law Commission"; Mr. Motoo Ogiso: "Jurisdictional immunities of States and their property"; Mr. Jiuyong Shi: "The case of the future Hong Kong Special Administrative Region"; Mr. Alexander Yankov: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier".

593. In addition, talks were given by officials of the United Nations Office at Geneva, of the secretariats of other international organizations in Geneva, and of ICRC, as follows: Mr. Gudmundur Alfredsson (Centre for Human Rights): "Legal aspects of the activities of the Centre for Human Rights"; Ms. Helga Klein (Secretary to the Human Rights Committee, Centre for Human Rights): "The work of the Human Rights Committee"; Mr. Dennis McNamara (Deputy Director, Division of Refugee Law and Doctrine, UNHCR): "International instruments for protection of refugees"; Mr. Frank Verhagen (UNDRO): "Legal aspects of emergency management"; Ms. Louise Doswald-Beck (Legal Division, ICRC): "International humanitarian law and public international law"; Mr. Alfons Noll (Legal Adviser, ITU): "The role and activities of the legal adviser in an international organization: example ITU".

594. As at the last six sessions of the Seminar, the participants were also officially received by the Canton of Geneva in the Alabama Room at the Hôtel de Ville. On that occasion they were addressed by Mr. E. Bollinger, Chief of Information of the Canton, who gave a talk on the constitutional and political features of Switzerland in general and of the Canton of Geneva in particular.

595. The participants had access to the facilities of the United Nations Library. They received copies of basic documents necessary for following both the debates of the Commission and the lectures and could also obtain or purchase at reduced prices United Nations printed documents.

596. At the end of the Seminar, Mr. Leonardo Díaz González, Chairman of the Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, addressed the participants. In the

course of this brief ceremony, the participants were presented with certificates attesting to their participation in the twenty-fourth session of the Seminar.

597. The Seminar is funded by voluntary contributions from Member States and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Argentina, Austria, Denmark, Finland, the Federal Republic of Germany and Sweden had made fellowships available to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of those fellowships, it was possible to achieve adequate geographical distribution of participants and bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. In 1988, fellowships were awarded to nine participants. Of the 544 candidates, representing 122 nationalities, accepted as participants in the Seminar since its inception in 1965, fellowships have been awarded to 264.

598. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers, and especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. It is therefore concerned that, in 1988, only nine fellowships, compared with 15 in 1987, could be awarded. It recommends that, in order to give an increasing number of participants from developing countries an opportunity to attend the Seminar, the General Assembly should again appeal earnestly to States which are able to do so to make the voluntary contributions that are urgently needed for the holding of the Seminar.

599. The Commission also noted with concern that, in 1988, the Seminar was held solely in the English language, no interpretation services being made available to it. While being aware of the constraints resulting from the financial crisis, the Commission expresses the hope that every effort will be made to provide the Seminar at future sessions with adequate services and facilities.