

# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1982

*Volume II*  
*Part One*

*Documents of the thirty-fourth session*

---

UNITED NATIONS





# YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1982

*Volume II*  
*Part One*

*Documents of the thirty-fourth session*

---

UNITED NATIONS

New York, 1984



## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook* . . . , followed by the year (for example, *Yearbook* . . . 1980).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

\*  
\* \*

The reports of the special rapporteurs and other documents considered by the Commission during its thirty-fourth session, which were originally issued in mimeographed form, are reproduced in the present volume, incorporating the corrigenda issued by the Secretariat and the editorial changes required for the presentation of the final text.

A/CN.4/SER.A/1982/Add.1 (Part 1)

UNITED NATIONS PUBLICATION

*Sales No. E. 83.V.3 (Part 1)*

03300P



## CONTENTS

	<i>Page</i>
Abbreviations .....	iv
Note concerning quotations .....	iv
<b>Filling of casual vacancies (article 11 of the Statute) (agenda item 1)</b>	
<i>Document A/CN.4/355</i> . Note by the Secretariat .....	1
<b>Question of treaties concluded between States and international organizations or between two or more international organizations (agenda item 2)</b>	
<i>Document A/CN.4/353</i> . Eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur .....	3
<b>State responsibility (agenda item 3)</b>	
<i>Document A/CN.4/351 and Add.1-3</i> . Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts ....	15
<i>Document A/CN.4/354 and Add.1 and 2</i> . Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur .....	22
<b>International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 4)</b>	
<i>Document A/CN.4/360</i> . Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur .....	51
<b>The law of the non-navigational uses of international watercourses (agenda item 5)</b>	
<i>Document A/CN.4/348</i> . Third report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur .....	65
<i>Document A/CN.4/352 and Add.1</i> . Replies of Governments to the Commission's questionnaire .....	192
<b>Jurisdictional immunities of States and their property (agenda item 6)</b>	
<i>Document A/CN.4/357</i> . Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur .....	199
<b>Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (agenda item 7)</b>	
<i>Document A/CN.4/356 and Add.1-3</i> . Information received from Governments .....	231
<i>Document A/CN.4/359 and Add.1</i> . Third report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur .....	247
<b>Draft Code of Offences against the Peace and Security of Mankind (paragraphs 1 and 2 of General Assembly resolution 36/106 of 10 December 1981) (agenda item 8)</b>	
<i>Document A/CN.4/358 and Add.1-4</i> . Comments and observations received from Governments pursuant to General Assembly resolution 36/106 .....	273
<b>Check-list of documents of the thirty-fourth session .....</b>	<b>281</b>

## ABBREVIATIONS

CMEA	Council for Mutual Economic Assistance
ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East (now ESCAP)
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
World Bank	
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSU	International Council of Scientific Unions
IDB	Inter-American Development Bank
ILA	International Law Association
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
WHO	World Health Organization
WMO	World Meteorological Organization

\*  
\* \*

<i>I.C.J. Pleadings</i>	ICJ, <i>Pleadings, Oral Arguments, Documents</i>
<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1–24: up to and including 1930)
<i>P.C.I.J., Series B</i>	PCIJ, <i>Collection of Advisory Opinions</i> (Nos. 1–18: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (beginning in 1931)

---

## 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.

## **FILLING OF CASUAL VACANCIES (ARTICLE 11 OF THE STATUTE)**

[Agenda item 1]

**DOCUMENT A/CN.4/355**

**Note by the Secretariat**

[*Original: English*]  
[22 March 1982]

1. Following the election on 19 March 1982 of Mr. Mohammed Bedjaoui as judge of the International Court of Justice, a seat has become vacant on the International Law Commission.

2. In this case, article 11 of the Commission's Statute is applicable. It prescribes:

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 2 reads:

1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8 reads:

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

3. The term of office of the member to be elected by the Commission will expire at the end of 1986.



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

[Agenda item 2]

DOCUMENT A/CN.4/353

## Eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur

[Original: French]  
[26 March 1982]

### CONTENTS

	Paragraphs	Page
INTRODUCTION .....	1-10	5
CONSIDERATION OF THE DRAFT ARTICLES .....	11-48	6
PART III. OBSERVATION, APPLICATION AND INTERPRETATION OF TREATIES .....	11-32	6
Section 1. Observance of treaties .....	11-18	6
Article 27 (Internal law of a State, rules of an international organization and observance of treaties) .....	11-18	6
Section 2. Application of treaties .....	19-21	7
Article 28 (Non-retroactivity of treaties),		
Article 29 (Territorial scope of treaties between one or more States and one or more international organizations) <i>and</i>		
Article 30 (Application of successive treaties relating to the same subject-matter) .....	19-21	7
Section 3. Interpretation of treaties .....	22	8
Article 31 (General rule of interpretation).		
Article 32 (Supplementary means of interpretation) <i>and</i>		
Article 33 (Interpretation of treaties authenticated in two or more languages) .....	22	8
Section 4. Treaties and third States or third international organizations .....	23-32	8
Article 34 (General rule regarding third States and third international organizations),		
Article 35 (Treaties providing for obligations for third States or third international organizations),		
Article 36 (Treaties providing for rights for third States or third international organizations),		
Article 36 <i>bis</i> (Effects of a treaty to which an international organization is party with respect to third States members of that organization),		
Article 37 (Revocation or modification of obligations or rights of third States or third international organizations) <i>and</i>		
Article 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom) .....	23-32	8
PART IV. AMENDMENT AND MODIFICATION OF TREATIES .....	33-34	10
Article 39 (General rule regarding the amendment of treaties),		
Article 40 (Amendment of multilateral treaties) <i>and</i>		
Article 41 (Agreements to modify multilateral treaties between certain of the parties only) .....	33-34	10
PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES .....	35-46	10
Section 1. General provisions .....	35-39	10
Article 42 (Validity and continuance in force of treaties),		
Article 43 (Obligations imposed by international law independently of a treaty),		

	Paragraphs	Page
Article 44 (Separability of treaty provisions) <i>and</i>		
Article 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)	35–39	10
Section 2. Invalidity of treaties .....	40–41	11
Article 46 (Violation of provisions regarding competence to conclude treaties),		
Article 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty),		
Article 48 (Error),		
Article 49 (Fraud),		
Article 50 (Corruption of a representative of a State or of an international organization),		
Article 51 (Coercion of a representative of a State or of an international organization),		
Article 52 (Coercion of a State or of an international organization by the threat or use of force) <i>and</i>		
Article 53 (Treaties conflicting with a peremptory norm of general international law ( <i>jus cogens</i> )) .....	40–41	11
Section 3. Termination and suspension of the operation of treaties .....	42	11
Article 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties),		
Article 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force),		
Article 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal),		
Article 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties),		
Article 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only),		
Article 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty),		
Article 60 (Termination or suspension of the operation of a treaty as a consequence of its breach),		
Article 61 (Supervening impossibility of performance),		
Article 62 (Fundamental change of circumstances),		
Article 63 (Severance of diplomatic or consular relations) <i>and</i>		
Article 64 (Emergence of a new peremptory norm of general international law ( <i>jus cogens</i> )) .....	42	11
Section 4. Procedure .....	43–45	12
Article 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty),		
Article 66 (Procedures for judicial settlement, arbitration and conciliation),		
Article 67 (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) <i>and</i>		
Article 68 (Revocation of notifications and instruments provided for in articles 65 and 67) .....	43–45	12
Section 5. Consequences of the invalidity, termination or suspension of the operation of a treaty .....	46	12
Article 69 (Consequences of the invalidity of a treaty),		
Article 70 (Consequences of the termination of a treaty),		
Article 71 (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) <i>and</i>		
Article 72 (Consequences of the suspension of the operation of a treaty) .....	46	12
PART VI. MISCELLANEOUS PROVISIONS .....	47	13
Article 73 (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization),		
Article 74 (Diplomatic and consular relations and the conclusion of treaties) <i>and</i>		
Article 75 (Case of an aggressor State) .....	47	13
PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION .....	48	13
Article 76 (Depositaries of treaties),		
Article 77 (Functions of depositaries),		
Article 78 (Notifications and communications),		
Article 79 (Correction of errors in texts or in certified copies of treaties) <i>and</i>		
Article 80 (Registration and publication of treaties) .....	48	13
PROVISIONS ALREADY CONSIDERED IN SECOND READING .....	49–53	13

## Introduction

1. In order to enable the International Law Commission to begin at its thirty-third session the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations, previously adopted on a provisional basis, the Special Rapporteur included in his tenth report<sup>1</sup> general observations and a review of articles 1–41 of the draft articles as adopted in first reading, in the light of the written comments and observations of Governments and principal international organizations<sup>2</sup> and views expressed in the Sixth Committee of the General Assembly.<sup>3</sup> The Commission reviewed and discussed articles 1–41, referred them to the Drafting Committee, and adopted in second reading the text of articles 1, 2 (para. 1 (a), (b), (b bis), (b ter), (c), (c bis), (d), (e), (f), (g), (i) and (j) and para. 2) and articles 3–26.<sup>4</sup> Consequently, although articles 27–41 have been considered by the Commission, they will have to be considered again.

2. The purpose of this report is to resubmit to the Commission articles 27–41, and also articles 42–80 and the annex, which were adopted in first reading but not covered by the preceding report, because the Commission hopes to complete the second reading at its thirty-fourth session and to formulate appropriate recommendations to the General Assembly concerning the final form of the draft<sup>5</sup> and also because the General Assembly, in paragraph 3 (a) of its resolution 36/114 of 10 December 1981, recommended that the Commission should:

Complete at its thirty-fourth session the second reading of the draft articles on treaties concluded between States and international organizations or between international organizations . . . ;

3. Throughout the course of its work on this topic, the Commission has been particularly careful to obtain all relevant information and observations from international organizations.<sup>6</sup> A detailed questionnaire was sent to a large number of international organizations through the Secretary-General and the Special Rapporteur was able to use a substantial amount of the information thus collected in his second report.<sup>7</sup> In 1979, before completing its first reading, the Commission requested the comments and observations of Governments and of international organizations on the

articles it had adopted provisionally. In 1980 the Commission requested the Secretary-General again to invite Governments and the international organizations concerned to submit their comments and observations on the draft articles, particularly the newly-adopted articles. Lastly, in 1981 it reminded Governments and principal international organizations, through the Secretary-General, of its invitation for the submission to the Secretary-General of comments and observations on the draft articles. The Commission has thus made every effort to obtain, particularly from the organizations most concerned, all the information that it could take into account in accordance with the desire repeatedly expressed by the General Assembly, in particular in resolution 36/114.

4. In fact, after the end of the most recent session of the Commission, the Special Rapporteur was in possession not only of the observations of a number of Governments and of international organizations<sup>8</sup> but also of a substantial body of comments made during the discussion in the Sixth Committee at the thirty-sixth session of the General Assembly.<sup>9</sup> Although most of the international organizations indicated that for the time being they had no comments or observations to present, a great many specific observations will be taken into account.

5. The observation thus made available to the Commission since its thirty-third session can be divided into three groups: those of a general nature, those relating to the articles already considered by the Commission in second reading (arts. 1–26) and those relating to the articles to be considered by the Commission at its thirty-fourth session (arts. 27–80 and the annex).

6. A number of general observations relate to aspects of the draft articles that were discussed at length in the course of the Commission's earlier work: the need to follow the 1969 Vienna Convention on the Law of Treaties<sup>10</sup> as closely as possible, while taking into account the specific differences between States and international organizations, the need to simplify the text of the articles as much as possible without sacrificing clarity, and so on.

7. Some of these general observations are particularly important because they concern, directly or indirectly, the ultimate fate of the draft articles, a question that will be settled by the General Assembly but which the Commission, as noted above, will doubtless wish to consider at its thirty-fourth session. The general feeling prevailing during the debate in the Sixth Committee seemed to be that after the second reading the draft articles could be referred to a codification conference

<sup>1</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 43, document A/CN.4/341 and Add.1.

<sup>2</sup> See *Yearbook . . . 1981*, vol. II (Part Two), p. 181, annex II.

<sup>3</sup> See particularly "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fourth session of the General Assembly" (A/CN.4/L.311), and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326).

<sup>4</sup> For a summary of the discussion in the Commission at its thirty-third session, see *Yearbook . . . 1981*, vol. II (Part Two), pp. 116–120, paras. 103–128; and for the text of draft articles 1–26, adopted in second reading, *ibid.*, pp. 120 *et seq.*, para. 129.

<sup>5</sup> *Ibid.*, p. 117, para. 107.

<sup>6</sup> According to the practice followed in this regard, the organizations consulted were, in addition to the United Nations, the inter-governmental organizations invited to send observers to United Nations codification conferences.

<sup>7</sup> *Yearbook . . . 1973*, vol. II, pp. 76–77 and 93, document A/CN.4/271, paras. 2–5 and annex.

<sup>8</sup> The comments and observations of Governments and of principal international organizations received before and after the drafting of the present report were distributed under the symbol A/CN.4/350 and Add.1–11, and are reproduced in *Yearbook . . . 1982*, vol. II (Part Two), annex.

<sup>9</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 34–110.

<sup>10</sup> Hereinafter called "Vienna Convention". For the text, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

for transformation into a treaty. Other views were expressed, and the need for a special conventional instrument covering treaties to which international organizations are parties was called in question. It was observed once again that it would be possible to prepare a draft referring broadly to the relevant articles of the Vienna Convention and containing only a minimum of articles embodying provisions that differ substantially from the latter Convention. In that case it would not even be necessary to prepare a special convention; a "declaration" adopted by the General Assembly would suffice to sanction the codification work, based on the close analogy that exists between treaties between States and treaties to which international organizations are parties.

8. For the purpose of this eleventh report, it will suffice for the Special Rapporteur to observe that it is not impossible that the Commission will recommend the convening of a general conference to which the draft articles will be submitted. If so, the only form which the draft articles can be given, at least at the current stage, is that of a set of articles that could become an autonomous convention, independent of the Vienna Convention. Even if the Commission were to recommend to the Sixth Committee that it should propose a simple "declaration" on the topic to the General Assembly, there would be no reason why the provisions to be included in the declaration should not retain their current form. In fact, the very considerable shortening of the text of the draft articles by the use of "*renvois*" would not only create the technical difficulties mentioned by the Special Rapporteur in his tenth report,<sup>11</sup> but would also no longer provide, materially, a complete picture of the applicable text and would thus unnecessarily complicate the reader's task. The real choice is between the form of a *declaration* and that of a *convention*; in both cases, the text of the draft articles must retain its current form until it is submitted to the organ competent to take a decision on its future.

<sup>11</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 47, document A/CN.4/341 and Add.1, paras. 11 *et seq.* Furthermore, as the Special Rapporteur pointed out (*ibid.*, p. 47, footnote 16), it would doubtless be necessary to bring the terminology of the draft articles completely into line with that of the Vienna Convention, which would entail a great deal of work involving a number of substantive problems. Is it necessary, for example, to recall that the word "treaty" is used in different senses in the two texts?

It has also been suggested that the draft should be supplemented (or even replaced) by a set of guidelines concerning the conclusion of such treaties. The Special Rapporteur believes that in its resolution 36/114, the General Assembly rejected that suggestion and that the Commission cannot assume the task of guiding the practice of States or even that of international organizations.

9. A second group of observations concerns the articles already considered in second reading, namely articles 1–26. These observations were made basically in the Sixth Committee. Most of them concern points which have been discussed at length in the Commission and on which compromises have been reached, sometimes with difficulty: for example, the use and meaning of expressions such as "treaty", "act of formal confirmation", "international organization", "rules of the organization" and "full powers". The Special Rapporteur considers that there is no need for the Commission to consider these points again. Some observations call in question both an article already considered in second reading and an article which has not yet been considered in second reading; in this case, the Special Rapporteur will mention the observation in connection with the consideration of the latter article (for example, article 7 and article 46). Lastly, it may be necessary to accord special treatment to articles 5 and 20; article 5 was adopted for the first time in second reading and its tardy adoption made it impossible to draw certain conclusions deriving from that article with regard to article 20; the Special Rapporteur will therefore re-examine both articles in this report, after articles 27–80 and the annex.

10. Lastly, there are the observations concerning articles 27–41, on the one hand, and articles 42–80 and the annex, on the other. With regard to articles 27–41, the Special Rapporteur will supplement the information already given in the addendum to his tenth report by the observations made at the thirty-third session of the Commission and by the observations and comments submitted since the end of that session by Governments and international organizations.<sup>12</sup> As regards articles 42–80 and the annex, he will take into consideration all the comments and observations submitted since the completion of the first reading.

<sup>12</sup> See footnote 8 above.

## Consideration of the draft articles

### PART III.<sup>13</sup> OBSERVATION, APPLICATION AND INTERPRETATION OF TREATIES

#### SECTION 1. OBSERVANCE OF TREATIES

##### ARTICLE 27 (Internal law of a State, rules of an international organization and observance of treaties)

11. From the outset, article 27 was the subject of extensive discussion in the Commission and subsequently of many observations and comments.

<sup>13</sup> For the purpose of harmonization, it would be desirable, in the French text, to replace the titles "Première partie", "Deuxième partie", etc., adopted in first reading, by the wording of the Vienna Convention: "Partie I", "Partie II", etc.

12. In first reading the Commission adopted a draft article reading as follows:<sup>14</sup>

##### Article 27

1. A State party to a treaty between one or more States and one or more international organizations may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the

<sup>14</sup> *Yearbook . . . 1977*, vol. II (Part Two), p. 118.



intention of the parties, is subject to the exercise of the functions and powers of the organization.

3. The preceding paragraphs are without prejudice to [article 46]. The Commission decided, however, to reconsider this text during the second reading.

13. In his tenth report<sup>15</sup> the Special Rapporteur proposed the following text:

1. Without prejudice to article 46, a State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. Without prejudice to articles 46 and 73, an international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless performance of the treaty, according to the intention of the parties, is subject to the exercise of the functions and powers of the organization.

14. This text was considered in second reading by the Commission at its thirty-third session, and referred to the Drafting Committee, which did not have time to consider it.<sup>16</sup> Generally speaking, the members of the Commission expressed a preference for a text having three paragraphs, such as that adopted in first reading. Moreover, they considered on the whole that there was no point in including a *renvoi* to article 73, which would add nothing to the text. With regard to the wording of the exception beginning "unless performance of the treaty . . .", included without change in both versions of the draft article, they criticized the reference to "the intention of the parties", a subjective criterion that was difficult to apply, and to "the exercise of the functions and powers of the organization", a vague and general concept. The Special Rapporteur agreed with those three observations.

15. What the members of the Commission had in mind was a simple case, which occurs frequently, in which an organization concludes an agreement with a State in order to implement a decision taken by one of its organs, while reserving its freedom to maintain or modify that decision. This occurs, for example, when the Security Council adopts a resolution concerning the conditions of a cease-fire and the United Nations concludes an agreement with one or more States with a view to the implementation of that resolution.

16. It was pointed out that similar situations might arise in the case of treaties concluded by States (with States or even with international organizations). A State might well conclude a treaty for the purpose of applying a law, *as long as that law remains in force*; in other words, the legislator retains the right to amend that law. This is a situation which simply arises less frequently in the case of States than in that of international organizations.

17. In fact, this involves a question relating to the interpretation of the scope of a treaty. There are thus two possible solutions. After close consideration, the Special Rapporteur considers that the simplest solution would be to revert to the version of paragraphs 1 and 3 adopted in first reading and to delete the exception from paragraph 2 as follows:

**2. An international organization party to a treaty**

**may not invoke the rules of the organization as justification for its failure to perform the treaty.**

The commentary to article 27 reflects the problems examined by the Commission. If the Commission wishes to retain the exception, paragraph 2 should be drafted as follows:

**2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty, unless the latter, by reason of its subject, depends on the adoption or maintenance of a decision of the organization.**

18. Concern was expressed that the proviso in article 46 might not protect an organization sufficiently against undertakings that violate rules of the organization other than those relating to its competence to conclude agreements. It is conceivable, for example, that an international organization might conclude a treaty in violation of a *substantive* rule of its constituent instrument and would subsequently be prevented, by reason of article 27, from withdrawing from that undertaking. However, there would seem to be little justification for this hypothesis: an organization is bound by its constituent instrument and has no capacity to conclude agreements in violation of that instrument; none of its organs is competent to do so and consequently the proviso embodied in article 46 is sufficiently broad in scope to protect the organization effectively.

## SECTION 2. APPLICATION OF TREATIES

**ARTICLE 28 (Non-retroactivity of treaties),**

**ARTICLE 29 (Territorial scope of treaties between one or more States and one or more international organizations) and**

**ARTICLE 30 (Application of successive treaties relating to the same subject-matter)**

19. No observations were made on articles 28–30 as adopted in first reading. In his tenth report<sup>17</sup> the Special Rapporteur proposed a purely drafting change in article 30, paragraph 4, which could easily be made much less cumbersome:

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between two parties, which are each parties to both treaties, the same rule applies as in paragraph 3;

(b) as between two parties, of which one is party to both treaties and the other to only one of the treaties, the treaty which binds the two parties in question governs their mutual rights and obligations.

20. A question of principle was raised in the Commission. One member considered<sup>18</sup> that there were two categories of treaties, which were quite different in character: treaties between one or more States and one or more international organizations and treaties between international organizations, and that in the case of conflicts between successive treaties that distinction might give rise to solutions that would introduce more numerous distinctions in the rules set forth in article 30. However, the exchange of views on that subject which took place in the Commission showed that it might be sufficient to mention that aspect of the problem in the commentary. Article 30 of the Vienna Convention and draft article 30 were designed to resolve a certain number of simple cases of conflicts between treaties,

<sup>15</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 88.

<sup>16</sup> *Yearbook* . . . 1981, vol. I, pp. 157–166, 1673rd meeting, paras. 4–42; 1674th meeting, paras. 1–27.

<sup>17</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 89.

<sup>18</sup> *Yearbook* . . . 1981, vol. I, p. 167, 1674th meeting, paras. 33–34 (Mr. Ushakov).

and not all such conflicts. Following its traditional course, the Commission did not seek to complete or correct, *mutatis mutandis*, the solutions adopted in the case of treaties between States. Although all the members of the Commission acknowledged that treaties between one or more States and one or more organizations and treaties between organizations were of equal value, it is not impossible that in some cases not covered in article 30 that distinction could provide the basis for a solution in the consideration of certain conflicts between treaties.

21. The Commission referred articles 28–30 to the Drafting Committee, which did not have time to consider them. The Special Rapporteur is not submitting any proposals other than that set forth in his tenth report, which he recalled above.

### SECTION 3. INTERPRETATION OF TREATIES

ARTICLE 31 (General rule of interpretation),

ARTICLE 32 (Supplementary means of interpretation) and

ARTICLE 33 (Interpretation of treaties authenticated in two or more languages)

22. Articles 31–33, which are identical to the corresponding provisions of the Vienna Convention, were not the subject of any comment. They did not give rise to any objection in the debates at the thirty-third session of the Commission,<sup>19</sup> which referred them to the Drafting Committee.

### SECTION 4. TREATIES AND THIRD STATES OR THIRD INTERNATIONAL ORGANIZATIONS

ARTICLE 34 (General rule regarding third States and third international organizations),

ARTICLE 35 (Treaties providing for obligations for third States or third international organizations),

ARTICLE 36 (Treaties providing for rights for third States or third international organizations),

ARTICLE 36 *bis* (Effects of a treaty to which an international organization is party with respect to third States members of that organization),

ARTICLE 37 (Revocation or modification of obligations or rights of third States or third international organizations) and

ARTICLE 38 (Rules in a treaty becoming binding on third States or third international organizations through international custom)

23. At its thirty-third session, the Commission examined articles 34–36, 36 *bis* and 37–38 and referred them to the Drafting Committee, which did not have time to consider them. All the discussions were centred on article 36 *bis*, and they call for fairly substantial coverage, while it is possible to be fairly brief on the other articles.

24. At its twenty-ninth session,<sup>20</sup> the Commission adopted in first reading a draft article 34 worded as follows:

#### Article 34

1. A treaty between international organizations does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

2. A treaty between one or more States and one or more international organizations does not create either obligations or

rights for a third State or a third organization without the consent of that State or that organization.

In his tenth report<sup>21</sup> the Special Rapporteur proposed reducing the text to a single paragraph as follows:

A treaty does not create either obligations or rights for a third State or a third organization without the consent of that State or that organization.

The Commission approved that simplification, and suggested that the expression “third international organization” should be used instead, in conformity with article 2, para. 1 (*h*),<sup>22</sup> and referred the text to the Drafting Committee, which did not have time to consider it.<sup>23</sup> The Special Rapporteur suggests that the text as amended should be adopted. As the discussion had called in question article 2, para. 1 (*h*), worded as follows:

“third State” or “third international organization” means a State or an international organization not a party to the treaty;

that too was referred to the Drafting Committee, and the Special Rapporteur proposes that it should be adopted in that form.

25. Articles 35–36 were considered in the Commission without any new suggestion being submitted and then referred to the Drafting Committee, which did not have time to consider them. The Special Rapporteur is not formulating any new proposal concerning them, and they are therefore presented now as adopted by the Commission in first reading at its thirtieth session,<sup>24</sup> with the reference to article 36 *bis* in square brackets so long as the Commission’s position on that article remains unchanged.

#### Article 35

1. [Subject to article 36 *bis*], an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

2. An obligation arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation in the sphere of its activities and the third organization expressly accepts that obligation.

3. Acceptance by a third international organization of the obligation referred to in paragraph 2 shall be governed by the relevant rules of that organization and shall be given in writing.

#### Article 36

1. [Subject to article 36 *bis*.] a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and if the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

2. A right arises for a third international organization from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third organization, or to a group of organizations to which it belongs, or to all organizations, and if the third organization assents thereto.

3. The assent of the third international organization, as provided for in paragraph 2, shall be governed by the relevant rules of that organization.

<sup>21</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 65, document A/CN.4/341 and Add.1, para. 91.

<sup>22</sup> *Yearbook* . . . 1981, vol. I, p. 173, 1675th meeting, paras. 30–31 (Mr. Ushakov) and para. 32 (Mr. Jagota).

<sup>23</sup> *Ibid.*, pp. 175–176, 1676th meeting, paras. 1–3.

<sup>24</sup> *Yearbook* . . . 1978, vol. II (Part Two), pp. 132–133.

<sup>19</sup> *Ibid.*, p. 169, 1674th meeting, paras. 49–53.

<sup>20</sup> *Yearbook* . . . 1977, vol. II (Part Two), p. 123.

4. A State or an international organization exercising a right in accordance with paragraph 1 or 2 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

26. Since article 36 *bis* was first considered by the Commission at its thirtieth session, it has caused much controversy, both within the Commission and in the observations of Governments and the debates of the Sixth Committee. In order to take that situation into account, the Commission, in first reading, placed an initial version of article 36 *bis* in square brackets.<sup>25</sup> In his tenth report,<sup>26</sup> the Special Rapporteur reconsidered draft article 36 *bis* and proposed a new version as follows:

The assent of States members of an international organization to obligations arising from a treaty concluded by that organization shall derive from:

(a) the relevant rules of the organization applicable at the moment of the conclusion of the treaty which provide that States members of the organization are bound by such a treaty; or

(b) the acknowledgment by the States and organizations participating in the negotiation of the treaty as well as the States members of the organizations that the application of the treaty necessarily entails such effects.

27. In his report, as in submitting this new wording to the Commission,<sup>27</sup> the Special Rapporteur indicated that the purpose of article 36 *bis*, as reworded, was not to change the fundamental principle set forth in article 35, i.e., the need for assent to establish an obligation, but to render more flexible the modalities of assent which article 35 has made subject to very strict formal requirements, which do not always seem to meet the requirements of practice. It was thus a question of introducing two exceptions for which it was easy to furnish examples, in particular, those of tariff agreements concluded by an organization administering a customs union, a headquarters agreement concluded by an organization with a host State, and a fisheries agreement between an organization and a State.

28. In the discussions in the Commission, opposition was expressed to article 36 *bis*, based on the assertion that that draft article applied only to the European Economic Community, that the latter constituted a quite exceptional case and that the Commission's draft should not be tied to particular situations. The feeling was also expressed that, in general, it was not entirely correct to present States members of an organization as third parties in relation to treaties concluded by the organization; draft article 36 *bis* thus referred to a real problem, though a fairly complicated one for some; certain members said that it would be more appropriate to place article 36 *bis* after article 35; others thought that the wording of paragraph (b) might be made more precise. It was in those circumstances that article 36 *bis*

was referred to the Drafting Committee, which did not have time to consider it.

29. It may be noted that, during the debates of the Sixth Committee at the thirty-sixth session of the General Assembly, although that article was not referred to in the report of the Commission then under discussion, some allusions were made either to article 36 *bis* or to particular difficulties to which article 36 *bis* endeavoured to provide a partial answer.<sup>28</sup> For the time being, however, the Special Rapporteur sees no need to make new suggestions with regard to article 36 *bis*.

30. With regard to draft article 37, its text did not elicit any particular comment from Governments. In the Commission, it was paragraphs 5–6, placed in square brackets, of the version adopted in first reading which attracted attention. Those paragraphs extend the application of the rules set forth in articles 35–36 to the two hypothetical instances envisaged in article 36 *bis*. Two consequences derive from this. On the one hand, if the Commission should decide to remove draft article 36 *bis*, paragraphs 5–6 of article 37 should also disappear. On the other, if the Commission should decide to follow for article 36 *bis* the new proposal made by the Special Rapporteur, the text of the two paragraphs would become as follows:

5. When an obligation has arisen for States which are members of an international organization under the conditions provided for in subparagraph (a) of article 36 *bis*, the obligation may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

6. When an obligation has arisen for States which are members of an international organization under the conditions provided for in subparagraph (b) of article 36 *bis*, the obligation may be revoked or modified only with the consent of the parties to the treaty, unless the relevant rules of the organization applicable at the moment of the conclusion of the treaty otherwise provide or unless it is established that the parties to the treaty had otherwise agreed.

31. The members of the Commission in general acknowledged that the above-mentioned paragraphs 5–6 were logically justified if article 36 *bis* was accepted, because it is the conjuncture of a number of consents which justifies the two paragraphs of article 36 *bis*. Nevertheless, some members considered that, in those hypothetical instances, so strong an effect should not be attributed to conjunctures of consents and that it would be better to delete paragraphs 5–6, even if the Commission retained article 36 *bis*. It was in those circumstances that article 37 as a whole was referred to the Drafting Committee.

32. Article 38 was not the subject of comment either by Governments or in the Commission and was referred to the Drafting Committee, which did not have time to consider it. The Special Rapporteur does not propose any amendment to its text.

<sup>25</sup> *Ibid.*, p. 134.

<sup>26</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 65–69, document A/CN.4/341 and Add.1, paras. 92–104.

<sup>27</sup> *Yearbook . . . 1981*, vol. I, pp. 170–173, 1675th meeting, paras. 6–29.

<sup>28</sup> *Official Records of the General Assembly, Thirty-sixth session, Sixth Committee, 40th meeting, para. 54 (Netherlands) and 42nd meeting, para. 37 (Japan)*.

## PART IV. AMENDMENT AND MODIFICATION OF TREATIES

ARTICLE 39 (General rule regarding the amendment of treaties),

ARTICLE 40 (Amendment of multilateral treaties) and

ARTICLE 41 (Agreements to modify multilateral treaties between certain of the parties only)

33. Generally speaking, the three articles of part IV have not particularly attracted the attention of Governments and international organizations. One such organization, however, thought, with regard to article 39, paragraph 1, that there might be some advantage in bringing the wording closer into line with that of article 39 of the Vienna Convention of 1969 by restoring, in the second sentence of that paragraph, the reservation formulated at Vienna: "in so far as the treaty may otherwise provide". Paragraph 1 of the draft article thus modified would then read:

**1. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.**

The main advantage of thus reverting to the text of the Vienna Convention would be the following. When a convention is drafted and adopted in the organ of an

organization, as are the conventions of the Council of Europe, it is normal for the same procedure to be followed for the amendments, and the treaties make provision accordingly. This possibility is already covered by the wording of new article 5, which is re-examined below (para. 49); the Special Rapporteur is nevertheless pleased to accept the suggestion made. The text of article 39 thus modified therefore makes provision, as does the Vienna Convention, for the possibility of particular rules for amendment and is thus more consistent with practice.

34. It was also pointed out that article 39, paragraph 2, is quite useless because it merely repeats a rule deriving as much from the constituent instrument of the organization as from the draft articles. Logically speaking, this observation is correct, but it calls in question a number of other articles in which the Commission recalled that the organization must comply with "the relevant rules of the organization" (art. 35, para. 3; art. 36, para. 3; art. 37, para. 7; art. 45, para. 3; annex, section I, para. 2 *bis*) and, since these reminders were intentionally included in all these texts, the Special Rapporteur does not propose to modify paragraph 2.

## PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

### SECTION 1. GENERAL PROVISIONS

ARTICLE 42 (Validity and continuance in force of treaties),

ARTICLE 43 (Obligations imposed by international law independently of a treaty),

ARTICLE 44 (Separability of treaty provisions) and

ARTICLE 45 (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty)

35. Two of the four articles of section 1, articles 43–44, do not call, and have not called, for any comment. On the other hand, while there were no comments on article 42, the Special Rapporteur thinks that there is nothing to prevent the first two paragraphs from being combined as one; actually there is no reason in terms of either substance or drafting which makes it necessary to distinguish treaties between two or more international organizations. If article 42 were thus condensed, it would be closer to the corresponding article of the Vienna Convention. Paragraph 3 adopted in first reading and unamended would become paragraph 2, and new paragraph 1 would read as follows:

**1. The validity of a treaty or of the consent of a State or an international organization to be bound by a treaty may be impeached only through the application of the present articles.**

36. While there is no need to propose further modifications of article 42, its tenor prompts the Special Rapporteur to recall two problems. First, the strict rule laid down by this article will raise a question with regard to article 73: is article 73 drafted in sufficiently broad and sufficiently precise terms to cover the provisos to which article 42 gives rise? Secondly, when the Commission adopted articles 30 and 42 in first reading, it raised the question whether the proviso mentioned in draft article 30, paragraph 6, should not be expressed in a separate article extending the proviso

regarding the application of Article 103 of the Charter to the draft articles as a whole.<sup>29</sup> Finally it decided to re-examine the question in second reading (see paras. 51–53 below).

37. Article 45 elicited critical comments on the part of certain Governments which had, moreover, already been submitted in the Commission. The origin and purpose of these criticisms are as follows. The Vienna Convention nowhere deals with the prohibition which might affect the right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty; on the other hand, it admits, with the same effects, acquiescence given by reason of the conduct of the State. In the present draft articles, the Commission has maintained this rule in respect of States; but, with regard to international organizations, one member pointed out that an organization was structured in a less unitary way than a State and that it had greater need than a State for protection against itself; or again, in other words, that the States members of the organization required to be protected against the weaknesses or inertia of certain organs of the organization, even at the expense of the co-contracting States. To accommodate this concern the Commission adopted special provisions for organizations.

38. First of all, the Commission somewhat altered the rule regarding the effects of the conduct of the organization. Instead of requiring that the organization's conduct should involve *acquiescence* in the validity, or maintenance in force or in operation of the treaty, the Commission requires that the conduct should involve *renunciation* of the right to invoke the ground referred

<sup>29</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 149, para. (3) of the commentary to article 42.

to in paragraph 1. Consequently the organization's conduct cannot have merely passive effects but must involve an actual renunciation. Furthermore, in a paragraph 3, the Commission states that "The agreement and conduct provided for in paragraph 2 shall be governed by the relevant rules of the organization".

39. Some Governments felt that these precautions were not sufficient. They would prefer it if the conduct of an organization could have no effects on the organization's right to invoke a ground for invalidation or termination, withdrawal or suspension. It was also proposed that it should not be possible to raise the question of the conduct of an organization in connection with article 46. But the vast majority of opinions expressed hold that in the text adopted in first reading an acceptable compromise was struck between the need to protect the treaty partners of an international organization and the need to protect the member States. Furthermore, the effects of legal personality cannot be disregarded to too great an extent; for, if an organization has been recognized as having some capacity in matters concerning the conclusion of treaties, it must by the same token be considered to bear some responsibility for its conduct. In conclusion, the Special Rapporteur has no other changes to propose to the text adopted in first reading except the deletion of the square brackets in paragraphs 1 and 2 around the reference to article 62.

## SECTION 2. INVALIDITY OF TREATIES

ARTICLE 46 (Violation of provisions regarding competence to conclude treaties),

ARTICLE 47 (Specific restrictions on authority to express or communicate consent to be bound by a treaty),

ARTICLE 48 (Error),

ARTICLE 49 (Fraud),

ARTICLE 50 (Corruption of a representative of a State or of an international organization),

ARTICLE 51 (Coercion of a representative of a State or of an international organization),

ARTICLE 52 (Coercion of a State or of an international organization by the threat or use of force) and

ARTICLE 53 (Treaties conflicting with a peremptory norm of general international law (*jus cogens*))

40. Articles 46–53, comprised in this section, have largely been approved by Governments. For drafting purposes the square brackets around article 79, in article 48, paragraph 3, should be deleted. Also, Governments have pointed to the unnecessarily cumbersome drafting of article 47. However, the article could not be made less unwieldy without abandoning the distinction between *expressing* and *communicating* consent in the case of a State and an international organization respectively. Since this distinction was maintained during the second reading in article 7,<sup>30</sup> it should also be kept in article 47.

41. Article 46 has given rise to a number of comments. Some Governments felt, first of all, that there was no reason to relinquish, in the case of international organizations, one of the conditions set for States, namely the violation of a rule of fundamental importance. This view met with some favour in the Commission, but it may nevertheless be noted that article 45,

indicating that the conduct of organizations can have certain effects, can offset any drawbacks occasioned by the removal of this condition. It has also been observed that the rule laid down in article 46 would have different effects in the case of members of an organization and in that of those treaty partners of the organization which were not members of that organization. This observation is quite true but the matter has, in fact, been taken care of in the wording of article 46, paragraph 4. This paragraph states that a violation is "manifest if it is or ought to be within the cognizance of any contracting State or any other contracting organization". However, a State or any other organization, which is a member of an organization, ought to be perfectly cognizant of the rules of that organization regarding competence to conclude treaties, which is not necessarily so in the case of the other contracting parties. It has also been said that the title of article 46 departs too far from the title of the Vienna Convention by placing unnecessary emphasis on the violation of provisions regarding competence to conclude treaties. If the Commission agreed, it would suffice to word the title of article 46 as follows:

### *Provisions regarding competence to conclude treaties*

## SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

ARTICLE 54 (Termination of or withdrawal from a treaty under its provisions or by consent of the parties),

ARTICLE 55 (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force),

ARTICLE 56 (Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal),

ARTICLE 57 (Suspension of the operation of a treaty under its provisions or by consent of the parties),

ARTICLE 58 (Suspension of the operation of a multilateral treaty by agreement between certain of the parties only),

ARTICLE 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty),

ARTICLE 60 (Termination or suspension of the operation of a treaty as a consequence of its breach),

ARTICLE 61 (Supervening impossibility of performance),

ARTICLE 62 (Fundamental change of circumstances),

ARTICLE 63 (Severance of diplomatic or consular relations) and

ARTICLE 64 (Emergence of a new peremptory norm of general international law (*jus cogens*))

42. Articles 54–64, which make up this section, did not give rise to any comments calling for changes in the text adopted in first reading. The awkward construction of the wording of paragraph (b) of articles 54 and 57, which has been criticized, is due to the need for precision. In connection with article 56, it was pointed out that the ICJ, in its Advisory Opinion of 20 December 1980, had referred to the work of the Commission,<sup>31</sup> and criticism was also voiced over the fact that the Commission mentioned headquarters agreements as an example of treaties coming within the scope of article 56, paragraph 1 (b).<sup>32</sup> One Government

<sup>30</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 128.

<sup>31</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, I.C.J. Reports 1980, p. 96, para. 49.

<sup>32</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 158, commentary to article 56.

suggested that the Commission should add to draft article 63 a provision mentioning that, where they are based on an agreement between the organization and a State, the special organic relations established between the organization and that State (appointment of local representatives, commissions, and experts of a permanent nature) could be suspended without affecting the treaty. This possibility had been considered by the Commission<sup>33</sup> and accepted. If the Commission deems it necessary, article 63 could be supplemented to include such a provision.

#### SECTION 4. PROCEDURE

**ARTICLE 65** (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty),

**ARTICLE 66** (Procedures for judicial settlement, arbitration and conciliation),

**ARTICLE 67** (Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty) and

**ARTICLE 68** (Revocation of notifications and instruments provided for in articles 65 and 67)

43. Few comments have been made in respect of articles 65–68. The most important concerns article 65, paragraph 2, which provides for a moratorium of three months in which an objection can be raised to an act intended to suspend the operation of the treaty. The Commission had considered the question whether this moratorium might not be too short in the case of an organization, and had indicated<sup>34</sup> that in doubtful cases an organization could always submit an objection, only to withdraw it subsequently. It has been suggested that it would be preferable to extend the moratorium. The Special Rapporteur takes the view that a system which extends greater privileges to organizations than to States cannot be established; it should not be forgotten that the three-month moratorium has the effect of suspending a measure taken by a treaty partner which may in certain cases be a State; such a measure does not necessarily have to be an exception, in that it may be a denunciation of a treaty in conformity with the clauses of that treaty; in providing for the three-month moratorium, the Vienna Convention and draft article 65 are already imposing a sufficiently rigorous rule on States, and a more rigorous rule would not be reasonable; it is up to organizations to ensure that their permanent organs are competent to take all necessary measures to protect their interests.

44. A further problem concerns article 66, which should be considered in relation to the annex. Generally speaking, these texts have not been commented upon. As far as substantive matters are concerned, there is perhaps no need for the Commission to dwell on their content. It is customary for the Commission to rely on the deliberations of the conferences or the intergovernmental bodies to which these texts are submitted. In formulating the draft articles in first reading, the Commission's intention was to provide Governments with the elements they need to take a decision; it is not necessary for the Commission

to devise other formulations. Furthermore, the draft articles will only be relevant if the General Assembly decides that it is timely to confer the form of a convention on the draft articles as a whole. The Special Rapporteur will therefore not re-examine the texts of article 66 and the annex.

45. From the point of view of drafting, however, the Special Rapporteur wondered whether the text of article 66 might not be reviewed. If a more general formulation is used instead of a description of the different types of disagreement to which an objection may give rise, paragraphs 2–3 of the draft article could be reduced to a single paragraph, so that the draft article would read as follows:

#### *Article 66*

1. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which an objection has given rise to a dispute between two or more States, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of articles 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) Any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in Part V of the present articles may set in motion the procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

2. If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which an objection has given rise to a dispute between an international organization and one or more States or between an international organization and one or more international organizations, any one of the parties to a dispute concerning the application or the interpretation of any of the articles in Part V of the present articles may, in the absence of any other agreed procedure, set in motion the procedure specified in the annex to the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

#### SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

**ARTICLE 69** (Consequences of the invalidity of a treaty),

**ARTICLE 70** (Consequences of the termination of a treaty),

**ARTICLE 71** (Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law) and

**ARTICLE 72** (Consequences of the suspension of the operation of a treaty)

46. Articles 69–72, which follow very closely the text of the corresponding articles of the Vienna Convention, have not elicited any comments or observations. It appears that the Commission can adopt them as they are in second reading.

<sup>33</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 83–84, commentary to article 63.

<sup>34</sup> *Ibid.*, p. 85, para. (4) of the commentary to article 65.

## PART VI. MISCELLANEOUS PROVISIONS

**ARTICLE 73** (Cases of succession of States, responsibility of a State or of an international organization, outbreak of hostilities, termination of the existence of an organization and termination of participation by a State in the membership of an organization),

**ARTICLE 74** (Diplomatic and consular relations and the conclusion of treaties) and

**ARTICLE 75** (Case of an aggressor State)

47. Articles 73–75 have long preoccupied the Commission in first reading. They have not, however, given rise to comments or objections at the governmental level. It appears that the Commission can adopt them in second reading without amendment.

## PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

**ARTICLE 76** (Depositaries of treaties),

**ARTICLE 77** (Functions of depositaries),

**ARTICLE 78** (Notifications and communications),

**ARTICLE 79** (Correction of errors in texts or in certified copies of treaties) and

**ARTICLE 80** (Registration and publication of treaties)

48. The same observations apply to draft articles 76–80.

## Provisions already considered in second reading

49. As already indicated (para. 9 above), the articles concerned are article 5 (Treaties constituting international organizations and treaties adopted within an international organization) and article 20 (Acceptance of and objection to reservations). During the discussions in the Sixth Committee, some doubts were expressed about the usefulness of adopting an article 5, but in general the proposal met with approval. A number of representatives, however, referred to a point made by the Commission in its commentary to article 20.<sup>35</sup> The text of article 20 as adopted in second reading contains no provision parallel to article 20, paragraph 3, of the Vienna Convention, which states:

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

50. The idea behind this omission was that treaties which are the constituent instruments of an international organization are treaties between States and come within the scope of the Vienna Convention. It is, admittedly, conceivable that an international organization might be a member of another international organization and that its constituent instrument would therefore come within the scope of the draft articles automatically. In 1977, during its consideration of draft article 20 in first reading, the Commission had set aside that hypothesis as referring to an exceptional situation.<sup>36</sup> With the adoption of article 5, however, the hypothesis has been retained: it is therefore logical to add to draft article 20 a paragraph 3 reiterating word for word the terms of article 20, paragraph 3, of the

Vienna Convention; the existing paragraphs of draft article 20, numbered 3 and 4, would become, respectively, paragraphs 4 and 5.

51. Another matter raised in the Commission in connection with articles 30 and 42 was whether it might not be appropriate to propose a new article on the following lines:

The present articles are without prejudice to Article 103 of the Charter of the United Nations.

52. Such a provision would extend to the articles as a whole the provision mentioned only in article 30, paragraph 6, in the following form:

The preceding paragraphs are without prejudice to Article 103 of the Charter of the United Nations.

53. It would seem in fact that the reservation regarding Article 103 of the Charter should appear in other articles besides article 30, and particularly in article 42, in that, whatever theoretical views may be taken with regard to the effects of Article 103, it is difficult to suppress the notion that this Article is, at the very least, conducive to results which are tantamount to a suspension. At the same time, it would seem that to conclude that it would be useful to adopt a new article, generalizing the scope of article 30, paragraph 6, would be to follow a line of reasoning which would have been equally valid for the Vienna Convention. The Commission has, however, consistently sought to avoid adopting provisions which seem to indicate the existence of omissions or shortcomings in the Vienna Convention. For this reason, the Special Rapporteur is more inclined to leave article 30 as it is and to refrain from adopting a new article generalizing the Article 103 formula. A further reason for this reservation relates to all the difficulties which invariably arise when reference is made to conventional provisions whose meaning is disputed and which the Commission has no authority to interpret.

<sup>35</sup> *Yearbook* . . . 1981, vol. II (Part Two), pp. 138–139, para. (3) of the commentary to article 20.

<sup>36</sup> *Yearbook* . . . 1977, vol. II (Part Two), p. 112, para. (3) of the commentary to article 20.





# STATE RESPONSIBILITY

[Agenda item 3]

## DOCUMENT A/CN.4/351 and Add.1-3\*

### Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts

[Original: English, Russian, Spanish]  
[1 March, 6 and 16 April and 6 May 1982]

#### CONTENTS

	Page
INTRODUCTION .....	15
A. COMMENTS AND OBSERVATIONS ON CHAPTERS I, II AND III OF PART 1 OF THE DRAFT ARTICLES .....	16
Spain .....	16
B. COMMENTS AND OBSERVATIONS ON CHAPTERS IV AND V OF PART 1 OF THE DRAFT ARTICLES .....	17
Byelorussian Soviet Socialist Republic .....	17
Netherlands .....	18
Union of Soviet Socialist Republics .....	19
Venezuela .....	19

#### NOTE

The text of part 1 of the draft articles on State responsibility appears in *Yearbook* ... 1980, vol. II (Part Two), pp. 30 *et seq.*

#### Introduction

1. The International Law Commission, having completed at its thirty-second session in 1980 the first reading of the whole of part 1 of the draft articles on State responsibility for internationally wrongful acts, decided to renew its 1978 request<sup>1</sup> to Governments to transmit their comments and observations on the provisions of chapters I, II and III of part 1 of the draft articles and to ask them to do so before 1 March 1981. At the same time, the Commission decided, in conformity with articles 16 and 21 of its Statute, to communicate the provisions of chapters IV and V of part 1, through the Secretary-General, to the Governments of Member States and to request them to transmit their comments and observations on those provisions by March 1982. The Commission stated that

the comments and observations of Governments on the provisions appearing in the various chapters of part 1 of the draft would, when the time came, enable the Commission to embark on the second reading of that part of the draft without undue delay.<sup>2</sup>

2. The General Assembly, by paragraph 6 of its resolution 35/163 of 15 December 1980, endorsed the Commission's decision. By paragraph 4 (c) of the same resolution, the Assembly recommended that the Commission should, at its thirty-third session:

Continue its work on State responsibility with the aim of beginning the preparation of draft articles concerning part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part one of the draft.

A similar recommendation to the Commission was made by the General Assembly in paragraph 3 (b) of its resolution 36/114 of 10 December 1981.

3. Pursuant to the Commission's decision, the Secretary-General, by means of a letter sent by the Legal Counsel, dated 8 October 1980, requested Governments of Member States which had not yet done so to

\* Incorporating documents A/CN.4/351/Add.2/Corr.1 and A/CN.4/351/Add.3/Corr.1.

<sup>1</sup>The previous request for comments and observations on chapters I, II and III of part 1 of the draft articles was made by decision of the Commission at its thirtieth session in 1978 (*Yearbook* ... 1978, vol. II (Part Two), pp. 77-78, para. 92). The comments and observations received were published in *Yearbook* ... 1980, vol. II (Part One), pp. 87 *et seq.*, document A/CN.4/328 and Add.1-4.

<sup>2</sup>*Yearbook* ... 1980, vol. II (Part Two), pp. 29-30, para. 31.

transmit their comments and observations on the above-mentioned provisions of chapters I, II and III of part 1 of the draft not later than 1 March 1981, and also to transmit their comments and observations on the provisions of chapters IV and V of part 1 of the draft not later than 1 March 1982. The comments and observations received from the Governments of five Member States by the end of the Commission's thirty-

third session, on 24 July 1981, have been published.<sup>3</sup> The comments and observations submitted by the Governments of five other Member States between that date and May 1982 are reproduced below.

<sup>3</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 71 *et seq.*, document A/CN.4/342 and Add.1-4.

## A. Comments and observations on chapters I, II and III of part 1 of the draft articles

### Spain

[Original: Spanish]  
[10 August 1981]

1. The Spanish Government considers that chapters I, II and III (arts. 1-26) of the draft articles prepared by the International Law Commission on the topic of State responsibility constitute a sound basis for the codification and progressive development of this important, extensive and complex subject-matter. It believes in particular that the Commission has found the right approach to the topic. Firstly, it was wise to confine these draft articles to international responsibility for wrongful acts, since responsibility for acts of States not involving a breach of international law raises very different problems which cannot appropriately be treated jointly with those raised by the first-mentioned type of responsibility. Secondly, it was wise to confine the draft articles exclusively to "secondary" rules, namely those aimed at determining the consequences of failure to comply with the "primary" rules. Codification and progressive development of the primary rules would have posed the difficult problem of setting a reasonable limit to the task, failing which international law would have to be considered almost in its entirety. Finally, the Spanish Government believes that, although responsibility for injuries to the person or property of aliens constitutes a prominent and, so to speak, classical part of the topic, the Commission was wise not to limit its study to that particular area but to consider other aspects of the international responsibility of States for wrongful acts which are also of great importance in this day and age.

Having made the above general remarks, we shall proceed with one observation on terminology, followed by specific comments on some of the draft articles.

2. The observation on terminology relates to the word *hechos*, which is used repeatedly throughout the draft articles to refer to the conduct of a State in relation to international responsibility. The Spanish Government believes that in Spanish the word *actos* is more apt than *hechos* because if, as stipulated in article 3, a necessary element of the wrongful act is that it must be attributable to the State under international law, then the fact of its being so attributable implies an element of self-will, and in Spanish legal parlance the wilful act of a natural or juridical person is termed an *acto*. *Hecho* is the generic term and *acto* is specific. In Spanish, States, like other juridical persons and like natural persons, commit not *hechos* but *actos*.

3. The principle enunciated in draft article 7, paragraph 1, namely that the acts of territorial governmental entities acting in that capacity are attributable to the State under international law, can be considered correct.

However, before such acts can entail the international responsibility of the State, the latter should be given the opportunity to prevent or make good the injury by means of the procedures available under internal law. Such an opportunity is not fully provided for in draft article 22, concerning the rule that local remedies must have been exhausted, since according to that rule such remedies must be sought by the alien private parties who suffered the injury, whereas it may be that action by the State aimed at preventing or making good the injury caused by a territorial governmental entity is not susceptible to private initiative, as in the case of article 155 of the Spanish Constitution of 1978.<sup>1</sup>

1. If an Autonomous Community fails to fulfil the obligations incumbent upon it under the Constitution or other laws, or acts in a manner seriously prejudicial to the general interests of Spain, the Government may, after calling upon the President of the Autonomous Community and, in the event of his failure to comply, with the approval of an absolute majority of the Senate, take such measures as are necessary to compel fulfilment of the said obligations or to protect the said general interests.

2. For the purpose of enforcing the measures provided for in the preceding paragraph, the Government may issue instructions to all authorities of the Autonomous Communities.

If an Autonomous Community of the kind referred to in the Spanish Constitution, which is obviously a territorial governmental entity of the State, were to commit a breach of international law, such conduct might *prima facie* constitute non-fulfilment of the obligations laid down by the Constitution and other laws. It should be noted in this connection that, according to the Autonomy Statutes already approved—with the status of organic laws—the Autonomous Communities are required to execute international treaties in all matters within their competence. Moreover, a breach of international law by an Autonomous Community might even be prejudicial to the general interests of Spain.

Should this be the case, according to article 155 of the Constitution, the Spanish Government could, subject to certain conditions, "take such measures as are necessary to compel fulfilment [by the Autonomous Community] of the said obligations [under the Constitution or other laws] or to protect the said general interests".

Since the Government can take this type of action on its own initiative, which means that it is not covered by draft article 22 on the exhaustion of local remedies, it would seem desirable to include in the draft an article allowing a State the opportunity to prevent or make

<sup>1</sup> Spain, *Boletín Oficial del Estado, Gaceta de Madrid*, No. 311.1 (29 December 1978); English trans. in A. P. Blaustein and G. H. Flanz, eds., *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y., Oceana Publications, 1982).

good the injury when a territorial governmental entity commits a breach of international law. As the draft articles are not yet complete, it would of course be premature to indicate the exact place and substance of the suggested provision.

4. The Spanish Government wishes to stress the exceptional importance of draft article 19 (International crimes and international delicts) and the favourable reaction which the underlying ideas as a whole should evoke, in that they introduce a moral component into the topic of the international responsibility of States. However, at the present stage, when the draft articles do not yet specify the consequences of the commission of the international crimes referred to in article 19, paragraphs 2 and 3—particularly the regime of sanctions and the determination of which entities are empowered to initiate action—the Spanish Government is not in a position to give its definitive views on the distinction between international crimes and international delicts. Only when these two points are known will the Spanish Government be able to express a considered opinion on the question.

However, the Spanish Government does deem it appropriate at the present stage to make the following preliminary general comments on the distinction established in draft article 19:

(a) The examples of serious breaches of international law which, according to article 19, paragraph 2, would constitute international crimes require reference to be made to primary rules of international law, which appears inconsistent with the general principle adopted by the Commission of not dealing with that type of rule. In addition, the specific mention of certain cases, although not exhaustive and not in the nature of a *numerus clausus*, may create difficulties with regard to the status and significance of the cases omitted. Moreover, if, as appears to be the case, international responsibility for international crimes is to entail the imposition of sanctions, such crimes should be set forth in a full, well-defined and precise list. The analogies to internal penal law systems, where the principle of legality—*nullum crimen, nulla poena sine lege*—pre-

vails, should be borne in mind.

(b) Determining in each specific case whether a State has committed an international crime is a delicate matter which may raise legal problems—whether there exists any international rule defining the crime in question—and factual problems—whether the acts attributable to a State can be subsumed under the rule which specifies the constituent elements of the crime. Since in most cases the State to which the crime in question is imputed is likely to deny its existence, an international dispute will arise between that State and the State, States or entities making the imputation. In order to settle such a dispute, it would be desirable to provide for compulsory recourse to an international jurisdiction, such as the ICJ or some other body. The Spanish Government believes that, in the absence of such compulsory jurisdiction, defining international crimes might give rise to abuse, friction and tension and, instead of serving the causes of peaceful coexistence between States and international justice, would create conditions inimical to those objectives.

(c) The Spanish Government also considers the problem of sanctions for international crimes to be a very delicate issue, since it raises the questions of determining what those sanctions will be (political, economic, military) and, in particular, of determining which organ will be competent to impose them. Although the United Nations Security Council might conceivably be used for this purpose, it must be borne very much in mind that the requirement of unanimity of the permanent members under Article 27 of the Charter would mean the establishment of a privileged regime for certain States. This requirement might in fact impede, and in many cases even preclude, the effective and just imposition of sanctions.

(d) In short, the Spanish Government considers that, although the concept of international crimes as distinct from international delicts embodied in draft article 19 is of considerable importance for the progressive development of international law, it requires institutional supports which it would be very difficult to establish in the present state of international relations.

## B. Comments and observations on chapters IV and V of part 1 of the draft articles

### Byelorussian Soviet Socialist Republic

[Original: Russian]  
[7 April 1982]

The Byelorussian SSR considers that chapters IV and V of the draft articles on State responsibility prepared by the International Law Commission can serve as the basis for the preparation of an international legal document on this matter. However, the Byelorussian SSR wishes to make some observations in connection with the provisions of articles 28, 33 and 34.

#### Article 28

Article 28 speaks of the responsibility of a State for an internationally wrongful act of another State. The provision in paragraph 2 of this article clearly contradicts the principles of individual responsibility of States

as set forth in the fundamental articles of the draft, specifically in article 1, which states that: "Every internationally wrongful act of a State entails the international responsibility of that State."

Accordingly, a State to which an internationally wrongful act is attributed cannot be released from responsibility for an act which it commits as a result of coercion exerted by another State.

However, since coercion in itself constitutes a wrongful act, the State which has used coercion against another State must bear international responsibility for its own acts as well, namely for the use of coercion against that other State.

#### Article 33

There is also a serious defect inherent in draft article 33, paragraph 1 of which precludes the wrongfulness of

an act of a State when that act is “the only means of safeguarding an essential interest of the State” or when the act “did not seriously impair an essential interest” of a State.

The admission of criteria such as the “essentiality” of interests or the “seriousness of impairment” as norms of international law is unjustified. It may give the State cause to interpret these criteria as broadly as possible and to violate its international obligations on this pretext, while avoiding responsibility for such acts.

The provisions of article 33, paragraph 1, contradict the essential meaning of the international responsibility of States and are therefore unacceptable.

#### Article 34

In order to avoid different interpretations of the term “self-defence”, this article should speak of legitimate measures of self-defence and refer specifically to Article 51 of the Charter of the United Nations.

#### Netherlands

[Original: English]  
[28 April 1982]

1. Before commenting on the draft articles submitted to it, the Netherlands Government feels it should stress that provisions concerning the settlement of disputes are a condition *sine qua non* for any codification of provisions on the subject in question. This view is prompted by a consideration of chapters IV and V as a whole. The Netherlands Government has already pointed out that such rules are necessary in its comments on chapters I, II and III.<sup>1</sup> Among the reasons for this is the use of terms which are not defined and perhaps cannot be defined in the abstract and which would therefore call for interpretation: “aid or assistance” and “rendered for” (art. 27); “coercion” (art. 28); “irresistible force” and “unforeseen external event” (art. 31); “essential interest” and “grave and imminent peril” (art. 33).

2. Certain provisions also refer to a “peremptory norm of international law” which is used to determine whether exceptions are applicable. Obviously it cannot be left solely to the State concerned—or, in the case of *jus cogens*, even to the States directly concerned—to judge on the interpretation and application of these concepts. Precisely on account of the possible effects of *jus cogens*, article 66 (a) of the 1969 Vienna Convention on the Law of Treaties<sup>2</sup> lays down the obligation to submit to the ICJ any dispute concerning the application or interpretation of the convention’s provisions relating to *jus cogens*. A similar provision should certainly be inserted in the present articles. This question is of great importance since the relevant provisions proposed by the Commission cannot have the desired effect unless a third party is called upon to give an impartial and, ideally, binding opinion on their interpretation and application.

3. It is to be noted that chapter V (Circumstances precluding wrongfulness) departs from the Commis-

sion’s distinction between “primary” and “secondary” rules, as all the provisions in the chapter (with the possible exception of article 35) are “primary rules”. The Netherlands Government can assent to the inclusion of the chapter. However, it should be emphasized that the provisions are not intended to list exhaustively all circumstances precluding wrongfulness, so that an *a contrario* reasoning will not be correct.

#### Article 27

The Netherlands Government reserves the right to return to this article in the light of further alterations to the draft as a whole. Unlike the Commission,<sup>3</sup> it does not consider it a matter of course that the conduct of a third State should be considered in every case where one State violates its obligations *vis-à-vis* another. In principle it would be more correct and more practical to restrict the rule in question to serious cases such as the crimes referred to in article 19.

#### Article 28

The Netherlands Government observes that, in the situations referred to in this article, the wrongfulness of the State taking the action must be established on the basis of the other provisions in the draft, i.e., including the exceptions in chapter V.

#### Article 29

The Netherlands Government agrees with the Commission’s comments<sup>4</sup> that the question of whether the injured State’s consent has been given correctly in terms of competence must be assessed in accordance with the rules of international law. However, the view stated in paragraph (12) of the Commission’s commentary, that the same principles apply in this respect as for establishing the validity of treaties, does not seem to be wholly correct. After all, there is certainly a difference between national rules on competence to enter into treaty obligations (or the extent to which such rules are apparent to third parties) and national rules (if any) on competence to give the consent referred to in this article.

#### Article 30

The Netherlands Government is of the opinion that the formula “if the act constitutes a measure legitimate under international law” makes insufficient distinction between the admissibility under international law of countermeasures in a concrete situation, on the one hand, and the limits imposed by international law on the modalities of a countermeasure which is in principle admissible, on the other.

#### Article 31

Although it may be admitted that the two exceptions dealt with here have aspects in common (albeit mainly as compared with the other exceptions), it would be clearer if they were to be dealt with in separate articles. As regards the “fortuitous event” element, the Nether-

<sup>1</sup> Yearbook . . . 1980, vol. II (Part One), p. 102, document A/CN.4/328 and Add.1-4.

<sup>2</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

<sup>3</sup> Yearbook . . . 1978, vol. II (Part Two), p. 99, commentary to art. 27.

<sup>4</sup> Yearbook . . . 1979, vol. II (Part Two), p. 112, commentary to art. 29, paras. (11) *et seq.*

lands Government observes that paragraph 2 is practically impossible to apply owing to the accumulation of requirements to which the "event" referred to in paragraph 1 must conform. If "unforeseen" were to be deleted, this would solve the problem.

#### Article 32

The Netherlands Government considers that there are insufficient grounds for retaining this article. There are no examples from practice. In cases relating to action by a State agency, the exceptions referred to in article 31 ought to be sufficient. Where there has been no action by a State agency but the rights of another State have been violated, the Netherlands Government believes it would be going too far to say that in the situation referred to in this article the only recourse open to the injured State would be that provided for in article 35.

#### Article 33

The Netherlands Government notes that the article leaves some ground uncovered by referring only to the contributions by the State which acts wrongfully to the coming about of a "state of necessity" (para. 2 (c)). It would be preferable for the article to take account of the possibility of the injured State itself having contributed towards the coming about of the situation referred to in this article.

#### Union of Soviet Socialist Republics

[Original: Russian]  
[31 March 1982]

1. Chapters IV and V of the draft articles on State responsibility, prepared by the International Law Commission, serve on the whole as an acceptable basis for an international legal instrument on the subject. However, the following observations may be made concerning certain provisions in those chapters.

2. There appears to be no justification for article 28, paragraph 2, which states that an internationally wrongful act committed by a State as a result of coercion exerted by another State entails the responsibility of that other State. Coercion in itself is wrongful and entails the international responsibility of the State which exerts it. At the same time, coercion cannot be considered a factor which releases the State against which it is exerted from responsibility. That would run counter to fundamental articles of the draft, particularly article 1, according to which: "Every internationally wrongful act of a State entails the international responsibility of that State."

3. Also unacceptable is article 33, paragraph 1, under which the wrongfulness of an act may be precluded if that act was "the only means of safeguarding an essential interest" of the State or did not "seriously impair an essential interest" of a State. Owing to the vagueness and subjectivity of the criteria for assessing how "seriously" an interest is impaired and how "essential" an interest is, this article may be interpreted extremely broadly. The introduction of the above-mentioned concepts in essence totally undermines the basic principles of the international responsibility of States set forth in the draft.

4. Article 34 should make reference to lawful mea-

sures of self-defence in conformity with article 51 of the United Nations Charter.

#### Venezuela

[Original: Spanish]  
[22 September 1981]

The following comments of the Government of Venezuela are by Mr. Leonardo Díaz González, Ambassador of Venezuela to Norway and member of the International Law Commission. They concern the discussion by the Commission, at its thirtieth to thirty-second sessions, of chapters IV and V of the draft articles on State responsibility. Thus they do not relate to the articles in their present form, which the Commission has now adopted. Nevertheless, the Government of Venezuela considers that, since the topic is a very new one and there is little doctrine on it to serve as a basis, the comments made by Mr. Díaz González may be regarded as representing Venezuela's position and their transmittal to the Secretary-General thus constitutes compliance with his request.

#### CHAPTER IV

##### Article 27

During the debate on this draft article,<sup>1</sup> certain amendments were made. Mr. Díaz González urged<sup>2</sup> acceptance of the word "complicity", inasmuch as there is complicity when a State, acting of its own free will as a sovereign entity, decides to render assistance to another State in order to enable it to commit an internationally wrongful act. The present version of this article is the result of a compromise between various views expressed in the Commission. In its new version, words such as complicity, accessory or international offence, which might give rise to misunderstanding, have been deleted. The article preserves the essence of what needs to be known about the material element, the internationally wrongful act, but it also takes into account the intention of the State rendering wrongful aid or assistance to another State. The aid or assistance must be rendered for the commission by the other State of an internationally wrongful act, and that intention must be established.

##### Article 28

It is a well-established principle that all sovereign States are responsible as subjects of international law. However, if this sovereignty is limited *de facto* or *de jure* by another State, whether by one of the traditional means or by one of the new means of control which have emerged in international relations, then that other State may incur responsibility. Furthermore, although all States are equal in principle, in practice some are more equal than others, as can be seen from a reading of the provisions of the Charter of the United Nations relating to the Security Council. Paragraph 1 of the draft article refers to "complete freedom of decision",<sup>3</sup>

<sup>1</sup> Originally draft article 25 (Complicity of a State in the internationally wrongful act of another State), see *Yearbook . . . 1978*, vol. I, p. 223, 1516th meeting, para. 4.

<sup>2</sup> *Ibid.*, p. 235, 1518th meeting, para. 19.

<sup>3</sup> For the original text of draft article 28, see *Yearbook . . . 1979*, vol. I, p. 4, 1532nd meeting, para. 6.

which implies that if that freedom were partial the situation would be different. However, freedom of decision, being bound up with sovereignty, either exists or does not exist. Any State which is subject to total or partial control by another State does not possess that freedom. The decisive factor is therefore *de jure* or *de facto* control. The party exercising *de jure* or *de facto* control must be the responsible party. If the control is exercised *de jure* or *de facto*, there is no difficulty. If it is exercised *de facto*, then the provisions of draft article 28 should apply.

Paragraph 2 is more precise in that it deals with control exercised by means of coercion. The decisive factor in this case is the party which exercises control in order to impose its will. Coercion can only entail the exclusive responsibility of the party exerting coercion. However, it must be made very clear that coercion does not mean only coercion exerted by armed force. Other types of coercion are now recognized. This diversity of means of coercion was discussed when article 52 of the 1969 Vienna Convention on the Law of Treaties<sup>4</sup> was being considered. Accordingly, the provisions of that article must be taken fully into account. The problem arises primarily in *de facto* situations.

## CHAPTER V

### Article 29

The discussion of chapter V dealt strictly with the question of preclusion of the wrongfulness of the act and not with renunciation of the State committing the wrongful act. What is at issue is the very existence of consent and the validity of its expression. It is therefore desirable to spell out in the actual text of the article that consent must be given validly and expressly.

### Article 30

Drafting changes were suggested in this article to simplify the text and eliminate wording that might be controversial or open to misinterpretation, such as the word "sanction", which now seems to be used only to refer to measures agreed upon by the Security Council.<sup>5</sup> The article should be given a broader sense within the framework of international law and of the Charter of the United Nations. The present wording still leaves room for improvement in that direction.

### Articles 31, 32 and 33

The concept of *lato sensu* of *force majeure* is accepted in international law with the three classical characteristics required under all national legal codes or legal systems, namely that the event or act should be external, unforeseeable and irresistible. The principle *ad impossibilia nemo tenetur* should be fully accepted with a view to protecting weak States and treating as cases of *force majeure* events which may be of entirely human origin, such as revolution, insurrection or civil war. Even where events are foreseeable, it may happen, as pointed out by Podesta Costa, that they are foreseeable but irresistible.

This protection based on impossibility of conformity, and the fact that non-conformity is consequently devoid of any wrongfulness, should be clearly spelt out.

The articles as currently worded have attempted to take into account and reconcile divergent views on the meaning to be attributed to the expressions *force majeure*, "fortuitous event", "state of necessity" and "extreme distress". It may be possible on the second reading to improve further the wording of the consensus of the views of Member States. For example, in article 33, with reference to norms of *jus cogens*, it may be possible to clarify the distinction between exemption and derogation, in that the former shows the flexibility of the legal rule while derogation merely gives rise to exceptions to its application.

### Article 34

Underlying the principle of self-defence is the equally or more important problem of the definition of aggression. This draft article contains two basic elements which make it very difficult for us to accept it as currently worded—two restrictive, limiting elements. The first is the reference to aggression, which limits the concept to armed aggression only. It would be more appropriate to refer to an act of aggression. The second element is the restriction of the concept of self-defence to the scope of Article 51 of the Charter of the United Nations.

## CHARTER OF THE UNITED NATIONS

### Article 2, paragraph 4, of the Charter

Some guidance can of course be obtained, by interpretation *a contrario*, from this paragraph, which provides that States shall refrain from the threat or use of force against the territorial integrity or political independence of any other State. The converse of this provision is self-defence by the threatened State.

Article 2, paragraph 7, could also provide a basis for the use of self-defence.

Article 51 of the Charter imposes a limitation on the application of the principle by providing that the measures taken by Members in the exercise of the right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus it is for the Security Council to determine whether there has been a case of aggression and hence of self-defence, or whether there was no aggression and therefore no occasion for self-defence.

The Venezuelan Government considers that the concept of aggression cannot be limited to armed aggression only. In practice there are other kinds of aggression which may be much more of an actual threat to international peace and security: ideological aggression, armed aggression not by a regular army but by armed bands directly or indirectly supported by another State, and so on. All this has been made clear in the protracted debates at the United Nations attempting to define aggression. It makes it impossible for us to determine categorically when the use of force is or is not wrongful or when aggression provoking and

<sup>4</sup> United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

<sup>5</sup> The original title of draft article 30 was "Legitimate application of a sanction"; see *Yearbook* . . . 1979, vol. I, p. 55, 1544th meeting, para. 8.

justifying self-defence can be considered to have taken place. We have in mind cases of aggression such as economic aggression.

Within the American regional system, the Charter of the Organization of American States (OAS)<sup>6</sup> expressly sets out the principle of self-defence in article 18, which reads as follows:

The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfilment thereof.

The other side of the coin appears in article 24 of the OAS Charter, which provides:

Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.

and article 25 logically provides that:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict . . . that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.

As can be seen, the provisions of the OAS Charter are very broad and comprehensive: (a) on what shall be understood to constitute aggression; and (b) as a

corollary, on the application of the principle of collective self-defence.

Among the special treaties referred to in the above-mentioned article, the most important or basic treaty—after the OAS Charter itself, of course—is the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro in 1947, which entered into force on 3 December 1948.<sup>7</sup>

Article 3 of the treaty reiterates the provisions of article 24 of the OAS Charter, quoted above, to the effect that every act of aggression against an American State shall be considered an act of aggression against the other American States, which are bound to meet the attack “in the exercise of the inherent right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations”.

The Venezuelan Government agrees with the excellent and well-documented report<sup>8</sup> of the Special Rapporteur, Mr. Ago, on the need to include in the draft articles on State responsibility a rule concerning self-defence, and believes that such a rule should be included. In our view, the article in question should be broadly worded and should not be limited to the scope of Article 51 of the Charter of the United Nations; rather, it should refer to the provisions of the Charter in general and to the principles of international law.

<sup>7</sup> *Ibid.*, vol. 21, p. 93.

<sup>8</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 13, document A/CN.4/318/Add.5-7, especially pp. 51 *et seq.*, paras. 82 *et seq.*

<sup>6</sup> United Nations, *Treaty Series*, vol. 119, p. 48.

**DOCUMENT A/CN.4/354 and Add.1 and 2\***

**Third report on the content, forms and degrees  
of international responsibility (part 2 of the draft articles),  
by Mr. Willem Riphagen, Special Rapporteur**

[Original: English]  
[12 and 30 March and 5 May 1982]

**CONTENTS**

	<i>Paragraphs</i>	<i>Page</i>
INTRODUCTION .....	1-4	23
<i>Chapter</i>		
I. STATUS OF THE WORK ON PART 2 OF THE TOPIC .....	5-24	23
A. The Special Rapporteur's preliminary report: identification of the three parameters and analysis of the problem of method of dealing with part 2 .....	5-8	23
B. The Special Rapporteur's second report: focus upon the first parameter .....	9-24	24
II. REVISION OF THE DRAFT ARTICLES SUBMITTED IN THE SECOND REPORT .....	25-34	26
III. THE GENERAL PROBLEM UNDERLYING THE DRAFTING OF PART 2 OF THE DRAFT ARTICLES .....	35-77	28
IV. THE CATALOGUE OF LEGAL CONSEQUENCES .....	78-101	34
V. THE LINK BETWEEN A BREACH OF AN INTERNATIONAL OBLIGATION AND THE LEGAL CONSEQUENCES THEREOF .....	102-143	39
VI. DRAFT ARTICLES .....	144-150	46
Article 1 .....	145	46
Commentary .....	145	46
Article 2 .....	146	46
Commentary .....	146	46
Article 3 .....	147	47
Commentary .....	147	47
Article 4 .....	148	47
Commentary .....	148	47
Article 5 .....	149	47
Commentary .....	149	48
Article 6 .....	150	48
Commentary .....	150	48
VII. ARTICLES TO BE DRAFTED .....	151-154	50

---

**NOTE**

Multilateral conventions mentioned in the present report:

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Source</i> United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 140.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	<i>Ibid.</i> , 1978 (Sales No. E.80.V.1), p. 106.

---

---

\* Incorporating document A/CN.4/354/Corr.1.



## Introduction

1. The present report is the third dealing with the issues under the topic of State responsibility (part 2 of the draft articles) submitted by the Special Rapporteur for consideration by the International Law Commission. A first preliminary report<sup>1</sup> was submitted by the Special Rapporteur in the course of the Commission's thirty-second session in 1980, and the second report<sup>2</sup> was submitted by him in the course of the Commission's thirty-third session in 1981.

2. The historical development of the consideration of the draft articles on the topic of State responsibility is summarized in the first report.<sup>3</sup> Thus, under the general plan adopted by the Commission, the origin of international responsibility forms the subject of part 1 of the draft, with respect to which the Commission has completed a first reading of the text of 35 articles which it has provisionally adopted.<sup>4</sup> These 35 draft articles, which have been referred to Member States for their comments, are concerned with determining on what

grounds and under what circumstances a State may be held to have committed an internationally wrongful act which, as such, is a source of international responsibility.

3. Part 2 of the draft, which is the subject of the present report, deals with the content, forms and degrees of international responsibility, that is to say, with determining the consequences which internationally wrongful acts of a State may have under international law in different cases (reparative and punitive consequences of an internationally wrongful act, relationships between these two types of consequences, material forms which reparation and sanctions may take). Once these two essential tasks are completed, the Commission may decide to add to the draft a part 3 concerning the "implementation" (*mise en oeuvre*) of international responsibility and settlement of disputes.

4. By its resolution 36/114 of 10 December 1981, the General Assembly, having considered the report of the Commission on the work of its thirty-third session, recommended, inter alia, in paragraph 3 (b), that the Commission should:

... Continue its work aimed at the preparation of draft articles on ... part two of the draft on responsibility of States for internationally wrongful acts, bearing in mind the need for a second reading of the draft articles constituting part one of the draft.

<sup>1</sup> *Yearbook* ... 1980, vol. II (Part One), p. 107, document A/CN.4/330.

<sup>2</sup> *Yearbook* ... 1981, vol. II (Part One), p. 79, document A/CN.4/344.

<sup>3</sup> *Yearbook* ... 1980, vol. II (Part One), pp. 107 *et seq.*, document A/CN.4/330, paras. 1-9.

<sup>4</sup> *Yearbook* ... 1980, vol. II (Part Two), pp. 30 *et seq.*

## CHAPTER I

### Status of the work on part 2 of the topic

#### A. The Special Rapporteur's preliminary report: identification of the three parameters and analysis of the problem of method of dealing with part 2

5. In his preliminary report, the Special Rapporteur analysed, in a general way, various possible new legal relationships (i.e., new rights and corresponding obligations) arising from an internationally wrongful act of States as determined by part 1 of the draft, and noted a number of circumstances which are, in principle, irrelevant for the application of part 1 but have relevance in the development of part 2.<sup>5</sup>

6. The Special Rapporteur then analysed in that preliminary report the problem of method of dealing with part 2, as follows:

97. In dealing with part 2 of the draft articles on State responsibility, the Commission is thus faced primarily with a *problem of method* which is caused not only by the circumstance just mentioned but also by the relative paucity of "hard" legal materials in this field. Indeed, while there are many decisions of international tribunals dealing with damages, there is little on counter-measures of injured States, and even less on responses of third States. Actually, the more serious the breach of an international obligation, the less likely it is to find an objective legal appraisal of the allowable responses to such a breach. Furthermore, whereas already in 1961 the Special Rapporteur, Mr. F. V. García Amador, noted in his sixth report on State responsibility that, in respect of the duty to make reparation "the diplomatic and

arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy",\* the practice of States in relation to counter-measures is (also) dictated to a large extent by purely political factors.

98. The problem of method then, in the view of the present Special Rapporteur, is the following. It is relatively easy to formulate a catalogue of possible "new legal relationships" established by international law as consequences of an internationally wrongful act, and even to arrange this catalogue in a *scala* of strength. When one comes, however, to the choice between those consequences (that is, the question of the legal admissibility of one consequence or another), there is no escape from the necessity to draw up a scale of values, both as regards the values affected by the breach and as regards the values affected by the response. A mere statement that there should be "proportionality" between response and breach simply leaves the question fully open. On the other hand, drawing up a scale of values obviously means operating in the field of primary rules, an operation the Commission has, in general, studiously avoided in drafting part 1 of the draft articles on State responsibility. The main exception to this "neutral" approach of the Commission is, of course, article 19 of the draft articles: the qualification of some internationally wrongful acts as "international crimes". But even there it seems clear that the international crimes listed (as possible examples) in paragraph 3 of the draft article cannot each entail the same new legal relationships.

99. A possible way out could be the Commission proceeding by way of approximation. Starting on the one side from a *scala* of possible responses and on the other from the general rule of proportionality between the actual breach and the actual response, and recognizing

<sup>5</sup> *Yearbook* ... 1980, vol. II (Part One), pp. 110-112, document A/CN.4/330, paras. 10-25.

\* *Yearbook* ... 1961, vol. II, p. 2, document A/CN.4/134 and Add.1, para. 1.

on the one hand that a bilateral treaty, a multilateral treaty or a rule "recognized by the international community of States as a whole" may explicitly or implicitly determine the content of proportionality, and on the other hand that the seriousness of the situation created by the actual breach may entail moving to a stronger actual response, the Commission could give examples of "normal" implications of proportionality. Such examples could then deal with the following heads of limitation of possible responses:

(a) Normal limitations by virtue of the particular protection given by a rule of international law to the object of the response;

(b) Normal limitations by virtue of a linkage, under a rule of international law, between the object of the breach and the object of the response;

(c) Normal limitations by virtue of the existence of a form of international organization *lato sensu* covering the situation, resulting from an actual breach, and a possible response thereto.

100. This approach, it would seem, has the advantage of flexibility. The examples to be given by the Commission would indeed be no more than examples, since it seems impossible to cover all situations which may arise in practice by hard and fast, quasi-automatic rules. Furthermore, they would be examples of normal implications of proportionality. The rapid development of rules of international law in bilateral, regional and world-wide international relations seems to preclude a more abstract approach.<sup>6</sup>

7. The preliminary report then set out three parameters for the possible new legal relationship arising from internationally wrongful acts of a State. The first parameter was the new obligations of a State whose act is internationally wrongful, the second was the new right of the "injured" State, and the third was the position of the "third" State in respect of the situation created by the internationally wrongful act. In drawing up a catalogue of possible new legal relationships established by a State's wrongfulness, the report discussed: the duty to make reparation in its various forms (first parameter), the principle of non-recognition of *exceptio non adimpleti contractus* and other "countermeasures" (second parameter), and the right, possibly even duty, of a "third" State to take a non-neutral position (third parameter).

8. Two other problems were addressed by the report: (a) the problem of "proportionality" between the wrongful act and the response thereto, and in this connection, the limitations of allowable responses by virtue of the particular protection, given by a rule of international law, to the object of the response, and by virtue of the existence of a form of international organization *lato sensu*; and (b) the question of loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of a wrongful act. It was suggested in this connection that the matter be dealt with rather within the framework of part 3 of the draft articles on State responsibility.

### B. The Special Rapporteur's second report: focus upon the first parameter

9. Taking into account the discussion of the preliminary report in the Commission<sup>7</sup> and the comments on the topic made in the Sixth Committee during the thirty-fifth session of the General Assembly,<sup>8</sup> the Special

<sup>6</sup> *Ibid.*, pp. 128-129.

<sup>7</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 62-63, paras. 35-48.

<sup>8</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 145-154.

Rapporteur prepared his second report on the topic, which is briefly analysed below.

10. In this second report,<sup>9</sup> the Special Rapporteur dealt primarily with the first parameter, i.e., the new obligations of the State which is held to have committed an internationally wrongful act entailing its international responsibility (the author State).

11. For the consideration of the Commission, the Special Rapporteur proposed, in chapter II of this report, a set of five draft articles in two chapters, as follows:

#### *The content, forms and degrees of international responsibility* (part 2 of the draft articles)

##### CHAPTER I GENERAL PRINCIPLES

###### *Article 1*

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

###### *Article 2*

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

###### *Article 3*

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

##### CHAPTER II OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

###### *Article 4*

Without prejudice to the provisions of article 5,

1. A State which has committed an internationally wrongful act shall:

(a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(b) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

(c) re-establish the situation as it existed before the breach.

2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.

###### *Article 5*

1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (c), or to act in accordance with article 4, paragraph 2.

2. However, if, in the case mentioned in paragraph 1 of the present article,

(a) the wrongful act was committed with the intent to cause direct damage to the injured State, or

<sup>9</sup> See footnote 2 above.

(b) the remedies referred to in article 4, paragraph 1, under (b), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply.

12. The Special Rapporteur suggested the advisability of starting the draft articles of part 2 with three "preliminary" rules (arts. 1–3), providing a frame for the rest of the chapters of part 2, which dealt separately with each of the three parameters outlined in the preliminary report. By way of introduction of those preliminary rules, the report noted the fundamental structural difference between international law and any system of internal law, and the interrelationship between—and essential unity of purpose of—the rules relating to the methodologically separated items of "primary rules", "rules relating to the origin of State responsibility", "rules relating to the content, forms and degrees of State responsibility" and "rules relating to the implementation of State responsibility". The report also noted that the "rule of proportionality" underlying the responses of international law to a breach of its primary rules, should be understood as to be rather of a negative kind, excluding particular responses to particular breaches.

13. The report then stated the reasons for including the three preliminary rules, articles 1 and 3 of which dealt with the continuing force, notwithstanding the breach, of the primary obligations and rights of the States concerned, while article 2 referred to possible special, self-contained régimes of legal consequences attached to the non-performance of obligations in a specific field (see para. 11 above).

14. The report then turned to the *first parameter* and analysed the three steps associated with that parameter: the obligation to stop the breach, the obligations of "reparation", and the obligations of *restitutio in integrum stricto sensu* and "satisfaction" in the form of an apology and guarantee against repetition of the breach.

15. This analysis is then confronted with State practice, judicial and arbitral decisions and doctrine, leading up to the proposed articles 4 and 5 (see para. 11 above). Article 4, paragraph 1, referred to the new obligations tending towards a belated performance of the original primary obligation (stop the breach *stricto sensu*, stop the breach *lato sensu*, and *restitutio in integrum stricto sensu*). Paragraphs 2 and 3 of article 4 referred to the new obligations tending towards a substitute performance (reparation *ex nunc*, reparation *ex tunc* and reparation *ex ante*).

16. Article 5, paragraph 1, provided for a deviation from the general rules contained in article 4 in the case of a breach of obligations in a particular field (treatment of aliens), and left it in such a case to the author to state the choice between re-establishment of the situation as it existed before the breach and reparation in pecuniary terms. If the latter course of action is chosen, the author State, under paragraph 2 of article 5, still has the additional duty to provide satisfaction in cases where the wrongful act is aggravated by one of the two circumstances described in subparagraphs (a) and (b) of that paragraph.

17. In its consideration of the report, the Commission decided to discuss first articles 1–3 together. It was suggested, and found generally acceptable, to start part

2 of the draft with an article providing for a link between the draft articles in part 1 and those to be drafted in part 2, in the form of a statement that "an internationally wrongful act of a State gives rise to obligations of that State and to rights of other States in accordance with the following articles".

18. There was considerable discussion and divergence of opinions within the Commission on the advisability of including articles 1–3 in an introductory chapter of part 2. While most members felt that the ideas underlying articles 1–3 should be expressed at the outset as a frame for the provisions in the other chapters of part 2, other members expressed doubts as regards the advisability of including articles of this kind in a first chapter.

19. It was suggested that articles 1 and 3 ought to be combined in one article dealing with both the obligations and the rights of the author State, the injured State and other States, and providing that those rights and obligations could be affected by a breach *only* to the extent stipulated in the other articles of part 2. In this way one could also avoid the impression, created by the wording of articles 1 and 3 as proposed, that those articles tended towards protection of the wrongdoing State.

20. As regards article 2, it was generally recognized that a specific rule, or set of rules, of international law establishing an international obligation could at the same time deal with the legal consequences of a breach of that obligation in a way at variance with the general rules to be embodied in the draft articles of part 2. The question was put, however, whether this should be stated at the outset or rather at some other place in the draft articles.

21. During the discussion on articles 4 and 5, several members expressed a preference for dealing with the new *obligations* of the author State arising from its internationally wrongful act, rather in terms of new *rights* of the injured State, and possibly other States, to demand a certain conduct of the author State after the breach occurred. While in part 1, relating to the origin of international responsibility, it was generally irrelevant towards which State or States the primary obligation existed, this question was essential in dealing with the legal consequences of a breach of such primary obligation. Obviously, such an approach would still make it necessary to spell out which conduct of the author State could be demanded by the injured State, and possibly other States. Furthermore, such an approach could leave open the question whether or not the injured State (or, as the case may be, other States) should *first* demand the specified conduct of the author State before taking any other measure in response to the breach. In this respect one member expressed the opinion that any legitimate countermeasure could always be taken *in advance* of any request for *restitutio in integrum* or for reparation.

22. Doubts were also expressed in respect of article 5 as proposed. While some members did not consider that the breach of an obligation concerning the treatment to be accorded by a State to aliens entailed, within the framework of the first parameter, other legal consequences than a breach of any other international obligation, other members wondered whether the special regime of article 5 should not also apply in cases of breach of other international obligations than those mentioned in paragraph 1 of that article.

23. The view was also expressed that article 4, paragraph 1 (*b*), and article 5, paragraph 2 (*b*), created the impression that the state of the internal law of a State influenced the extent of its obligations under international law. In this connection it was recalled that article 22 of part 1 of the draft articles (Exhaustion of local remedies) dealt with the *existence* or *non-existence* of a breach of an international obligation of result and only where that result or an equivalent result may be achieved by subsequent conduct of the State.

24. After having examined at its thirty-third session the five draft articles submitted by the Special Rapporteur, the Commission decided to refer them to the

Drafting Committee, which was unable to consider them because of lack of time. Taking into account the views expressed during the Commission's discussions, and at the Sixth Committee during the thirty-sixth session of the General Assembly,<sup>10</sup> the Special Rapporteur proceeded in the present report to a re-evaluation of the approach to the development of part 2 of the draft articles.

<sup>10</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 111–130.

## CHAPTER II

### Revision of the draft articles submitted in the second report

25. It was suggested during the discussions in the Commission and the Sixth Committee that part 2 of the draft articles on State responsibility should begin with an article explaining the link between the 35 articles composing part 1 (as adopted by the Commission on first reading) and part 2. The Special Rapporteur agrees with this suggestion. Consequently, it is now proposed that a new article 1 of part 2 should read as follows:

#### *Article 1*

**An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.**

26. It is submitted that the question whether this article should have a title and, if so, which title, could perhaps better be decided at a later stage. It is also submitted that the wording of the new article 1 does not necessarily mean that the other articles of part 2 would give an exhaustive picture of all the legal consequences of any internationally wrongful act of a State. Indeed, in the opinion of the Special Rapporteur, it would seem unwise to commit the Commission at this stage to draw up such an exhaustive catalogue. The conceptual reasons for this opinion are set out in paragraphs 97–100 of the preliminary report (see para. 6 above). To these may be added the practical reason that it may prove to be impossible to reach a measure of consensus on such a complete solution. It may well be that, as in so many other fields of international law, there is a consensus on a number of legal consequences of certain types of internationally wrongful acts of a State, and a consensus on the absence of certain types of legal consequences in certain situations, but that a "grey zone" is left on which opinions differ. If, then, the grey zone is not too large, the codification of those points on which consensus exists would still be a meaningful achievement.

27. Obviously, the new article 1 as proposed is not an alternative for the article 1 proposed earlier (see para. 11 above). Articles 1–3 as proposed in the second report (*ibid.*) were intended to have a different function. In this connection, it should be recalled that the

Commission had already, at a relatively early stage of its consideration of the topic of State responsibility, remarked:

... The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en oeuvre*) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions. Moreover, we have seen the extent to which State practice and the authors of legal writings bring out the differences in gravity that exist even among the various internationally wrongful acts which are lumped together under the common label of international crimes. The same must undoubtedly be true of other internationally wrongful acts; the idea that they always entail a single obligation, that of making reparation for the damage caused, and that all they involve is the determination of the amount of such reparation, is simply the expression of a view which has not been adequately thought out.<sup>11</sup>

The Commission went on to say, in particular:

The idea that there is some kind of least common denominator in the régime of international responsibility must be discarded.<sup>12</sup>

These remarks are, no doubt, substantially correct. But their impact on the task with which the Commission is confronted at present—the drafting of part 2—is somewhat staggering and calls for a cautious approach.

28. If there are indeed a multitude of different régimes of State responsibility, and if there is even no "least common denominator" of those régimes, the prospect of drawing up a complete set of articles in part 2 would seem rather dim. In any case, there is much to

<sup>11</sup> *Yearbook* . . . 1976, vol. II (Part Two), p. 117, para. (53) of the commentary to art. 19 (International crimes and international delicts).

<sup>12</sup> *Ibid.*, para. (54).

be said in favour of postponing the consideration of a set of "framework" articles, as suggested by the present Special Rapporteur in his second report, until the Commission has reached conclusions as to the three parameters of the legal consequences of an internationally wrongful act of a State.

29. As a matter of fact, articles 1–3 as proposed in the second report—particularly article 2—were meant to point out at the outset that there are more than one or two different régimes of responsibility and that in any case an internationally wrongful act of a State does not necessarily make a *tabula rasa* of its legal relationships with other States as they existed before. Actually such statements, though true, would lead up to the drafting of an article which combined articles 1 and 3 proposed in the second report—as Mr. Aldrich suggested in the Commission at its thirty-third session (see para. 31 below). But this clearly would commit the Commission to draft a complete set of articles for part 2 of the draft. Without giving up the hope of doing just that, the Commission would perhaps prefer not to indicate its ambitions too early.

30. An additional reason for such an attitude might be that—at least in the opinion of the Special Rapporteur—a complete codification of the rules relating to State responsibility is highly unlikely to be workable in practice, and thereby acceptable to the States composing the international community, without some machinery of dispute settlement being provided for as an integral part of the draft articles.<sup>13</sup>

31. In case, however, the Commission—possibly without prejudice to the place where the articles eventually would appear in the draft—would wish to confirm the earlier decision to let the Drafting Committee consider those articles, the Special Rapporteur would withdraw his original proposal and suggest that the Drafting Committee take as a basis of discussion the wording, orally presented in 1981 by Mr. Aldrich,<sup>14</sup> to wit:

**Article . . .** [replacing articles 1 and 3 as suggested in the second report]

**A breach of an international obligation by a State affects the international rights and obligations of that State, of the injured State and of third States only as provided in this part.**

**Article . . .** [replacing article 2 as suggested in the second report]

**The provisions of this part apply to every breach by a**

<sup>13</sup> Already in para. (36) of its commentary to article 33 (State of necessity) of part 1 of the draft the Commission remarks: "... that the State invoking the state of necessity is not and *should not be the sole judge* of the existence of the necessary conditions in the particular case concerned." (*Yearbook . . . , 1980*, vol. II (Part Two), p. 50). Furthermore, the articles of part 1 often refer to *jus cogens* and similar notions as affecting State responsibility. Would it be likely that States are willing to accept such provisions without some guarantee for impartial dispute settlement? The history of the law of treaties and the United Nations Conference on the Law of Treaties of 1968 and 1969 would seem to point in the direction of a negative answer to this question.

<sup>14</sup> *Yearbook . . . 1981*, vol. I, p. 136, 1669th meeting, paras. 5–6.

**State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.**

32. Turning now to articles 4 and 5 as proposed in the second report, the Special Rapporteur would like first of all to do justice to a remark made both in the Commission and in the Sixth Committee, to the effect that those articles—and, presumably, the title of chapter II—should rather be drafted in the form of what the "injured" State—and, possibly, "third" States—is or are entitled to require from the "author" State of an internationally wrongful act. Indeed, in the articles adopted in first reading by the Commission for part 1, reference is often made to conduct (consisting of action or omission) of a State which is not in conformity with what is required of it by an international obligation. It would seem that everyone agrees that such conduct—i.e., an internationally wrongful act—does not destroy the original obligation, but rather creates a situation in which additional, or at least more specific, obligations are "automatically" added.<sup>15</sup> But it is surely up to the other State or States to invoke the "new" obligations of the author State.<sup>16</sup>

33. Since, at this stage, the question whether only the directly injured State or also other States may—or possibly, should—invoke the "new" obligation of the author State, should not be prejudiced, a neutral formulation of the introductory part of the article might be the following:

**Article . . .**

**An internationally wrongful act of a State entails for that State the obligation:**

. . .

34. Apart from this drafting point, articles 4 and 5 as proposed in the second report raise the point of substance and of method already touched upon above (para. 27). Indeed, if there were no "least common denominator in the régime of international responsibility", this would apply also to the first parameter: the description of the "new obligations" of the author State.<sup>17</sup> This brings us back to our general problem, on which it would seem useful to elaborate, since its solution determines our total method of work in respect of the topic of State responsibility.

<sup>15</sup> Obviously, the original obligation may not be couched in abstract terms, but may require only a specified conduct at a specified time; in such a case, by definition, the absence of that specified conduct at that specified time constitutes not only a breach of that obligation, but actually renders the obligation so to speak obsolete; no belated performance but only substitute performances can be envisaged in such a case. But all this is self-evident, and anyway the bulk of international obligations are formulated in abstract terms.

<sup>16</sup> Although in some cases, the other State or States may not be free not to invoke the new obligation; this, however, is a matter of the third parameter.

<sup>17</sup> Actually, article 5, as proposed in the second report, deviates from article 4 in respect of a particular type of primary rules—namely, those relating to "the treatment to be accorded by a State [within its jurisdiction] to aliens" and, as such, introduces another régime of State responsibility.

## CHAPTER III

The general problem underlying the drafting of part 2  
of the draft articles

35. In the opinion of the Special Rapporteur, international law as it stands today is not modelled on one system only, but on a variety of interrelated subsystems, within each of which the so-called "primary rules" and the so-called "secondary rules" are closely intertwined—indeed, inseparable.

36. Actually, every single primary rule—as an expression of what ought to be—necessarily raises the next question: what should happen if what is is not in conformity with what ought to be under that primary rule? Since the answer to this question is also framed in terms of "ought to be", this answer raises the same type of next question, and so forth. The circuit is finally closed by either accepting the actual set of facts, or by creating—by the exercise of factual power—another set of facts, which may be more or less far removed from the realization of the original "ought to be", more or less equivalent to the situation originally envisaged by the primary rule.

37. Now, obviously, in the process of creation of a rule of international law—be it through custom, treaty, decisions of competent international institutions, or even judgments of international tribunals—the questions referred to in the foregoing paragraph are very seldom (fully) looked at, let alone explicitly answered. This does not mean that there are no answers in international law. Sometimes some of the questions are explicitly addressed and answered in respect of particular primary rules. In other cases there may be a more or less consistent practice of States, and even a practice which is considered as "law". But, since practice is made up from conduct in a great variety of actual circumstances, and such conduct is often inspired, or at least influenced, by "political"—that is, *ad hoc*—considerations, it is awfully hard to draw from it general rules, and even impossible, as the Commission had realized earlier, to draw from it one set of general rules applicable to all primary rules.<sup>18</sup>

38. Under those circumstances, there is no escape from a categorization of primary rules for the purpose of determining the legal consequences of their breach, and from formulating different sets of legal consequences for each category of primary rules. And even then, it must be realized that in a given situation more than one subsystem of interlinked primary and secondary rules may apply. This, then, requires a determination of the interrelationship between those subsystems. Thus we will get ever further away from the unitary concept of international obligation which is the cornerstone of part 1 of the draft articles.<sup>19</sup>

<sup>18</sup>Of course, the Commission is not bound only to describe or codify the actual practice of States in so far as it appears to be accepted as law; it also has a task of progressive development, which, of necessity, implies some power to suggest a way to "cut the Gordian knot".

<sup>19</sup>Surely part 1, as adopted on first reading (see footnote 4 above), itself makes some distinctions between categories of primary rules, and—in its chapter V on "Circumstances precluding wrongfulness"—what the Special Rapporteur called the "zero-parameter" in his

39. A first attempt to distinguish subsystems of international law may, in the opinion of the Special Rapporteur, be based on the function of the different subsystems.<sup>20</sup> It would seem that, roughly, one could distinguish (a) rules of international law the purpose of which is to keep the States apart, from (b) rules which reflect the idea of a sharing between States of a common substratum, and from (c) rules which organize a parallel exercise of sovereignty in respect of certain international situations.

40. The prime example of category (a) rules is the rule, now recognized as being a rule of universal customary law, which stipulates that every State "shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state". Here the sovereignty of one State (in the final analysis exercised through "the threat or use of force") is confronted with the sovereignty (in the form of its "territorial integrity" and "political independence") of another State, and the resolution of this conflict is found in a conduct-rule of international law. It should be noted that the rule envisages the existence of a particular intent on the part of one State, in respect of a particular effect on the part of another State. A breach of the international obligation stipulated in this rule, by a State, cannot be distinguished from the violation of a right, implied in this rule, of another State.<sup>21</sup> There would seem to be no doubt that the legal consequence of a breach of this obligation is a duty to restore completely the *status quo ante*, including a wiping out of all the consequences of the wrongful act and a providing of guarantees against repetition (first parameter). As to the second and third parameters of the legal consequences, article 34 of part 1 of the draft articles implies, and the United Nations Charter gives, an answer to some of the relevant legal questions.<sup>22</sup>

41. It is to be noted in this respect that measures of individual and collective self-defence, as well as enforcement action by the United Nations, must respect the set of rules of international law relating to humanitarian *jus in bello*, and that a guarantee against repetition may not, in principle, be sought in the permanent annexation of the State which is author of the internationally wrongful act in question.

second report (*Yearbook . . . 1981*, vol. II (Part One), p. 85, document A/CN.4/344, para. 49, footnote 22)—recognizes the fact that a given situation may be governed by different and even conflicting rules. At some stage in the second reading of those draft articles the Commission may wish to consider the question whether even part 1 does sufficiently reflect the diversity of primary rules.

<sup>20</sup>Here, as will appear below, we have to take into account the dimensions of any subsystem: rules of procedure, of conduct and of status.

<sup>21</sup>The relationship between this obligation and this right is underlined in the words "in their international relations" appearing in Article 2, para. 4, of the United Nations Charter; of course, which relationships are considered to be "international" is another matter.

<sup>22</sup>As to the ultimate "closing of the circuit", reference must, alas, be made to the last sentence of para. 36 above.

42. There are other primary rules of international law which have the same function of keeping the States apart, though perhaps the breach of none of those other primary rules entails all the legal consequences outlined above, at least in so far as the second and third parameters are concerned. Nevertheless, some kind of "least common denominator" seems to apply to the régimes of State responsibility in regard to this category of rules.

43. While the scope of the prohibition of aggression is not entirely clear,<sup>23</sup> the scope of other primary rules having the same function is even less clear. Actually, it seems that it was not so much the scope of the primary rules as, rather, considerations concerning the legal consequences of the breach of such rules, which inspired doubts as to the formulation of such primary rules.

44. Indeed, while it is easy to recognize that no State has the right to intervene in the affairs of any other State, it is less easy to determine specific obligations deriving therefrom, and even more difficult to determine the limits of allowable responses to a breach of such obligations, particularly in terms of the second and third parameters. As a matter of fact, one is bound to admit that intervention may be less serious as to its effects than aggression, and that measures of self-help strictly limited (also in time) to the purpose of terminating *ex nunc* a factual situation constituting an infringement of a right may not be identifiable with an action directed against the territorial integrity and political independence of another State.<sup>24</sup> In short, it is more difficult to strike the balance between conduct on the part of one State and the response to such conduct by another State when one arrives at situations which are less serious than an outright war.<sup>25</sup>

45. While the main difference between aggression and intervention is that the former implies the exercise of factual or military power not only within but "over" foreign territory—the most blatant disregard of the sovereignty of another State—there are less serious forms of conduct, also prohibited by rules of universal customary law, the function of which is to keep the States apart. Hence the principle that a State may not "use" the territory of another State for the performance of its government functions.<sup>26</sup> Here again, there

may be no difference between the legal consequences of a breach of the relevant obligations and those of a breach of the obligations mentioned earlier, in so far as the first parameter is concerned; but the admissibility of countermeasures in such a case may be judged differently and the existence of a third parameter of legal consequences—rights, let alone duties, of third States—seems, in principle, excluded.<sup>27</sup>

46. While the rules of universal customary international law mostly have the function of keeping the States apart,<sup>28</sup> obligations founded on treaties may have quite a different function and may reflect a notion of sharing a common substratum, or at least a notion of organizing a parallel exercise of sovereignty in respect of certain international situations.<sup>29</sup>

47. Situated between obligations arising out of universal customary international law and obligations arising out of treaties are the rules of customary law which apply to relationships between States and which are, so to speak, "triggered" or filled in by some form of consent between those States. The procedure of consent then creates a status from which rights and obligations between States are derived. A typical example are the rules of customary law relating to diplomatic intercourse. The mutual consent to establish diplomatic relations implies the consent of the receiving State to the exercise of some governmental functions by the sending State within the former's territory, as well as privileges and immunities of the diplomatic mission, its personnel and its materiel, and entails corresponding obligations of the sending State. It is significant to recall here that the corpus of rules of diplomatic law is considered by the International Court of Justice to be a self-contained régime, thus that the breach of an obligation in this field by the sending State can be countered only by what is in essence a partial (declaration of *persona non grata*) or total (breaking off of diplomatic relations) termination or suspension of the relationship, comparable to the *exceptio non adimpleti contractus* in the law of treaties.<sup>30</sup>

48. The rules of customary international law relating to the treatment of aliens are also often linked with an element of consent on the part of the receiving State, in the form of admission of the alien.<sup>31</sup> In this field, however, a different function appears. While a *jus communicationis*, in the sense that a State is obliged to admit aliens, does not exist under customary international law, the rules on the treatment of aliens apply irrespective of any formal act of admission. In other words, the mere presence of the alien within the

<sup>23</sup> Cf. the Definition of Aggression (General Assembly resolution 3314 (XXIX) of 14 December 1974, annex), and in particular the various reservations made and interpretations given in the course of its preparation and adoption (see *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1)*, annex I).

<sup>24</sup> In this connection it is interesting to note that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex), in the second paragraph of the part on non-intervention, refers to: "measures to coerce another State in order to obtain from it the *subordination*\* of the exercise of its sovereign rights and to secure from it *advantages*\* of any kind".

<sup>25</sup> Even the Definition of Aggression (see footnote 23 above), in its article 2, contains the proviso that "the Security Council may . . . 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". Cf. also the reference to "gravity" in article 3, under (g), of the same definition.

<sup>26</sup> Perhaps one might also mention in this connection the "hard core" of a State's immunity, as regards the *imperium* of another State, for acts committed within the former's territory. It is to be

noted that, both in this case and in the case mentioned in para. 44 above, the rules of international law relate to jurisdiction rather than to sovereignty.

<sup>27</sup> If only because the obligations referred to here may be suspended by the consent of the State the "immunity" or "independence" of whose territory is concerned.

<sup>28</sup> Also by making a distinction between States directly concerned with a rule and its application, and third States.

<sup>29</sup> On the other hand, treaties may also serve to specify in more detail the customary rules of separation of States, such as treaties establishing a boundary.

<sup>30</sup> Actually, in view of the rules applicable in the case of breaking off of diplomatic relations, the qualification "suspension of the relationship" seems more adequate. The status character of the régime is also reflected in the obligations of third States.

<sup>31</sup> The "sending State" being presumably the State of nationality of the alien.



jurisdiction of another State is considered to give rise to an international situation which entails obligations and rights of the States concerned. The recognition that international trade in the larger sense of the word is *grosso modo* in the interest of all States is at the basis of the rules of customary international law in this field.<sup>32</sup>

49. It would seem, therefore, that even in the realm of universal customary international law there are different sets of obligations of States, fulfilling different functions. It is submitted that this difference in primary rules cannot but influence the content of the applicable secondary rules.

50. The differentiation of obligations becomes even more necessary if obligations arising out of treaties are taken into account.<sup>33</sup> Treaties fulfil a variety of functions. Their "least common denominator" is the fusion of the *voluntates* of individual States at a particular time into an instrument the content of which thereafter becomes, in principle, independent of each individual *voluntas*. This procedure, in itself, cannot but influence the relationship between States, and not necessarily only between those States which are parties to it. Actually, the 1969 Vienna Convention on the Law of Treaties<sup>34</sup> contains several provisions dealing with the legal consequences of conduct of a State, within the framework of the validity of the treaty and of the basic principle of *pacta sunt servanda*, the latter principle forming the link between the law of treaties and the law of State responsibility.<sup>35</sup>

51. As to the various functions of rules laid down in treaties, the same distinctions can be made as were made above in regard of rules of customary international law. Indeed, article 43 of the Vienna Convention presupposes that rules laid down in treaties may well be an elaboration of rules of customary international law. But in any case, a treaty always implies some element of organization, as well as some element of object and purpose, of the relationship as a whole established by that treaty. Again, these elements may influence the legal consequence of a breach of an obligation resulting from the treaty even if the treaty does not itself spell out the legal consequences of such breach. Admittedly, the elements of organization and of object and purpose, separable from rules of conduct contained in the treaty, may be so minimal as to be negligible for the purpose of determining the legal consequences of a breach of those rules of conduct. Furthermore, just as a

rule of conduct in a sense fails if it is not implemented, the elements of organization and of object and purpose may fail.<sup>36</sup>

52. The element of "object and purpose" of the treaty is particularly important in the context of secondary rules, if that object and purpose includes the creation or recognition of extra-State interests involved in the treaty and its implementation. Such interests may be of different kinds. Actually, very few treaties are in the nature of a pure barter transaction, a simple *do ut des* relationship, in which only the respective separate interests of each individual State-party are involved. The very notion of an object and purpose of a treaty as a whole already implies some measure of extra-State interest, if only in the form of an inseparable common interest of the parties. In addition, a treaty may envisage interests of third States, and even of entities other than States, such as individual human persons.

53. On the other hand, the element of "organization" of relationships, inchoate in every treaty, may be more developed in a particular treaty. Typical examples are the provision, in a treaty, of a procedure of dispute settlement as regards the interpretation and application of the treaty in concrete circumstances, or of procedures for collective elaboration (and interpretation) of the general rights and obligations under the treaty. In this connection it should also be noted that, increasingly, treaties do not so much address the State as such—that is, as an indivisible "person"—but rather take into account the relative independence of its elements *inter se*, by addressing those elements directly, both passively and actively.<sup>37</sup>

54. In short, a treaty may create a subsystem of international law with its own, express or implied, secondary rules, tailored to its primary rules. This does not necessarily mean that the existence of the subsystem excludes permanently the application of any general rules of customary international law relating to the legal consequences of wrongful acts. As already remarked, the subsystem itself as a whole may fail, in which case a fall-back on another subsystem may be unavoidable.<sup>38</sup> On the other hand, such a subsystem is, in principle, self-contained, in the sense that it cannot be overruled by situations and considerations belonging to another subsystem. This might seem in contradiction with what has just been said. As a matter of fact, the interrelationship between the subsystems may be complicated by the fact that a particular set of actual circumstances may be relevant for more than one subsystem. Here the measure of organization of the relationship becomes particularly important; if it is not possible to allocate the situation to one or the other

<sup>32</sup> A functional approach which also underlies the particular position of merchant ships flying the flag of a foreign State and engaged in navigation; to a lesser extent the same applies to civil aircraft.

<sup>33</sup> There are international instruments of consensus between two or more States which do not intend to create obligations and rights, but which may nevertheless entail legal consequences in the relationship between the States involved. Actually, the frequent reference in the Vienna Convention on the Law of Treaties to the legal relevance of what is "otherwise established", together with the various legal consequences attached to what is laid down in the text of a treaty as soon as that text is adopted, as well as to the "object and purpose" of a treaty even before it is ratified, already suggest a sliding scale of legal force of transactions between States which is not easily reconciled with the simple doctrinal dichotomy between the existence or absence of "true legal obligations". Indeed, how true is a legal obligation if there are circumstances precluding the wrongfulness of its breach?

<sup>34</sup> Hereinafter called Vienna Convention.

<sup>35</sup> Consequently, the question arises as to the relationship between the two sets of rules; thus, for example, between the *exceptio non adimpleti contractus* and a prohibition of reprisals.

<sup>36</sup> The question arises as to what should happen then (see para. 36 above and para. 54 below).

<sup>37</sup> This is not the same phenomenon as the one referred to at the end of para. 52 above, since a link between the element involved and the State to which it belongs remains essential. Actually, the rules referred to here are more in the nature of rules of conflict of laws; in this respect they are akin to the rules of diplomatic law referred to in para. 47 above.

<sup>38</sup> An example of such fall-back is given by the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (United Nations, *Treaty Series*, vol. 575, p. 159). Article 27 of this convention bars the exercise of diplomatic protection; but such diplomatic protection revives if the receiving State does not comply with the award, rendered in its dispute with the foreign investor.



system, the more organized system prevails until it fails as such.

55. What conclusions can be drawn from the foregoing analysis? It seems clear that part 2 of the draft articles on State responsibility cannot exhaustively deal with the legal consequences of any and every breach of any and every international obligation. The other extreme solution is to leave the determination of such legal consequences entirely to the judgment of those bodies which are charged with the peaceful settlement of international disputes. The latter solution, in the final analysis, leaves the matter to the individual sovereign States, since (a) they choose the means of settlement of disputes, and (b) they have to determine their action if those means of settlement fail. Clearly, then, the Commission has to seek a solution between those two extremes.

56. Actually, the Commission was faced with a similar problem when it dealt with the law of treaties. Then it singled out a particular type of transaction and also took care of the different subsystems created by treaties by saving clauses, such as that embodied in article 5 of the Vienna Convention;<sup>39</sup> while the United Nations Conference on the Law of Treaties added, as an integral part of the Vienna Convention, a general procedure for dispute settlement with respect to "invalidity, termination, withdrawal from or suspension of the operation of a treaty" (art. 65).

57. A general saving clause comparable to the one in the Vienna Convention<sup>40</sup> was suggested in the second report as article 2. The reference in that article to a "rule of international law"—and, in the redraft, to "other applicable rules of international law" (see para. 31 above)—is sufficiently wide as to make all other articles of part 2 of the draft no more than rebuttable presumptions as to the legal consequences of internationally wrongful acts. A consequence of such an approach would seem to be that part 3 of the draft should contain a meaningful procedure for dispute settlement as to the lawfulness of the action taken, including the demands presented by a State invoking the legal consequences of a breach of an international obligation by another State as a ground for its action in response to such breach.

58. Just as in the case of the Vienna Convention, the dispute settlement procedure would be limited to a particular legal question, which is only one of the questions to which a particular set of actual facts gives rise. Indeed, the procedure would not deal with the

question whether there has in fact been a breach of an international obligation in the first place. Such an isolation of one of many legal questions which may be relevant in a given situation surely has its disadvantages and its inherent difficulties of application. Nevertheless, it is a feasible machinery and one which is well known in international practice.

59. The first example is of course the Vienna Convention itself. Obviously, the questions "concerning the application or the interpretation of article 53 or 64" (*jus cogens*), as well as those "concerning the application or the interpretation of any of the other articles in Part V of the present Convention" (art. 66) are, in fact, only incidental to a situation where the implementation of a treaty is in issue. They are preliminary or prejudicial legal questions, taken out of the context of the legal appreciation of total situation in which they arise.

60. Another example is the separation of the preliminary legal question "whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration", as mentioned in article 1 of the "Model Rules on Arbitral Procedure" adopted by the Commission in 1958.<sup>41</sup> Though these "Model Rules" have as yet not been embodied in a convention, they reflect a practice of States.<sup>42</sup> Sometimes a distinct legal question is put to the ICJ by the States parties to a dispute, as in the *North Sea Continental Shelf* cases between the Federal Republic of Germany and, respectively, Denmark and the Netherlands.<sup>43</sup>

61. In this connection, reference may also be made to the machinery for making a preliminary decision ("*pour statuer, à titre préjudiciel*") adopted in the Treaty establishing the European Economic Community.<sup>44</sup> A similar machinery has been suggested for questions relating to the interpretation of rules of international law to be submitted to the ICJ by national courts for an advisory opinion. Indeed, the isolation of one or more legal questions arising in a dispute can just as well be envisaged as the isolation of the establishment of the facts of the case in an international procedure of fact-finding.

62. Obviously, a general machinery for dispute settlement, as envisaged above, should be without prejudice to existing procedures in which the whole situation may be dealt with, in particular, to the competence of the Security Council of the United Nations.

63. Within the framework of, on the one side, a general saving clause, and, on the other, a general dispute-settlement clause, part 2 could afford to be reasonably abstract; but, it is submitted, not to the same extent that the draft articles of part 1 are abstract, in the sense of making virtually no distinction at all between the content of the international obligations involved. Some "categorization" of those obligations, some recognition of the difference between possible subsystems of rules of international law, remains necessary in order to give to part 2 of the draft meaningful scope and content.

64. Of course, any subsystem of international law

<sup>39</sup> Other saving clauses are contained in the Vienna Convention, for example, in articles 73 and 75, and, of course, in the frequent use of terms such as "except in so far as the treaty may otherwise provide". It may be recalled that the then Special Rapporteur suggested in the Commission a special article dealing with a particular subsystem of international law, namely "Treaties providing for objective régimes" (*Yearbook* . . . 1964, vol. II, pp. 26 *et seq.*, document A/CN.4/167 and Add.1-3, draft article 63). The Commission as a whole did not favour such a special clause, considering that the matter could be dealt with within the framework of the articles on treaties and third States. The "State responsibility" aspects of that type of subsystem were, of course, not under discussion then (about those aspects, cf. E. Klein, *Statusverträge im Völkerrecht: Rechtsfragen territorialer Sonderregime* (Berlin, Springer, 1980), p. 225). Another saving clause adopted at the time was more or less "hidden" in the introduction of *jus cogens*.

<sup>40</sup> "Unless otherwise provided for by the treaty". Compare in particular, in the field where the law of treaties and the law of State responsibility meet, article 60, para. 2, of the Vienna Convention.

<sup>41</sup> *Yearbook* . . . 1958, vol. II, pp. 83-86, document A/3859.

<sup>42</sup> See, for example, the *Ambatielos* case, Judgment of 1 July 1952, *I.C.J. Reports* 1952, p. 28.

<sup>43</sup> Judgment of 20 February 1969, *I.C.J. Reports* 1969, p. 3.

<sup>44</sup> Art. 177 of the treaty (United Nations, *Treaty Series*, vol. 298, pp. 76-77).

remains abstract in the sense that it generally does not take into account the quantitative aspects of the facts of a given situation, or, if it does seem to do so, it does so often by using even more abstract, non-legal terms, which appeal to “*les données immédiates de la conscience*”, to use the term of Bergson, such as “serious”, “important”, “gravity”, etc.<sup>45</sup> This is particularly true for the link between primary and secondary rules. Accordingly, any such link can never be “automatic”. A wrongful act may, in fact, be of such negligible importance that it should not entail the legal consequences determined by the secondary rules. Thus the Definition of Aggression<sup>46</sup> presupposes that even an act of aggression as there defined, may be not “of sufficient gravity” to be treated as such.

65. The mirror-image of this immediate appreciation of a particular set of factual circumstances is the principle of law called the principle of proportionality, which in a sense may be said to underlie every link between norm and sanction in a system of law. Here, the principle may be concretized in a rule of positive law.

66. It would not seem necessary to refer explicitly in the draft articles of part 2 to the considerations in paragraphs 64 and 65 above, which apply to all subsystems of international law, provided that the two safeguards—a general saving clause and a general machinery for dispute settlement—are adopted.

67. On the other hand, it may be advisable to give explicit recognition to the fact that a given set of actual circumstances, in other words a factual situation, may be relevant for more than one subsystem, or, to put it inversely, that more than one subsystem may be applicable to such a situation.<sup>47</sup> In such a case a choice between, or combination of, such subsystems may be unavoidable.<sup>48</sup>

68. In a sense, one might consider the matter of the so-called “aggravating” or “extenuating” circumstances as falling within the scope of this choice between, or combination of, subsystems. However, a note of caution should be entered here. First of all, the terminology itself is derived from municipal law systems and practices and is, as such, prone to evoke false analogies. Actually, many aggravating or extenuating

circumstances can be taken care of through the application of the considerations outlined in paragraphs 64 and 65 above. They are either elaborated in the abstract rule of law itself, or immediately apparent as a matter of fact.<sup>49</sup>

69. What is meant in paragraph 67 above is a somewhat different phenomenon from that which was touched upon in paragraphs 38 and 54 above, to wit, the *concursum* of different subsystems. Various types of such *concursum* can be distinguished. First, the conduct of a State, which is not in conformity with what is required of it by an international obligation of that State, may at the same time be not in conformity with what is required by another, parallel, obligation. In particular, treaty rights and obligations between States may well be created in order to specify, in *per se* rules, what under particular circumstances could be considered to be already covered by a more general rule of customary law.<sup>50</sup> Similarly, and inversely, treaty rights and obligations may specify, in *per se* rules, conduct which, again under particular circumstances, would otherwise be clearly not only not prohibited but maybe even lawful under the rules of customary international law. If such “parallel” rules belong to different subsystems of international law, a choice between, or combination of, the legal consequences of a breach provided for in such subsystems may be necessary, when the particular circumstances are present.<sup>51</sup> Accordingly, it may be, for example, that the breach of an obligation relating to the treatment of aliens is at the same time an act committed with the intent to cause direct damage to another State, and having this effect. On the other hand, it may be that a breach of an obligation, though not justified by a circumstance precluding wrongfulness, is nevertheless committed under circumstances which should preclude other legal consequences than the duty to compensate the damage caused.

70. It is debatable whether this type of *concursum*, and the interplay of “parallel” and “anti-parallel” primary conduct-rules which is at its basis, should be addressed in part 2 of the draft articles. The problem is somewhat similar to that dealt with in paragraphs 64–66 above, and it might be said that here, too—as in the case referred to in paragraph 68 above—the relative weight of the connecting factors with one or the other applic-

<sup>45</sup> Of course there are also treaties which do use quantitative terms, directly related to the facts. Thus, for example, the “agreed understandings” relating to articles I and II of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (General Assembly resolution 31/72 of 10 December 1976, annex) translate some of the terms of the treaty, concerning the effects of conduct, into notions of pure fact. But significantly, there was no agreement on whether factual phenomena not covered by the agreed understanding concerning article I were allowed, and the agreed understanding concerning article II is explicitly only illustrative. In any case, the intention of causing “destruction, damage or injury to any other State Party” is made an element of the prohibition.

<sup>46</sup> See footnote 23 above.

<sup>47</sup> A situation, in this sense, may extend in time, in other words cover a series of facts occurring at different points of time.

<sup>48</sup> Actually such choices, for example, and such combinations, are already envisaged in some of the draft articles on circumstances precluding wrongfulness (the “zero-parameter”). Thus, for example, state of necessity cannot be invoked as a justification for not complying with a rule of *jus cogens*. Furthermore, even if the circumstances are such that, in the first instance, countermeasures are allowed or self-defence can be invoked, the measures actually taken should still be legitimate, i.e., remain within the limits of the applicable rules of international law.

<sup>49</sup> Cf. para. (22) of the commentary to art. 34 of part 1 of the draft (Yearbook . . . 1980, vol. II (Part Two), p. 60) where the “necessary” character of the action in self-defence, the “proportionality” and the “immediacy” of the reaction, are qualified as “. . . questions which in practice logic itself will answer and which should be resolved in the context of each particular case”, a nice combination between the most abstract and the most concrete.

<sup>50</sup> Article 43 of the Vienna Convention, in a different context, seems, *inter alia*, to envisage such a situation.

<sup>51</sup> Again, the “zero-parameter” offers an illustration: under article 35 of part 1 of the draft, a duty to offer compensation for damage—and no more than that—may arise from an act the wrongfulness of which is precluded by some of the earlier articles. Actually, this preclusion of wrongfulness is entailed by another primary (“anti-parallel”) rule, with the result that there is a parallel rule belonging to a different subsystem (which some would describe as the subsystem of “liability for injurious consequences of acts not prohibited by international law”). But, in the cases referred to in articles 31–33, the preclusion does not arise if the State invoking it has contributed to the occurrence of the particular situation. In such particular set of circumstances, another subsystem applies, namely a subsystem of legal consequences of wrongful acts, even though there still is *force majeure*, a material impossibility, distress or state of necessity.

able subsystem is either immediately apparent or—in the case of treaty rules—is elaborated in the treaty itself. The two safeguards mentioned in paragraph 66 above might then be considered sufficient.<sup>52</sup>

71. There are, however, two other types of *concursum*, where the solution is perhaps less evident. One such type is the *concursum* of subsystems having a clearly separate and different object and purpose; in fact, dealing with separate and different types of relationship. A typical example is given by the set of rules of international law relating to the respect for human rights in armed conflicts. In principle, these rules are applicable even if one of the parties in the armed conflict is an aggressor, and their observance by one party is obligatory even if the other party does not implement its obligations under those rules. This is in conformity with the object and purpose of protection of the human person as such. On the other hand, the restraints those rules put on the methods of warfare of the parties in an armed conflict, and thereby on the possibility of gaining a military advantage in a concrete situation, are sometimes recognized in the formulation of those rules themselves. In this respect—the equality of opportunity to gain a military advantage—a neutral position of the rules, and the non-reciprocity, are perhaps less self-evident. Actually, the conventions in this field address the problem. But in several other fields the questions arising from this type of *concursum* are open.

72. Whereas in the example mentioned in the foregoing paragraph the *lex specialis* character of the relevant rules is generally recognized, there seems to be less consensus on the inverse question, whether the breach of an obligation under a subsystem, which excludes a reciprocal breach as a response, also excludes the response of non-fulfilment of an obligation under another subsystem, which is also applicable in the given situation. Thus, for example, while it is accepted that a member State of the European Economic Community cannot suspend its obligations under the establishing Treaty towards another member State on the ground of non-fulfilment of the latter's obligations as a member State, the question arises whether the first State can suspend its obligations outside the field of the EEC Treaty. A positive response to the general question could be based on two arguments: (a) that the object and purpose, which excludes a reciprocal breach, is not involved, and (b) since a reciprocal breach is excluded, there is a particular need to provide for other means of pressure to obtain observance of the other subsystem's object and purpose.

73. Both arguments are, however, not always decisive, because (a) the object and purpose of a subsystem may well include matters which are not covered by strict rights and obligations as provided for in the subsystem, and (b) the second argument may lose its validity if there are other means indicated in the subsystem's organizational provisions.<sup>53</sup>

<sup>52</sup> Indeed, the Commission has already noted in its commentary to chapter V of part 1 of the draft that the articles contained in that chapter are not to be considered as an exhaustive list of circumstances precluding wrongfulness (*Yearbook* . . . , 1979, vol. II (Part Two), p. 106 *et seq.*).

<sup>53</sup> Though the treaties establishing the European Communities are of a special kind, they also contain obligations which in some form or

74. Indeed, the organizational provisions of the subsystem may, explicitly or implicitly, exclude some legal consequences of a breach of an international obligation until the procedures indicated in those organizational provisions are exhausted without avail.<sup>54</sup> Actually, all legal consequences of an internationally wrongful act presuppose that such an act has been established, and it is a matter of organizational provisions to determine how this is brought about.<sup>55</sup>

75. Furthermore, as we have seen (para. 51), the object and purpose of the subsystem may also exclude some legal consequences of a breach of a primary international obligation under that subsystem. Here, too, there is a limit to the exclusion, a fall-back into another subsystem, if the original subsystem fails as such. In that case, the qualitative aspects (law) and quantitative aspects (fact) of the subsystem meet in a general breakdown of the envisaged implementation.

76. In the foregoing paragraphs, several circumstances of law and of fact, precluding one or more legal consequences to be drawn from an internationally wrongful act, have been considered. We have noted that if, on the one hand, the possibility of explicit exclusion of one or more such legal consequences in the formation of (abstract) rules of international law is

another can be found in other multilateral treaties—for example, in the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No. GATT/1969-1)—such as the obligation to refrain from imposing quantitative restrictions and measures having equivalent effect (which are not based on certain specified overriding non-economic purposes such as public health protection). The direct effect of this provision, together with the organizational system under which local courts are required to submit to the Court of Justice of the European Communities any legal questions relating to the interpretation of the treaty, and are bound by the Court's opinion—in other words, the combination of local remedies and international court decisions—seems to exclude any claim from one member State against the other for damages, if a breach of the obligation occurs, even if the local remedy falls short of a *restitutio in integrum stricto sensu*. Actually one can discern in the jurisprudence of the Court of Justice of the European Communities a certain tendency to leave at least some of the legal consequences of its declaratory decision on the interpretation of a treaty provision or of a Community regulation entirely to the determination of the local courts.

Furthermore, there is also room for the opinion that the object and purpose of the treaty excludes even countermeasures in a field of obligations outside the treaty, unless the organizational system fails, e.g., because the local courts do not ask for, or do not follow, the decisions of the Court of Justice of the European Communities. Even then, there is a breach of another obligation for which other remedies—be it of a declaratory character only—are provided in the treaty, which must be exhausted. A comparison can be drawn with the Washington Convention on the Settlement of Investment Disputes, where diplomatic protection is excluded pending the settlement procedures between a State and a foreign investor, but revives if the award is not complied with by that State (see footnote 38 above).

<sup>54</sup> There is a clear analogy with the rule of exhaustion of local remedies in the case of rules concerning the treatment of aliens, particularly if one admits that this rule only applies to the treatment of aliens within the jurisdiction of the State in question. There is also—again—a clear analogy with the state of necessity, which cannot be invoked if the primary rule in question has already taken into account the possibility of such a situation.

<sup>55</sup> In this connection it seems significant that the European Court of Human Rights does not consider the rule of exhaustion of local remedies to be applicable to a complaint of an individual that the State has not drawn the legal consequences of a finding of that Court that there has been a violation of his rights under the European Convention on Human Rights. In such a case, even the exhaustion of the international remedy of a (new) complaint to the European Commission of Human Rights is—according to the Court—not required.

admitted, and if, on the other hand, a general international procedure of control (*in concreto*) over the admissibility of the drawing of legal consequences is adopted, the task of formulating general rules on those legal consequences is facilitated.

77. Nevertheless, it would still seem necessary to draw up a catalogue of possible legal consequences in a certain order of gravity, and to indicate the principal circumstances precluding one or more legal consequences in a general way.

## CHAPTER IV

### The catalogue of legal consequences

78. As to the catalogue of legal consequences, in his preliminary report, the Special Rapporteur distinguished three parameters, while underlining, in his second report, the interrelationship between those parameters. In the second report an attempt is made to analyse somewhat further the first parameter, that is, what international law requires of a State in case of a breach of an international obligation by that State.

79. In this connection, another preliminary point should be noted, which was already touched upon in paragraph 32 above. In actual international practice, "State responsibility" means that a rule of international law is invoked against a State by someone else whose interests are affected in an existing factual situation; in general, the "someone else" is another State, and the procedure of invoking is through the diplomatic channel. Now, leaving aside the possible denial of the State whose responsibility is invoked that the alleged existing factual situation in reality exists,<sup>56</sup> the first reaction of this State will be the requirement of some proof that the situation really is relevant for any rule of international law by which it is bound towards the other State invoking its responsibility;<sup>57</sup> if not, it will invoke its domestic jurisdiction. In other words, if State responsibility is invoked, immediately the relationship between the international system—or subsystem—and the national system arises. Indeed, while international law is gradually and slowly—sometimes only regionally—building up its own, primarily functional, substratum and its own equally functional, and usually weak, power structure, one cannot escape a "debunking" of the fiction of the State as the sole actor on the international stage. In other words, as regards the State, one has to differentiate.

80. Actually, the functional substratum of the rules of international law is translated into its personal and territorial prolongations. As to its personal prolongations, this is done in part 1 of our draft articles by the provisions of its chapter II relating to the "act of the State".<sup>58</sup> There the main problem is to distinguish between "organs of the State" (arts. 5–8) and "a person or group of persons not acting on behalf of the State" (art. 11), and to take into account their possible factual

interrelationship through conduct of the one "related to" conduct of the other, possibly by omission.<sup>59</sup>

81. The draft articles just referred to, then, differentiate the State or national system by making a distinction between conduct which can be considered an "act of the State" and conduct which cannot be so considered. Thereby they tend to address only breaches of an international obligation which are intentional as regards another State or are construed to be so.<sup>60</sup> Now, obviously, *mens rea* is not necessarily an element of the breach of an international obligation, quite apart from the general inapplicability of municipal law analogies in international law. The state of mind of a person, so important in many fields of municipal law, has to be translated, in international law dealing with States, into terms of the internal structure of the national system.<sup>61</sup>

82. The foregoing tends to show that, in dealing with the legal consequences of an internationally wrongful act, one cannot fail to take into account the internal structure of the State as well as the character of the primary rules of international law involved.<sup>62</sup> In these terms, the factual circumstances of the breach—"intentional", "fortuitous", or "incidental"—have to be appreciated.<sup>63</sup>

83. As a counterpoint, it may not be amiss to analyse the first parameter of the legal consequences of an

nationals of the State concerned, which do rather have a genuine link with the (autonomous) territory of that State which is not covered by the territorial scope of the treaty.

<sup>59</sup> This topic is touched upon in paras. 20–25 of the preliminary report (*Yearbook . . . 1980*, vol. II (Part One), pp. 111–112, document A/CN.4/330). The Special Rapporteur still holds to the opinion expressed in para. 24 thereof, although he also still feels that there is an uneasy discrepancy between the construction of rights of a State in the person of its nationals and the absence of responsibility—i.e., in fact, of obligations—of a State in respect of conduct of persons not acting "on behalf of" the State. Of course, the gap is sometimes more or less filled by treaty provisions which oblige the State to ensure that persons under their jurisdiction or control commit, or refrain from committing certain acts. Whether treaty provisions of such a type are really meant to create an obligation the non-fulfilment of which entails all the possible legal consequences of an internationally wrongful act, is another matter. Perhaps they only reflect a "duty to take care".

<sup>60</sup> Cf. the notion of "constructive intent" known to several municipal legal systems in the field of penal law, such constructive intent being a state of mind in which a person commits an act not actually directed at a particular consequence or effect, but knowingly accepting that consequence as a foreseeable part of attaining a different purpose.

<sup>61</sup> If in fact there is any. If not, other constructions are necessary: see, in part 1 of the draft, draft article 14, para. 2, and draft article 15, para. 1, second sentence, in comparison with article 14, para. 3, dealing with a situation of "insurrection"—in other words, of failure of the national system as such.

<sup>62</sup> In both cases, the legal structure is the starting point; compare draft article 5 of part 1 of the draft.

<sup>63</sup> There is in principle no State responsibility if the private author

<sup>56</sup> Or will come about, in the case of a "preventive" diplomatic *démarche*.

<sup>57</sup> Of course, the same occurs the other way round if the other State is allegedly acting in response to a wrongful act of the first-mentioned State.

<sup>58</sup> An element of "territorial" prolongation appears in article 28, para. 1 of part 1 of the draft. Cf. also article 29 of the Vienna Convention, relating to the territorial scope of treaties. Incidentally, both treaties and doctrine tend in this respect to focus on obligations only ("binding upon . . ."); consequently, if a limited territorial scope of a treaty is established, some complicated questions arise as to the scope of the rights in that case, particularly in respect of

internationally wrongful act in terms related to the internal structure of the State.<sup>64</sup> In particular, the distinction between belated performance, culminating in *restitutio in integrum stricto sensu*, and substitute performance, culminating in the giving of guarantees against repetition of the breach, would seem appropriate, as well as the distinctions between the various degrees of either performance.<sup>65</sup>

84. Indeed, the distinction between *restitutio in integrum stricto sensu* and the application of effective local remedies seems essential for the determination of the first parameter of the legal consequences of a breach of an international obligation concerning the treatment to be accorded to aliens.<sup>66</sup> Those primary rules of international law are obviously not meant to pre-empt all rules of municipal law which are applicable also to aliens, including rules providing for local remedies.<sup>67</sup> It stands to reason that the particular character of those primary

rules is reflected in the legal consequences of a breach of those rules.

85. In this connection, it may be noted—though it does not belong to the topic of State responsibility—that the fairly recently perceived interdependences of States in the field of human environment as a “shared resource” has given rise to rules of international law showing distinctions in the primary rules which can be considered as a mirror image of the distinctions in secondary rules, just referred to. In general, in this field the rules do not prohibit the use of the national part of such shared resources but require in successive degrees: (a) the taking into account of the environmental impacts in national regulation of such use; (b) the non-discrimination between environmental impacts within and outside the State frontiers in the application of such national regulation, and (c) the equal access of national and foreign interested parties to local remedies provided for in such national regulations.

86. In view of the foregoing, it would seem useful to mention separately in the catalogue of legal consequences of an internationally wrongful act the degrees of the first parameter, to wit: (a) stop the breach (*ex nunc*), (b) application of local remedies (in principle, *ex tunc*), and (c) *restitutio in integrum stricto sensu* (which, in a way, works *ex ante*). All this is “belated performance” of the original primary obligation. In the case of material impossibility of belated performance, a substitute performance is required in similar degrees, namely: (1) compensation, including possibly an apology as a compensation for moral damage. Compensation is *ex nunc* and is not necessarily the pecuniary equivalent of “wiping out all the consequences of the wrongful act”; (2) reparation (in principle, *ex tunc*); and (3) the giving of guarantees against repetition of the breach (*ex ante*), which may include punishment of the author. All these possible legal consequences in the first parameter can be considered as self-enforcement of the “primary” obligation by the author State.

87. The second parameter deals with what could be called national enforcement by the injured State or States, while the third parameter deals with international enforcement.<sup>68</sup> If self-enforcement has fully

of the act just happens to be a national of the State, or happens to be acting within the territory of that State. There may be limits to State responsibility if the breach is only incidental to otherwise lawful conduct of State organs.

<sup>64</sup> After all, the Vienna Convention (art. 46) also takes into account to some extent the internal structure of a State; this is particularly apparent if one compares that provision to the one laid down in art. 48 of the convention.

<sup>65</sup> In this connection, the Special Rapporteur wishes to correct a misunderstanding which may have been created by the wording of draft article 4, para. 3, as proposed in his second report (see para. 11 above). Actually, an “apology” is rather in the nature of a compensation for immaterial or moral damage suffered (a satisfaction which may sometimes be replaced by a declaratory judgment of an international tribunal), whereas a “guarantee against repetition”—possibly in the form of punishment of the human person who is the author of the act—obviously is a higher degree of substitute performance.

<sup>66</sup> If it were not considered possible that, in this field, the exhaustion of the available local remedies might entail a result or treatment which would be equivalent to that required by the international obligation, as specified in article 22 of part 1, that article would lose its *raison d'être*. Actually, that article presupposes that, in fact, the interest of the alien is separable from the interest of the State in the performance of the primary obligation and, consequently, that there may be no direct injury to the foreign State. Accordingly, the applicability of the local remedies rule in cases where there is wrongful interference in international communications seems doubtful indeed (cf. the case mentioned in the second report (*Yearbook* . . . 1981, vol. II (Part One), p. 95, document A/CN.4/344) of the *Société Radio-Orient*, cited in footnote 92, and the case of the *Air Service Agreement of 27 March 1946 (United States v. France)*, cited in footnote 57 (*ibid.*, p. 91)); cf. also art. 292 of the recent Convention on the Law of the Sea on the “prompt release of vessels” (see footnote 82 below).

<sup>67</sup> Cf. footnote 66 above. Cf. also the General Agreement on Tariffs and Trade prohibiting measures having an effect equivalent to quantitative restrictions (the so-called non-tariff barriers to trade) but making an exception for measures having specified (non-commercial) purposes (see footnote 53 above). Actually, the so-called minimum standard (see also second report, para. 89) is the result of a balancing of public and private interests. In the same way, art. XX of the General Agreement balances the interest of free international trade with national non-commercial interests. The “intention” of the national measure involved is decisive here, in order to distinguish between a breach of the obligation and conduct “incidentally” causing the same effect. Furthermore, in respect of all obligations the fortuitous material impossibility of performance is a circumstance precluding wrongfulness, but not necessarily precluding the duty to compensate damage caused thereby. It is interesting to note the jurisprudence of the Court of Justice of the European Communities in respect of the application of arts. 30 and 36 of the Treaty establishing the EEC, which are the equivalent of GATT provisions mentioned before. The Court tests the effects of the national measure on the protection of the non-commercial interest as well as the effects on intra-community trade and, in essence, applies a functional standard of “unreasonable interference” of the one with the other.

<sup>68</sup> The distinction between the three parameters is predicated upon the notion of the “injured” State. One might perhaps object that this notion tends to reintroduce the element of damage in the definition of an internationally wrongful act, which the Commission rejected at an earlier stage. However, “injury” and “damage” are not identical terms. Injury means an infringement of a right, and does not necessarily create a damage in the ordinary sense of the word. Actually—in the opinion of the Special Rapporteur—a right is a “bundle of potential conduct” and not a “thing” which can be damaged, though many rights in this sense are connected with—and sometimes expressed in terms of—physical objects.

On the other hand, in determining the legal consequences of a particular wrongful act of a State under international law, it is simply unrealistic to put all other States on the same footing. It is all right to recognize that some conduct of a State, which is a breach of an international obligation, may infringe a fundamental interest of the international community as a whole, but that does not mean that each individual State (other than the author State which also belongs to that international community) is an injured State. It may be that in case of such conduct some other States, or even all other States, are entitled, or even obliged, to take measures or to accept burdens resulting from such measures, but this is a matter of international enforcement. The use of the term “obligation” tends to hide the concomitant rights and to blur the distinction between a right to a certain conduct or action which is the consequence of (the breach of) that obligation, and the right which is the origin of the obligation in the sense of being protected by it; those two rights do not necessarily

(Continued on next page.)

taken place, the circuit is closed. This does not necessarily mean that, in the meantime, no other measures of enforcement may be taken, in particular measures of the second parameter. The same goes for the relationship between the second and third parameter measures.<sup>69</sup>

88. The catalogue of degrees of second parameter measures is similarly structured as that of the first parameter measures. One can distinguish here: (a) the mere non-recognition of the situation resulting from the breach; (b) the unilateral termination of the relationship;<sup>70</sup> (c) the "balancing" countermeasure;<sup>71</sup> (d) the countermeasure in another field of relationship; (e) measures of self-help; and, finally, (f) the ultimate measure of self-defence.<sup>72</sup>

89. As already remarked in paragraph 87 above, the first and second parameter measures may overlap in time. Though, generally, the author State must be given an opportunity for self-enforcement,<sup>73</sup> there is no rule excluding all second parameter measures pending such self-enforcement.

90. Second and third parameter measures also overlap, be it in a different way. Actually, it is here that we encounter the problem of determining the "injured" State or States.<sup>74</sup> This is, clearly, primarily a matter of the primary rules involved. Indeed, the degree of involvement of States parties in a breach of an international obligation imposed by a multilateral treaty is the problem which article 60, paragraph 2, of the Vienna Convention attempts to solve by distinguishing (a) the "defaulting" party; (b) the "party specially affected by

the breach", and (c) other parties to the treaty. The provision thereby recognizes that the mere fact that a State is a party to a treaty does not necessarily make it an injured State in the case of a breach of an obligation imposed by that treaty. On the other hand, the fact that a State is not a (formal) party to a treaty does not necessarily exclude it from being injured by such a breach.<sup>75</sup> The same question arises in respect of rules of international law established by other sources than treaties.<sup>76</sup> In particular, there may well exist regional customary law.

91. Furthermore, it cannot be *a priori* excluded that a breach of an international obligation laid down in a bilateral treaty in reality is committed in order to injure a third State.<sup>77</sup> Actually, the relationship breach/injury is primarily a factual relationship and the question is under what circumstances this factual relationship is, by law, translated into a legal relationship between author State and injured i.e., "non-third" State. Traditionally, international law is rather reluctant to perform such translation,<sup>78</sup> being essentially bilateral-minded.<sup>79</sup> Of course, even traditional international law, in respect of a breach of an international obligation imposed by a rule of customary law, recognizes the factual possibility of more than one State being injured by one and the same conduct of another State.<sup>80</sup>

92. Modern international law seems to admit increasingly a "constructive injury" to a State, either as a

(Footnote 68 continued.)

appertain to, and appertain only to, the same subject of international law, under the same conditions.

<sup>69</sup> Actually, the three parameters are—as the word "parameter" already indicates—interrelated parts of a total system of "closing the circuit" (see para. 36 above). This interrelationship also appears in the possible fallback on another subsystem if the original subsystem as a whole fails. Thus, while some international obligations in the field of respect for human rights may, in individual cases, be left to self-enforcement by the State concerned, a gross, persistent and widespread violation may call for other measures of enforcement.

<sup>70</sup> This applies to the future (see art. 70, para. 1 (b), of the Vienna Convention). It should be recalled that, in the case of suspension of the relationship, there even remains some obligation as regards the future: article 72, para. 2, of the Vienna Convention provides the obligation to refrain from acts tending to obstruct the resumption of the operation of the treaty, an obligation to some extent comparable with the one laid down in article 18 of the convention.

<sup>71</sup> In the same field of relationship, such a measure goes further than a termination or suspension of the relationship, which does also release the other party or parties from any obligation further to perform the treaty. In this connection one has to distinguish the balancing countermeasure from the situation, described in article 65, para. 5, of the Vienna Convention.

<sup>72</sup> Which may comprise measures in order to guarantee a non-repetition of the breach. In the present context it does not seem necessary to enter into the question of the possible legality or illegality, according to the circumstances, of measures designed to prevent an imminent breach, though the prohibition of the threat of force in Article 2, para. 4, of the United Nations Charter and the fact that article 2 of the Definition of Aggression (see footnote 23 above) considers the "first use of armed force" as constituting only "*prima facie* evidence of an act of aggression" have some puzzling aspects. But perhaps we are here rather in the field of the "immediate" appreciation referred to above (paras. 64 and 68).

<sup>73</sup> Cf. also the general duty of prior notification in article 65 of the Vienna Convention—to which provision para. 5 of the article does not seem to intend to stipulate a real exception—and article 45 of the same convention: a belated consent.

<sup>74</sup> Cf. the preliminary report, paras. 62 *et seq.*, and in particular the last sentence of para. 62 (*Yearbook . . . 1980*, vol. II (Part One), p. 119, document A/CN.4/330).

<sup>75</sup> Cf. the preliminary report, para. 96 (*ibid.*, p. 128). Cf. also the position of third States for which a right arises under article 36 of the Vienna Convention.

<sup>76</sup> Thus one could regard the inherent right of collective self-defence both as a recognition that a State not attacked may have the status of injured State, and as a substitute for collective enforcement by the organized community of States as a whole.

<sup>77</sup> This is the inverse of the situation dealt with in article 27 of part 1 of the draft. An example might be a bilateral treaty on trade between States A and B, in which the origin of products of the States concerned is determined taking into account the economic relations of either State with a third State or States. A related question in this connection is whether the actual treatment given by a State A to another State B, in breach of a treaty between those two States, is relevant for the rights of a third State which is a beneficiary State under a most-favoured-nation clause in a treaty it has concluded with State A. In short, relationships between different sets of States may be interlocked either only in fact or also in law, just as they may be interlocked in law—through a multilateral treaty—but not in fact.

<sup>78</sup> Also in the inverse situation of responsibility of a State in connection with a wrongful act of another State; see articles 27 and 28 in part 1 of the draft.

<sup>79</sup> See the Judgment of 18 November 1953 in the *Nottebohm case*, *I.C.J. Reports 1953*, p. 111, and the Judgment of 5 February 1970 in *Barcelona Traction, Light and Power Company, Limited*, *I.C.J. Reports 1970*, p. 3. See also the much criticized Judgment of 18 July 1966 in the case which opposed Ethiopia and Liberia and the Union of South Africa (*South West Africa, Second Phase*, *I.C.J. Reports 1966*, p. 6). See also the preliminary report, para. 62 (see footnote 74 above): link with the principle of non-intervention in the external affairs of another State; in the debate in the Sixth Committee in 1981 on the Commission's report, the representative of China referred to the relevance of this principle in the present context (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th meeting, para. 37).

<sup>80</sup> Cf. the preliminary report, para. 63 (see footnote 74 above). The tendency to avoid the actual existence of "parallel rights of protection" is to be noted, particularly where it is possible to consider the injury of a State as only derived from the injury of another State. The inverse case of joint responsibility of a member State of an international organization and that organization itself seems to be envisaged by the Third United Nations Conference on the Law of the Sea (annex IX, art. 6) (see footnote 82 below); the division of competences as to the various stages of jurisdiction in the same field of activities seems to inspire this particular provision.



result of its participation in multilateral rule-making, or as a result of the recognition of extra-State interests being protected by the primary rule of international law.<sup>81</sup> In both cases the primary rule of international law itself has to create the constructive injury, either explicitly or implicitly. The mere fact of being a party to a multilateral treaty, and the mere mentioning, in the rule, of non-State "entities", do not in themselves suffice to create that effect in respect of second parameter rights, let alone third parameter obligations. Indeed, there are many multilateral treaties—and rules of customary international law—which create only bilateral legal relationships, be it of uniform content. Thus, for example, the recent Convention on the Law of the Sea<sup>82</sup>—and the rules of customary international law it codifies—does regulate a number of legal relationships between coastal States and flag States, between coastal States *inter se* and flag States *inter se*, but this in itself does not mean that any State party to that convention is injured by a breach of an obligation under that convention by another coastal State (or flag State) vis-à-vis another flag State (or coastal State). The possibility of splitting up a multilateral treaty into a number of bilateral relationships is recognized—be it also limited—in the Vienna Convention on the Law of Treaties' articles on reservations<sup>83</sup> and on modification of multilateral treaties between certain of the parties only (art. 41). No modification *inter se* is, of course, allowed in respect of rules of *jus cogens*, in view of the extra-State interests involved.

93. On the other hand, to keep to examples drawn from the law of the sea, coastal States' rights and flag States' rights cannot, in principle, be transferred to another State nor exercised for the benefit of another State. However, a "regionalization" of such rights may be allowed.<sup>84</sup> Furthermore, nothing seems to prevent

the creation in the relationships between the parties to a multilateral treaty of solidarity of the other parties vis-à-vis a breach of an obligation under the multilateral treaty by one of them.<sup>85</sup>

94. It would seem that a constructive injury may also result from the object and purpose of the primary rule or set of rules. Actually, the introduction of extra-State interests as the object of protection by rules of international law tends towards the recognition of an *actio popularis* of every State having participated in the creation of such extra-State interest, the other possibilities of enforcement being either only self-enforcement, or enforcement by the subject to which this extra-State interest is allocated for this purpose.<sup>86</sup>

95. The existence of a "derived" or a "constructive" injury does not necessarily mean that the injured State is entitled to take all the measures of the second parameter catalogue.<sup>87</sup> In particular, self-defence, self-help and countermeasures outside the field of the relationship involved in the breach are probably not allowed (at least not without a collective decision to this effect). In other words, there may be a correlation between the degree of involvement in the injury and the degree of second parameter measure allowed.

96. Obviously, if one and the same conduct of State A is internationally wrongful both in respect of State B

221, in the sense that the proportionality of the measure in relation to the actual or threatened damage is applied for each of the co-operating States *individually* rather than in respect to the area as a whole and the sum total of the measures taken by each co-operating State. One might well see here an analogy with collective self-defence.

<sup>85</sup> A draft convention on investments abroad, proposed in 1959 and at some time under consideration by the Organisation for European Economic Co-operation (OEEC; since become OECD), contained an article IV, the second sentence of which read as follows: "The Parties shall not recognise or enforce within their territories any measures conflicting with the principles of this Convention and affecting the property of nationals of any of the Parties until reparation is made or secured". Such provision would go further than what is mentioned in the present paragraph, inasmuch as it deals also with measures taken by non-parties to the convention. Whether this is admissible or not is not the point here. In any case the clause is valid as between the States parties to the convention and creates a "constructive injury" of the State party whose national is not a victim of the measure. A similar clause—this time limited to the parties to the convention—is contained in article VIII of the above-mentioned draft, which reads: "If a Party against which a judgment or award is given fails to comply with the terms thereof, the other Parties shall be entitled, individually or collectively, to take such measures as are strictly required to give effect to that judgment or award." (See "The proposed convention to protect private foreign investment: A round table", *Journal of Public Law* (Atlanta, Ga.), vol. 9, No. 1 (Spring 1960), p. 115). See also article 64 of the Washington Convention on the Settlement of Investment Disputes (see footnote 38 above), as interpreted by A. Broches in *Recueil des cours de l'Académie de droit international de la Haye*, 1972-II (Leyden, Sijthoff, 1973), pp. 379-380.

<sup>86</sup> This subject may be an individual human person (compare the individual complaints to the European Commission of Human Rights under the European Convention on Human Rights) or an international organization. An interesting example of a combination of self-enforcement—including a duty to provide for special local remedies—and a "declaratory" enforcement through an international tribunal is found in the European Convention on State Immunity and its Additional Protocol; under the convention, a State party is under an international obligation to give effect to a judgment of a foreign national court in a case in which it cannot claim State immunity in respect of the jurisdiction of that Court. See articles 20 and 21 of the convention and articles 1, 4 and 6 of the Protocol (Council of Europe, European Treaty Series, No. 74 (Strasbourg, 1972)).

<sup>87</sup> Indeed, as noted above in para. 91, the traditional tendency towards bilateralism limits even the mere recognition of a "derived" injury.

<sup>81</sup> The factual effect of a breach of an international obligation imposed by a multilateral treaty is underlined by the formula, in article 60, para. 2 (c), of the Vienna Convention on the Law of Treaties, that "a material breach of its provisions by one party radically changes the position" of every other party with respect to the further performance" of its obligations under the treaty"—a formula similar to that contained in article 62, para. 1 (b), of the same convention, dealing with "fundamental change of circumstances". A similar approach can be found in several provisions of the Vienna Convention on Succession of States in Respect of Treaties: cf. "would radically change the conditions for its operation" (arts. 15, subpara. (b); 17, para. 2; 18, para. 3; 19, para. 3; 27, para. 5; 30, para. 2 (a), etc.). But article 60, para. 2 (c) of the Convention on the Law of Treaties also refers to the "character" of the treaty itself, and the character of particular treaties is also relevant in some of the provisions, just mentioned, of the Convention on Succession of States, as well as in other provisions of that convention, such as article 17, para. 3.

<sup>82</sup> Signed at Montego Bay (Jamaica) on 10 December 1982 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF.60/122).

<sup>83</sup> A reservation formulated by State A and accepted by State B, but objected to—in the manner described at the end of article 20, para. 4 (b), of the Vienna Convention—by State C, entails the result that between State A and State B the treaty applies to the extent modified by the reservation (art. 21, para. 1), between State A and State C the treaty provisions apply not at all, and between State B and State C the treaty applies in its unmodified form (art. 21, para. 2).

<sup>84</sup> Cf. the effect of "co-operative arrangements" on third States in article 211, para. 3, of the Convention on the Law of the Sea. Article 199 of the Convention obliges States "in the area affected" to co-operate "in eliminating the effects of pollution and preventing or minimizing the damage" and to "jointly develop and promote contingency plans"; it is not quite clear, however, whether such regional co-operation also has an effect on the application of article

and of State C and causes separable injuries to both States, there is no reason why State B and State C would not both be entitled to take all second parameter measures independently, to the extent that such measures are allowed at all. The situation is less clear when State C's injury is a "derived", a "constructive" or an "extra-State" injury. Actually, it is the primary rule which determines not only the international obligation, but also the right which it intends to protect, in other words, the injury caused by the breach of this obligation. By the same token, it is the primary rule which should determine to what extent State C is entitled to national enforcement (second parameter measures) or, for that matter, entitled to claim self-enforcement by the author State, particularly the various types of substitute performance (first parameter).<sup>88</sup>

97. As already remarked, traditional international law is "bilateral minded". This goes for all the three stages of the process of international law. Being a party to a primary legal relationship, being a "party" to the breach of an international obligation, and having a *persona standi* for the purpose of activating an international procedure of remedy<sup>89</sup> are different stages, the first not necessarily entailing the second, let alone the third. Consequently, while the possibility of a purely factual situation, where one act of a State causes injury to more than one other State, has always been recognized, traditional international law has been hesitant to admit "derived", "constructive" or "extra-State" injury.<sup>90</sup>

98. Thus, as we have seen, obligations imposed by the rules of general customary law are "bilateralized", and the same goes, in principle, for obligations imposed by treaties: *pacta tertiis nec nocent nec prosunt*. Even being a formal party to a multilateral treaty does not necessarily make a State a (full) "party" to any (even material) breach of an international obligation under that treaty. On the other hand, it is admitted that a treaty (particularly a treaty establishing an "objective regime") may create rights for a State which is not a (formal) party to it, and, though these rights may be taken away by the formal parties to the treaty through modification of the treaty without the consent of the third State (a sharp contrast with the position of the formal party to the treaty, as determined by article 41

of the Vienna Convention), one may assume that the third State may be injured by a breach of an obligation under the treaty.<sup>91</sup>

99. The degree of being a "third" State in respect of a primary legal relationship necessarily influences the degree of being a party to a breach of the international obligation, which is only an element of that legal relationship. While, in modern international law, it is certainly not generally correct to state that "an 'obligation' to perform specific acts, by way of reparation for the damage or otherwise, can only derive from an agreement between the State committing the breach and the injured State",<sup>92</sup> neither can the statement of Grotius "that kings . . . have the right of demanding punishments . . . on account of injuries which . . . excessively violate the law of nature or of nations in regard to any persons whatsoever . . ."<sup>93</sup> be accepted without qualification as a description of present-day international law. Nevertheless, the latter statement comes closer to the truth, be it that the response to such "excessive violations" is nowadays generally made subject to the control of the organized community of States.

100. At the same time, the obligation of a third State to react to a given violation makes its appearance in international law. Here again there are various degrees of such obligation. One may distinguish between (a) an obligation not to recognize as legal the result of such violation by the author State; (b) an obligation to accept for oneself some injurious consequences of measures lawfully taken by the injured State in response to the violation; and (c) an obligation to take (positive) measures in order to restore the situation as it existed before the breach, and possibly even in order to prevent a repetition of the breach.<sup>94</sup>

<sup>91</sup> In principle, however, no rights of State C as regards State A under a treaty between States A and B may be created by a treaty between States B and C. But, here again, the *pacta tertiis* rule may be set aside in a treaty between State B and State C inasmuch as State C may invoke, as regards State B, a (legal) relationship between State B and State A (most-favoured-nation clause); even there the rule is not without exceptions. The *pacta tertiis* rule may also be set aside through "regionalization" (see para. 93 above). Actually, while the "bilateralism" inherent in the (functional) rule of reciprocity is only relevant for the application of the most-favoured-nation clause if expressly so provided, and the fact that the beneficiary State could get the "favour" requested by becoming a party to the treaty, to which the granting State and the most-favoured nation are parties, is not considered relevant, there are objective régimes of a territorial kind (frontier traffic, land-locked States) and of a "personal" kind (generalized system of preferences; according to many, also regional integration régimes including a measure of common jurisdiction) to which the most-favoured-nation clause does not apply. In short, the notion of "third State" is far from being self-evident.

<sup>92</sup> H. Kelsen, as quoted in the second report, footnote 24 (*Yearbook . . . 1981*, vol. II (Part One), p. 85, document A/CN.4/344). There may, however, exist international obligations the breach of which does not entail any duty of substitute performance.

<sup>93</sup> Quoted in the second report (*ibid.*).

<sup>94</sup> There is here a certain analogy with the distinction between *ex nunc*, *ex tunc* and *ex ante*, made earlier in the preliminary and second reports. The obligation under (a) is in reality an obligation not to support *a posteriori* the breach committed by the author State, while the obligation under (b) may, e.g., include a suspension of obligations of the injured State as regards freedom of movement of persons and goods towards the third State, and possibly even an obligation of the third State not to substitute the movement of its persons and goods towards the author State for that from the injured State towards the author State. Obviously, in a situation of conflict between State A and State B, the distinction between C's attitude as non-support of B, neutrality, or support of A may be gradual indeed.

<sup>88</sup> In this connection the question arises as to whether State C can claim reparation if State B has settled its claim against State A, possibly by a waiver of that claim. In the *Barcelona Traction* case (see footnote 79 above), this complication was one of the reasons for the ICJ not to admit the existence of a "derived" injury to Belgium; in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (I.C.J. Reports, 1949, p. 174), however, the independent claim of the United Nations was considered by the ICJ as a corollary of the independence of the United Nations itself, and the complication of parallel claims was taken lightly. The difference between the two cases is, of course, that in the latter case there was a *concursus* of two separable wrongs, flowing from the breach by one and the same conduct of two distinct rules of international law, one analogous to a rule of diplomatic law and the other relating to the treatment of (private) aliens. But then it would perhaps have been more logical to consider the second claim as being only subsidiary to the first, or what amounts to the same as "pre-empted" by the first claim, if actually brought and honoured.

<sup>89</sup> Cf. also the preliminary report, paras. 39-42 (*Yearbook . . . 1980*, vol. II (Part One), pp. 114-115, document A/CN.4/330).

<sup>90</sup> Indeed, the notion of sovereignty of each individual State implies a separation between foreign sovereign States as regards legal relationships in any of the three stages, even to the extent of not admitting the third State to obtain a purely declaratory judgment of an international court.



101. Such obligations to react of a third State are obviously an element of international enforcement which presupposes an organized community of States which, as such, reacts against a violation of a rule of international law which it considers as essential for the protection of its fundamental interests.<sup>95</sup> The existence

<sup>95</sup> This organized international community need not be a universal one (cf. para. 93 above). But the obligation cannot, in principle, affect the rights of a State which does not belong to that community.

of obligations of this kind is, so to speak, a prelude to part 3 of the draft articles on State responsibility.<sup>96</sup>

Of course, here also there may be *concursum*: compare collective, as distinguished from individual, self-defence.

<sup>96</sup> At the same time, they underline the particular position of primary obligations imposed by a decision of a competent international organization, including judicial decisions. Cf. also the preliminary report, paras. 69–78 (*Yearbook* . . . 1980, vol. II (Part One), pp. 121–123, document A/CN.4/330).

## CHAPTER V

### The link between a breach of an international obligation and the legal consequences thereof

102. As may have appeared from the preceding paragraphs, the process of international law, from the formation of its rules to their enforcement, is determined by its structure, or rather by the structure or character of its subsystems and the relationships between those subsystems. “State responsibility” is only one phase in this total process of international law; it cannot but take into account the earlier and later phases of the process. In this connection it should be pointed out once again that there are subsystems of international law which govern a particular substratum of international situations, without necessarily creating “primary” rights and obligations in the strict sense of the word.<sup>97</sup>

103. It would seem, therefore, that any meaningful and acceptable codification of rules of international law on State responsibility should be placed within the framework of, on the one hand, a general clause admitting explicit or implicit deviation from those rules in a particular subsystem of rules of international law and, on the other hand, of a general clause on the procedure of settlement of disputes relating to the interpretation of those rules. Even within such a framework it should be made clear that the rules are not exhaustive in the sense that they purport to describe automatic legal consequences entailed by an internationally wrongful act, whatever the circumstances of the particular case. Only with those three “safeguards” could one—in the opinion of the Special Rapporteur—venture to draw up abstract rules in this field.<sup>98</sup>

104. Every one of the many different régimes (or

subsystems) of State responsibility (see para. 27 above) is in present-day international law subject to the universal system of the United Nations Charter, including its elaboration in unanimously adopted declarations such as the Declaration of Principles of International Law<sup>99</sup> and the Definition of Aggression<sup>100</sup> and including also its built-in provisions on collective and individual self-defence. Surely, there is no consensus on the exact scope and content of this universal system. The Special Rapporteur submits, however, that the Commission is not called upon to elaborate, let alone try to improve this system. One simply has to accept its “deviations”, its “non-exhaustiveness” and its “interpretation-mechanism” as overruling any of the draft articles on State responsibility which the Commission has adopted and will adopt in the future.

105. Another legal phenomenon—one could call it a system or subsystem—which the Commission has to accept as axiomatic, is the open-ended body of rules called *jus cogens*.<sup>101</sup> Again, there is no consensus on the exact scope—including its possibly graduated force<sup>102</sup>—and content of this legal phenomenon. But its existence is accepted in present-day international law, and the future development of its content is unforeseeable and, indeed, by definition left to the international community as a whole. In principle, that “international community as a whole” would also have to develop the “content, forms and degrees of State responsibility” resulting from any breach of an international obligation, imposed by a rule of *jus cogens*. In this field, however, the Commission, by provisionally adopting article 19 of part 1 of the draft articles on State responsibility, would seem to be, equally provisionally, bound to indicate at least some possible legal consequences of the distinction it made between international crimes and other internationally wrongful acts, subject, of course, to what has been stated in paragraph 104 above and to the general safeguards indicated in paragraph 103.<sup>103</sup> This point will be dealt with later in the present report.

<sup>99</sup> See footnote 24 above.

<sup>100</sup> See footnote 23 above.

<sup>101</sup> The original text of this sentence was corrected orally by the Special Rapporteur during the Commission's discussion of the topic at its thirty-fourth session (*Yearbook* . . . 1982, vol. I, p. 203, 1731st meeting, para. 23).

<sup>102</sup> Reference may again be made to para. 79 of the preliminary report (see footnote 98 above).

<sup>103</sup> These two provisos are particularly important in respect of article 19, 3 (a), of part 1 of the draft.

<sup>97</sup> Thus, for example, the GATT provisions (see footnote 53 above) concerning “nullification or impairment” of “advantages” (art. XXIII), and the ICAO provisions relating to “hardships” caused by one member State to another (see art. II, sect. 2, of the International Air Transport Agreement, Chicago, 7 December 1944 (United Nations, *Treaty Series*, vol. 171, p. 396)). Other subsystems—notably in the field of international environmental law—avoid the “State responsibility” phase altogether.

<sup>98</sup> As was pointed out above (see footnote 19), this approach has much in common with the approach the Commission adopted in respect of chapter V of part 1 of the draft articles, dealing with “circumstances precluding wrongfulness” (the “zero parameter”). Indeed, in articles 30, 34 and 35—and to a certain extent, even in article 33—there is a certain overlap with part 2. Furthermore, article 29 may even be regarded as a “deviation *ad hoc*”; a real deviation is taken into account in article 33, para. 2 (b). In this connection, it should be recalled that another “circumstance precluding wrongfulness” is dealt with in article 18, para. 2, of part 1 of the draft articles; cf. the preliminary report, para. 79 (*Yearbook* . . . 1980, vol. II (Part One), pp. 123–124, document A/CN.4/330).

106. For the purposes of drafting rules relating to the legal consequences of internationally wrongful acts, it would seem useful to distinguish—at least as a start—international obligations imposed by (a) general customary international law; (b) conventional international law (i.e., treaties); and (c) international judicial, quasi-judicial, and other decisions of international organizations.<sup>104</sup>

107. Apart from the general legal system embodied in the United Nations Charter (see para. 104 above) and *jus cogens* (para. 105 above), general customary international law creates legal relationships of a bilateral character between States. To an internationally wrongful act of one State corresponds the injury of one other State. In principle, therefore, the whole range of first parameter and second parameter legal consequences apply.<sup>105</sup> Now the question arises whether one can distinguish between obligations under general customary international law according to their character, and draw from such distinction conclusions as to an *a priori* exclusion of certain degrees of legal consequences in the first and second parameters.<sup>106</sup>

108. Generally, the international obligations of one State vis-à-vis another State under the rules of customary international law, dealt with here, are limitations on the sovereignty of one State in view of the equal sovereignty of another State. It does not follow, however, that the breach of any such obligation infringes in the same way the sovereignty of the other State. As a matter of fact, customary international law differentiates between the various “emanations” of the sovereignty of the States involved. In particular, it distinguishes between sovereignty *stricto sensu*, jurisdiction *stricto sensu*, and exclusive right of use of territory.<sup>107</sup> Accordingly, the obligations under general

<sup>104</sup> Indeed, the increasing organizational elements in those three legal phenomena cannot but influence the modalities of the legal consequences (and implementation thereof) of a breach of an international obligation imposed by the primary rule.

<sup>105</sup> Subject to the exclusion of particular legal consequences by virtue of other rules of international law; these limitations will be discussed separately. Obviously, *a priori* exclusion of some legal consequences and limitations resulting from other rules of international law tend to meet in a point where no distinction between the two can be made.

<sup>106</sup> Another question is whether there is always a perfect correlation between the breach of an international obligation and the infringement of a right. A negative answer to this question seems to be implied by the existence of “circumstances precluding wrongfulness”. In any case, beyond the absence of legal consequences—except possibly by virtue of article 35 of part 1 of the draft—stipulated in principle by a circumstance precluding wrongfulness, and all legal consequences stipulated in principle in the present paragraph, there may be room for other *a priori* exclusions of some legal consequences. Thus, while in general a specific primary rule of international law (particularly a rule of customary international law) can be considered as having fully balanced the interests of the States concerned for all circumstances in imposing a specific obligation on one of them, it may also be that such specific rule of international law in reality leaves room for a distinction between conduct of a State which is “inherently”, conduct which is “fortuitously”, and conduct which is “incidentally” in conflict with that primary rule, at least for the determination of the legal consequences of such conduct. In other words: it may not be easy to establish what, for the purposes of the legal consequences of an act of a State is, in the terms of article 16 of part 1 of the draft articles, “required of it by that obligation”. The non-exhaustive list of circumstances precluding wrongfulness—in particular articles 31–33—confirms this analysis. If one wants to keep a sharp distinction between primary and secondary rules, the articles just mentioned definitely belong to the first category.

<sup>107</sup> Admittedly, this distinction is not always clear in international doctrine and practice. In particular, the terms “sovereignty” and

international customary law to respect the sovereignty of other States relate respectively to sovereignty *stricto sensu* (compare the terms “territorial integrity and political independence”), to jurisdiction *stricto sensu* (compare the various immunities) and to use of territory (compare the obligations concerning the treatment of aliens admitted to the territory). To these obligations are added—in view of the particular international status of their environment—obligations relating to foreign ships (and similar means of transport).

109. Is this differentiation of obligations relevant to the determination of the legal consequences of a breach of such obligations? The Special Rapporteur is inclined to give an affirmative answer to this question.<sup>108</sup> At any rate—taking into account the non-exhaustiveness of the articles to be drafted in part 2—a differentiation as regards obligations relating to the treatment of aliens,<sup>109</sup> as distinguished from obligations to respect the sovereignty *stricto sensu* of a foreign State, is at the basis of article 5 (see para. 11 above) as proposed in the second report. The main point of difference in (first parameter) legal consequences of the breach of an obligation is here that, in principle, a *restitutio in integrum stricto sensu* is not required and can be replaced by a substitute performance.<sup>110</sup>

110. While it is relatively easy to distinguish between obligations under general customary international law as regards respect of foreign sovereignty *stricto sensu* and obligations as regards the treatment of aliens within the territory, other obligations under general customary international law are less easy to classify.<sup>111</sup> Actually, as regards jurisdiction *stricto sensu*, it is even controversial whether there are any real obligations and rights under general customary law, except in respect of the enforcement phase of jurisdiction.<sup>112</sup> Real obligations and rights are, however, provided for in the rules of general customary international law relating

“jurisdiction” are often used as indicating the same notion, while exclusive right of use of territory is often not distinguished from either (except in the relatively novel term of “permanent sovereignty over natural resources”). No doubt the personification of the State is responsible for this confusion of the functional, personal and territorial aspects of the State, corresponding to its separate responsibilities of self-maintenance (political), of maintenance of law and order (legal), and of providing for the well-being of its nationals (socio-economic). However that may be, what interests us here is not so much the terminology, but rather the essence.

<sup>108</sup> Particularly in connection with the distinctions made in footnote 106 above. Actually those distinctions are analogous ones, this time in relation to the author State's conduct as an exercise of its sovereignty *stricto sensu* in its external relations (“inherent” conflict), its exclusive right of use of its territory (“fortuitous” conflict), and its jurisdiction *stricto sensu* (“incidental” conflict).

<sup>109</sup> As to the scope of the category of obligations “concerning the treatment to be accorded by a State [within its jurisdiction] to aliens” (art. 5), it should be noted that (a) it does not cover diplomatic law; (b) it does not cover the treatment of foreign ships under the customary law of the sea; (c) it does not cover obligations to respect human rights, even if within the framework of such obligations a distinction is made between human persons who are, and those who are not nationals of the State concerned.

<sup>110</sup> Compare the three international arbitral awards in the Libyan nationalization cases, discussed *inter alia* in R. B. von Mehren and P. N. Kourides, “International arbitrations between States and foreign private parties: The Libyan nationalization cases”, *American Journal of International Law* (Washington, D.C.), vol. 75, No. 3 (July 1981), p. 476.

<sup>111</sup> Even in respect of the first mentioned distinction there is, of course, always the possibility of a *concursum* in fact; article 5, para. 2, as proposed in the second report attempts to take account of this fact (cf. para. 11 above).

to, on the one hand, immunities, diplomatic and other, and on the other, foreign ships.<sup>113</sup>

111. It is typical for the structure of customary international law relating to immunities and to the legal status of ships—both in older doctrine often expressed in terms of territory: e.g., “extritoriality” of foreign diplomatic missions, or “a ship is territory of the flag-State”—that the obligations of a State to grant immunity and to respect the special status of foreign ships are matched by obligations of the State enjoying this immunity or special status. Thus the activities of foreign diplomatic missions must remain within certain limits, and foreign ships should act “innocently”.<sup>114</sup> If these obligations of the sending State or of the flag-State are real obligations, the question arises of the legal consequences of a breach of such obligations.<sup>115</sup>

112. The answer to this question is not entirely clear in all cases. In its judgment of 24 May 1980 in the case *United States Diplomatic and Consular Staff in Teheran*,<sup>116</sup> the ICJ held that an abuse of diplomatic functions could never justify a violation of diplomatic immunity. In a recent incident concerning the presence of a USSR warship in Swedish waters the Government of Sweden apparently held that article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone did not prevent Sweden from retaining the foreign warship in its waters for the purpose of

fact-finding.<sup>117</sup> The recent Convention on the Law of the Sea contains various provisions regarding the prompt release of foreign (merchant) vessels and their crews, in case they have been arrested on the ground of violation of regulations, upon the posting of a reasonable bond or other financial security.<sup>118</sup> It is controversial whether the rule of exhaustion of local remedies applies in the case of wrongful interference of a State with international communications serviced by an alien ship or aircraft.<sup>119</sup> In the matter of jurisdictional immunity there is a tendency to limit such immunity *a priori* to *acta jure imperii*, and a tendency not to grant immunity in case of acts of the foreign State which are contrary to its obligations under a rule of international law.

113. All this seems to show that there are certain international activities, both of Governments and of private persons, which have a special status under the rules of customary international law. Whether an abuse of such status may entail a breach of that status and, if so, to what extent, is not always clear. A suspension (for the future) of the relationship itself<sup>120</sup> usually is allowed.<sup>121</sup>

114. On the other hand, the protection of the special status even in the case of abuse seems to suggest the conclusion that a breach of the corresponding obligation without any possible justification by virtue of the abuse, may be regarded as an infringement of the sovereignty *stricto sensu* of the other State for the purpose of the legal consequences of the breach. However, this conclusion may amount to “swinging the pendulum” too far, or, to use a cybernetic metaphor, to exaggerate the “feedback”. Actually, in customary international law a distinction between *a priori* exclusion of certain legal consequences of a breach, limitation of legal consequences by virtue of other rules of customary international law, and the content of primary rules, necessarily tends to become blurred.<sup>122</sup>

115. In view of the variety of obligations under rules

<sup>112</sup> Cf. the “*Lotus*” case (Judgment No. 9 of 7 September 1927, P.C.I.J., Series A, No. 10), in which the Permanent Court, however, seems to have overlooked the particular status of ships; both the 1958 Geneva Convention on the High Seas (United Nations, *Treaty Series*, vol. 450, p. 11) and the 1982 Convention on the Law of the Sea (see footnote 82 above) overrule the “*Lotus*” decision. Apart from the special position of ships, international practice shows that, in matters of jurisdiction *stricto sensu*, reference is made to obligations of comity rather than of law. Nevertheless, these “non-obligations” are treated in a way analogous to the treatment of real obligations, inasmuch as countermeasures are sometimes taken as a response to a foreign exercise of jurisdiction *stricto sensu* considered to be not in conformity with such rules of comity. In this connection it is interesting to note that the British *Protection of Trading Interests Act 1980* (The Public General Acts 1980 (London), H.M. Stationery Office, part 1, chap. 11, p. 243) provides for a declaration of foreign requirements as “inadmissible”, entailing a prohibition of compliance with such requirements, and even provides for a right of recovery of “multiple damages” paid under a foreign judgment. Note that the Act envisages a declaration of inadmissibility of a foreign requirement, *inter alia*, “(a) if it infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom; or (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country”.

<sup>113</sup> Significantly, however, as regards foreign ships passing through the territorial waters, both the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 205), and the recent Convention on the Law of the Sea (see footnote 82 above) formulate the limitations of the coastal State’s jurisdiction in criminal and civil matters in terms of “should”.

<sup>114</sup> Thus diplomatic status can be abused and foreign ships, even on the high seas, should not engage in certain activities which are prejudicial to other States’ interests, like piracy or, in the territorial waters of another State, activities other than “innocent passage” or—in straits—“transit passage”. Incidentally, the Commission’s commentary to article 32 of part 1 of the draft, entitled “*Distress*”, seems to presuppose that the activities of a (merchant) ship may be considered as an act of the flag-State (*Yearbook* . . . 1979, vol. II (Part Two), pp. 133 *et seq.*).

<sup>115</sup> Of course, the question also arises if the obligations are not “real” obligations, but in that case—according to the viewpoint adopted by the Commission throughout the discussions of the topic—the question is not one of State responsibility.

<sup>116</sup> I.C.J. Reports 1980, p. 3.

<sup>117</sup> For reports of aspects of the incident, see, e.g., *The New York Times* of 30 October 1981, p. A3; 2 November 1981, p. A8; and 3 November 1981, p. A1.

<sup>118</sup> See article 292 of the convention in conjunction with arts. 73, para. 2; 220, para. 7; and 226, para. 1 (b) (see footnote 82 above).

<sup>119</sup> See footnote 66 above.

<sup>120</sup> Cf. declaration of *persona non grata* and breaking-off of diplomatic relations. In essence, the measure contemplated in article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is also a suspension of the relationship. Compare also article 228, para. 1, of the Convention on the Law of the Sea, where the suspension of proceedings by the coastal State upon the taking of proceedings by the flag State is provided for “unless . . . the flag State in question has repeatedly disregarded its obligations to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels”. Again it is clear that “primary” and “secondary” rules are closely intertwined.

<sup>121</sup> These cases of special status could just as well be considered as limitations rather than as *a priori* exclusions of certain legal consequences. See footnote 105 above.

<sup>122</sup> This is also true for the distinction between the three parameters themselves. As already noted above, there is a gradual transition from one parameter to the other, or overlap between those parameters. Indeed, the *restitutio in integrum stricto sensu* and the guarantee against repetition of the breach are legal consequences of the first parameter already verging on the second parameter (just as a state of necessity, contributed to by the State against which it is invoked, verges on the determination of the legal consequences of a breach of an obligation of that other State). Furthermore, as to the second parameter of legal consequences, one is bound to distinguish

(Continued on next page)

of customary international law—in between the categories of rules protecting the sovereignty *stricto sensu* of other States and rules concerning the treatment of aliens—and taking into account the non-exhaustiveness of the rules to be drafted in respect of the legal consequences of internationally wrongful acts, the Special Rapporteur is inclined not to propose other rules excluding *a priori* some legal consequences of a breach of an obligation under customary international law.

116. Contrariwise, it might be useful, in the draft articles, to refer to limitations of second-parameter legal consequences, resulting from the special status accorded by the rules of customary international law to foreign States as juridical persons, to their diplomatic and consular missions and to the ships flying their flags. Such a reference clause would, in fact, serve the same purpose as the general safeguard clause of possible deviation from the rules to be embodied in part 2 of the draft articles on State responsibility, and would reinforce such a clause.

117. Turning now to international obligations under conventional international law (i.e., treaties) it must be noted, first of all, that the general safeguard clause of deviation is of particular importance for treaty régimes. Furthermore, it is perhaps useful to distinguish at the outset various functions of treaties within the structure and process of international law as a whole. A general duty of States to co-operate in matters of mutual or common concern may be considered as a principle of modern general customary international law. Obviously, the breach of such a duty cannot, however, be considered as giving rise to State responsibility in the sense this term has always been understood by the Commission. There are many treaties, both bilateral and multilateral, which affirm this duty for a particular subject matter.<sup>123</sup> Unless such a treaty otherwise provides—and this is particularly the case in treaties providing for the establishment of international organizations—the non-fulfilment of such obligations to co-operate will entail no legal consequence whatsoever. Actually, treaty provisions stipulating an obligation to co-operate are not more than a “prelude” to international organization *lato sensu*, an inchoate form of such organization as a (functional) fusion of governmental powers of States.<sup>124</sup>

118. On the other hand, treaties establishing international boundaries do not as such create obligations, but only legal consequences in respect of obligations and rights under very many other rules of international law. It is the breach of those obligations that entails State

responsibility; the establishment of the boundary is a “prelude”; it stipulates the (territorial) separation between States.<sup>125</sup>

119. Furthermore, there are treaties the sole function of which is either to unify, in a particular field, the exercise of jurisdiction *stricto sensu* by the States concerned, or to regulate the respective reach of such jurisdictions *stricto sensu*, and, possibly, the legal relevance of such exercise of jurisdiction *stricto sensu* in one State for the exercise of jurisdiction *stricto sensu* in the other State or States, in other words, to lay down rules of conflict of law between the States concerned. Here again, the separation or fusion of national legislations has, in the case of breach of an obligation under such a treaty, in principle no other legal consequence than those provided for in those treaties themselves.<sup>126</sup>

120. Two other types of treaties require a special mention, namely, treaties establishing objective régimes and treaties establishing international organizations. Both types of treaties usually also impose obligations on States (other than those referred to in paragraphs 117–119).<sup>127</sup>

121. As already remarked above, the main special point in relation to treaties establishing objective régimes is the position of third States in respect to such régimes. In principle, to the extent that non-parties to the treaty may become parties to the relationships governed by that treaty, they may also be injured States or “parties to the breach” of an obligation under such treaty.<sup>128</sup> Actually, such objective régimes also exist by virtue of customary international law.<sup>129</sup>

122. As to treaties establishing international organizations, much the same reasoning applies in reverse. In principle, a breach of an obligation under such a treaty injures every other member State of the organization. But here again, in principle, any response to or legal consequence of such a breach is determined collectively in accordance with the constitution of the international organization involved.<sup>130</sup>

<sup>125</sup> This does not necessarily apply to sea boundaries. Actually, it would seem that the nature of the coastal States' sovereign rights as regards the exploration and exploitation of the mineral or non-living resources of the continental shelf—a functional, not a territorial, sovereignty, be it expressed in spatial terms—reflects on the legal rules relating to the delimitation of the continental shelf between adjacent and opposite States. In this connection it is interesting to note the recent Judgment of 24 February 1982 of the ICJ in the case *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, in particular the somewhat diminished reliance on the concept of “natural prolongation” of the land domain (*I.C.J. Reports 1982*, p. 18; see particularly p. 92, para. 133, A.2).

<sup>126</sup> Cf. footnote 112 above.

<sup>127</sup> Often the same treaty does establish both an objective régime and an international organization to “administer” such a régime.

<sup>128</sup> Though not necessarily parties to the modification of the treaty. Nor does the establishment of the objective régime necessarily entail deviation from bilateralism of the breach/injury relationship; under an objective régime of freedom of navigation on an international river, a breach of an obligation of the coastal State in respect to the ship of a flag-State remains a bilateral affair, unless—as is often the case—not only the navigation in the technical sense, but also the communication between riparian, and possibly non-riparian, States and/or the economic integration aspect of freedom of transportation are involved.

<sup>129</sup> Sea, outer space. Cf. also footnote 84 above on the possibilities of regionalization in this respect, which, incidentally, is not only relevant for the determination of the injured State for the purposes of State responsibility, but also for the determination of the author State or States and the responsibility of international organizations.

<sup>130</sup> Again, this does not mean that there may not be a *concursum*

(Footnote 122 continued)

between what the injured State can do as a response to a breach (a) within its own jurisdiction *lato sensu* (non-recognition of the result of the breach; balancing that result; see for example the recovery of damages paid under a foreign judgment provided by the British law of 1980 (see footnote 112 above)); (b) in respect of its legal relationship with the author State under a rule of international law (suspension of the legal relationship with the author State under a rule of international law (suspension of the legal relationship for the future; balancing countermeasures in the same field of the breach; countermeasures as regards other fields of relationship); and (c) within the jurisdiction *lato sensu* of the author State (self-help, self-defence). It would also seem clear that the measures under (b) and (c) verge on the third parameter.

<sup>123</sup> The recent Convention on the Law of the Sea is full of clauses of this kind.

<sup>124</sup> One might say that such treaty provisions deal with legal consequences without passing through the phase of obligations.

123. Though in modern international practice the five types of treaties discussed above together constitute a great part of existing treaties, there are also other treaties, particularly bilateral treaties, which are of the kind of "synallagmatic contracts" between States envisaging an exchange of prestations between those States. Actually, traditional doctrine is inclined to concentrate on these reciprocal treaties as regards the determination of the legal consequences of a breach of an obligation under a treaty. Indeed, the element of barter is seldom quite absent in treaty transactions, though the same goes for the element of rule-making; there is always an interaction between fact and law in any system or subsystem. The focusing on the barter element in traditional international law is in conformity with the concept of individual and separate "sovereignty" of each State.<sup>131</sup>

124. As to the legal consequences of a breach of an obligation under such barter treaties, the emphasis lies in the second parameter, in particular in the balancing countermeasures of the injured State, which are, in effect, a return to the pre-treaty relationship. At the same time, such countermeasures, taken together with the breach of the obligation by the other State, necessarily destroy the law element (if any) in the treaty. The result is exactly the contrary of an enforcement of the treaty rule. But then, of course, if the function of the treaty-transaction is nothing else than the exchange of prestations, the treaty has no object and purpose of its own. If countermeasures are to be enforcement measures they must be disproportional to the breach of the obligation in terms of the effects of both. Consequently, such enforcement measures will normally be sought in other fields than that of the breach. This raises the question already referred to in paragraph 72 above.

125. One field of relationship may be covered by the same treaty (in the sense of the same instrument) or by a group of rules of international law flowing from another source.<sup>132</sup> On the other hand, separate treaty instruments dealing with the relationship between the same States may deal with the same field of relationship.<sup>133</sup> In this connection, it may be recalled

in the sense that a bilateral primary relationship is breached by the same conduct and entails a bilateral breach/injury relationship; regionalization is also possible in this respect. Here too, there may be similar régimes under the rules of customary international law inasmuch as, in respect of the breach of certain obligations, a legal consequence may only be drawn through a collective decision.

<sup>131</sup> In this sense, the non-reciprocity underlying treaties giving effect to what is called "a new international economic order" is a shift towards the "law" element, as, for that matter, is the old idea of *jus communicationis*; the difference between these two approaches lies in another dimension.

<sup>132</sup> In this connection, attention may be drawn to article 44 of the Vienna Convention, dealing with the separability of treaty provisions. Actually, the reference in para. 2 of this article to article 60 seems to imply that, in case of a breach of a treaty provision, another party to the treaty may suspend the operation of another treaty provision even if those provisions are not separable in the sense of article 44, para. 3. But then, of course, article 60 applies only in the case of a material breach, which presupposes a link between the provision violated and other provisions of the same treaty (art. 60, para. 3). Nevertheless, such a link seems to be an objective one, while article 44, para. 3 (b), also takes into account the subjective link resulting from the treaty as a "package deal" between States, i.e., as a barter transaction with respect to rights and obligations lying in—objectively—different fields.

<sup>133</sup> Cf. the preliminary report, paras. 60–61 (*Yearbook* . . . 1980, vol. II (Part One), pp. 118–119, document A/CN.4/330).

that a field of relationship may cover matters which are not dealt with in terms of real rights and obligations.<sup>134</sup> In any case, where different fields of relationship, covered by different sets of rules of international law, are involved, a cumulative application of such sets of rules may result in the precluding of countermeasures outside the field of relationship involved in the breach, either temporarily or permanently.

126. Until now, no specific distinction has been made between bilateral and regional treaties, though some of the types of treaties mentioned before are, in fact, mostly multilateral or regional. Actually, the mere fact that an international obligation is imposed on a State by a multilateral treaty does not necessarily alter the bilateral character of the breach/injury relationship between States.<sup>135</sup> Nevertheless, the treaty as an instrument remains a multilateral one, and, consequently, the Vienna Convention treats the invoking of the invalidity, the termination, the withdrawal from and the suspension of the operation of a treaty as a matter which concerns all other parties to that treaty (art. 65). But this is a matter of procedure. As to substance, article 60 of the Vienna Convention seems rather to underline the bilateral character of the breach/injury relationship by providing for two exceptions, and those only in respect of a material breach of a multilateral treaty by one of the parties.<sup>136</sup>

127. In this connection, it should be recalled (see above, paras 94 *et seq.*) that a "derived" or "constructive" injury may be "organized" in the multilateral treaty itself. Actually, article 60 of the Vienna Convention seems to approach this situation from three different angles: first, by limiting itself to "material" breaches, it presupposes an "object or purpose" of the multilateral treaty as such (para. 3 (b)); second, it refers to treaties "of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty" (para.

<sup>134</sup> Compare para. 72 above. Particularly in economic matters, the interaction between economic facts may lead to treaty clauses which, while not creating *per se* rights and obligations in respect to conduct, nevertheless make such conduct relevant for the application of the treaty, sometimes in the form of special procedures in case of such conduct—for example, the GATT "nullification or impairment" and ICAO "hardship" provisions (see footnote 97 above). One might contrast such "good faith" expansions of the field of relationship, or object and purpose, with the "contraction" of the field of relationship implicit in the possibility of making reservations, and other distinctions between provisions essential and those not essential for the object and purpose of a treaty or legal relationship.

<sup>135</sup> Indeed, the obligation itself may be bilateralized, for example, through the effect of reservations accepted by one or more and rejected by other participants in the multilateral treaty. Furthermore, as noted before, even obligations imposed by rules of customary international law are often bilateral.

<sup>136</sup> See above, paras. 90 *et seq.* Obviously the Vienna Convention only deals with the legal consequences of a breach in respect of operations relating to the treaty, and not with State responsibility (art. 73). It does not purport to exclude other responses in other cases of breach, even by States other than the directly injured State. Nevertheless, one may well ask why the suspension of the operation of a treaty in whole or in part by a party—particularly under the circumstances described in article 65, para. 5, of the Vienna Convention—should be so limited, if more or less the same effect could be produced by taking a countermeasure under the rules of State responsibility. Indeed, the whole tenor of the Vienna Convention provisions on the legal consequences of a breach of a treaty obligation seems at least to suggest a legal limitation of such countermeasures, in particular as regards States not "specially affected" by the breach.

2 (c)); and third, it presupposes a collective interest of all the parties by permitting the parties, other than the defaulting State, to terminate the treaty or suspend its operation in whole or in part "by unanimous agreement" (para. 2 (a))—that is, by a collective decision.<sup>137</sup>

128. The third angle of approach, in particular, may be further developed in the treaty itself. Thus international procedures for internal remedies may be provided for in respect of alleged breaches, and should then, in principle, be exhausted before at least some of the otherwise possible legal consequences are drawn from the situation.

129. On the other hand, the collective decisions resulting from such procedures may themselves impose or "trigger" new obligations, and create relationships of another type, another field, and even another "organization". Thus, for example, if there has been a breach of an international obligation, and if the ICJ has dealt with the—bilateral—dispute, and if then its judgment is not complied with, the Security Council of the United Nations may deal with the matter.

130. A particular case of the shift from one subsystem to another is, it seems, the qualification of an internationally wrongful act as an "international crime".<sup>138</sup> The notion of international crime seems to imply that (a) the wrongful act thus qualified can not be made good by any substitute performance (first parameter), and (b) it causes injury to all States (second parameter). Indeed, the notion itself is a typical deviation from the traditional approach of bilateralism and reparation in international affairs.

131. On the other hand, at least in the first instance, the words "international crime" evoke some general principles of municipal law as to penal consequences of conduct, such as the principle that conduct can only be qualified as criminal by previous legislation that also determines the penalty, and the principle that a person is not guilty unless his guilt is established through the appropriate procedures. Of course such principles, being principles of municipal law, are not simply transferable to international law—but the same is true of the notion of "crime" itself.<sup>139</sup>

132. Nevertheless, it may be stated that the notion of "international crime" implies at least a third parameter of legal consequences: some form of international enforcement. One can hardly accept this notion without at the same time providing for its specific legal consequences and the means of "implementation" (*mise en oeuvre*).

133. One such specific legal consequence could be an obligation of all States to contribute to a situation in which the author State of an international crime could be compelled to stop the breach. As a minimum, such contribution would include refraining from support *a posteriori* of the conduct constituting an international crime. A second degree of contribution would be a

support of countermeasures taken by another State or States, and a third degree would be the taking of countermeasures against the author State.

134. In respect of all three degrees of contribution, further distinctions can be made. Thus the support *a posteriori* from which each State should refrain may refer to the conduct constituting the international crime itself, or to the result of such conduct,<sup>140</sup> or even to the author State itself in other fields of relationship. Furthermore, support can be given, and countermeasures taken, by a State within its own jurisdiction, in a field of international legal relationship with the author State, or even within the jurisdiction of the author State itself. Finally, the support by State A of countermeasures taken by another State (or States) B against author State C may range from accepting that State B's measures include devices to prevent evasion through State A, to taking parallel measures in order to prevent substitution, and even to the taking of measures amounting to aid or assistance to State B under article 27 of part 1 of the draft articles.

135. In determining the legal consequences of an international crime in terms of obligations of States other than the author (or defaulting) State, three general points must not be lost sight of. In the first place, it should be noted that in present-day international relations—often characterized as a state of interdependence—the survival of a State may depend not so much on the observance by other States of their legal obligations towards it as on conduct of such other States to which they are not strictly obliged under the rules of international law. Accordingly, an internationally wrongful act, and particularly an international crime committed by a State may entail in fact an attitude of other States which seriously affects its interests to the point of compelling it to mend its ways. The question arises then, whether this category of "political" consequences should be addressed in our draft articles on State responsibility, or at least be taken into account.

136. Secondly, it should not be overlooked that in many, though not all, cases of "international crime" the same conduct also invokes a bilateral internationally wrongful act; in other words in many cases there is, or are, State(s) especially affected by the breach. The legal consequences of the breach in terms of rights of those States remain as determined by the rules concerning other internationally wrongful acts.

137. Thirdly, in modern times there is a strong tendency towards regionalization, the formation of groupings of States with common interests and opinions. This generally results in particular legal relationships between the member States of such groupings. In some cases the grouping even entails legal consequences in the relationship with States outside the grouping, but the extent to which this is the case under general rules of international law is, as yet, far from clear. Again the question arises whether this phenomenon should be taken into account in the draft articles (see also para. 143 below).

<sup>137</sup> A similar idea of cohesion of bilateral relationships is expressed *inter alia* in article 20, para. 2 of that convention, and in various articles of the Vienna Convention on Succession of States in respect of Treaties (see footnote 81 above).

<sup>138</sup> Of course, the text of article 19 of part 1 of the draft is not now under discussion; the second reading may lead to its revision, in particular in the light of decisions taken in respect of parts 2 and 3.

<sup>139</sup> That is to say, the notion of a crime committed by a State; individual criminal responsibility by a physical person is another matter.

<sup>140</sup> See, for example, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV) of 24 October 1970, annex): "No territorial acquisition resulting from the threat or use of force shall be recognized as legal".



138. Article 19, para. 2, of part 1 of the draft presupposes the existence of international obligations "so essential for the protection of fundamental interests of the international community that [their] breach is recognized as a crime by that community as a whole". Presumably such recognition precedes the breach. Ideally, it would be for that international community as a whole to determine the legal consequences of a breach, including the procedures according to which the existence of a breach is established and the corresponding obligations of all other States are determined. Actually, to the extent that the situation created by the commitment of an international crime also could give rise to action of United Nations organs in application of the relevant provisions of the United Nations Charter, the legal consequences of the international crime and the implementation of those consequences are already provided for. Any improvement of that subsystem of international law would seem beyond the task of the Commission.<sup>141</sup>

139. Article 19 of part 1 of the draft also seems to presume that an international crime, in the sense of para. 2 of that article, may not be at the same time "a serious breach of an international obligation of essential importance for the maintenance of international peace and security" in the sense of para. 3, under (a). The question arises whether, nevertheless, "the international community as a whole", in recognizing particular conduct as a crime, may at the same time declare applicable—and indeed, unless a contrary intention is clearly established, may be considered to have declared applicable—the procedures of collective decision provided for in the United Nations Charter.<sup>142</sup> The Special Rapporteur is inclined to give a positive answer to this question.

140. Quite apart from the obligation of every State (see para. 133 above), the question arises as to the right of every State to respond to an international crime on its own initiative. Apart from the situation of *concurso* (see para. 136 above), the answer would seem negative in principle.<sup>143</sup> A single State cannot take upon itself the role of "policeman" of the international community. However, there may be room for an exception to this principle.

141. In this connection, it would seem that some analogies may be drawn with the situation dealt with in the ICJ's advisory opinion at 21 June 1971 on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.<sup>144</sup> Indeed, in this opinion

the Court seems to make a distinction between legal consequences flowing from the mere fact of an international wrongful act having been committed and "... acts permitted or allowed—what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied ...".<sup>145</sup> Although this case turned on the scope of an obligation of non-recognition of the result of an internationally wrongful act (cf. para. 134 above) and also dealt with "political" measures (in the sense of para. 135), the distinction between the degrees of countermeasures may perhaps be applied also to the question of the right of a State or States to respond to an international crime in the absence of a collective decision to that effect of the competent United Nations body. One could then draw the conclusion that measures amounting to the withdrawal of support *a posteriori* and termination or suspension of treaty relationships with the author State are allowed, at least pending a decision of the competent organ of the United Nations.

142. In the case dealt with in the advisory opinion just mentioned, a decision of the Security Council had already been taken establishing the internationally wrongful act (resolution 276 (1970), of 30 January 1970). Obviously, such prior determination is an important safeguard. It would seem, however, that in view of the limitation of the allowed countermeasures to essentially temporary, or at least not "irreversible" measures, a control *a posteriori* is sufficient. After all, it seems hardly likely that the facts of the case are much in dispute if a State invokes its right to take limited countermeasures as a response to an international crime. On the other hand, the qualification of alleged conduct as an "international crime" under the definition given to that notion in article 19, para. 2, of part 1 of the draft may very well give rise to a dispute. Indeed, such a dispute is quite comparable to the dispute which may arise if and when a State invokes the nullity of a treaty under article 53 or 64 of the Vienna Convention (*jus cogens*). Accordingly, the present draft articles should provide for a similar procedure to that provided for in article 66, subpara. (a), of that convention.

143. One could also imagine another additional safeguard against precipitous action of a State in response to an alleged international crime of another State: that the (still limited) countermeasures could only be taken by a grouping of States collectively. Obviously, the question immediately arises how to qualify such a grouping and the "collective" character of the decision. In itself the idea is not quite without precedent, apart from the fact that even an international crime may affect some parts of the international community more than others.<sup>146</sup> Actually, both the notion of collective self-defence and the provisions of article 60, paragraph 2 (a), of the Vienna Convention seem to point in the direction of "regionalization" (see para.

<sup>141</sup> In particular, in view of the existence of a Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (see document A/AC.182/L.31 of 2 February 1982).

<sup>142</sup> Such a course of action would not, in the opinion of the Special Rapporteur, require any formal amendment of the United Nations Charter; see W. Riphagen, "Over concentratie en delegatie bij internationale instellingen", *Netherlands International Law Review* (Leyden), vol. VI, Special Issue, July 1959, p. 229 (English summary at pp. 252–253). In all its decisions relating to Namibia, the ICJ has accepted the competence of United Nations bodies to deal with the implementation of the mandate agreements.

<sup>143</sup> This is without prejudice to the "countermeasures" referred to in para. 134 above.

<sup>144</sup> As stated in the preliminary report, paras. 41, 55–62 and 69–74 (*Yearbook* ... 1980, vol. II (Part One), pp. 115, 117–119, 121–122, document A/CN.4/330), the case of Namibia is a special one in view of the particular legal status of the territory.

<sup>145</sup> *I.C.J. Reports 1971*, p. 55, para. 120. It should be recalled that, in its Judgment of 18 July 1966, the Court had decided that Ethiopia and Liberia did not have a "separate self-contained right" to demand performance of the obligations of South Africa in respect of its "sacred trust" (*I.C.J. Reports 1966*, pp. 28–29, para. 33).

<sup>146</sup> At the time the Charter of the United Nations was adopted, a reasoning of this kind may have inspired the "Transitional Security Arrangements" of Articles 106 and 107 in connection with Article 53 of the Charter.

137 above). For the moment, the present Special Rapporteur feels that this aspect should only be analysed further if the Commission so decides, particularly since the scope and terms of article 19 of part 1 of the draft are still to be discussed in second reading.<sup>147</sup>

<sup>147</sup> Actually the "philosophy" behind article 19 may bear further

scrutiny. Some might consider that the notion of obligation "essential for the protection of the fundamental interests of the international community . . . as a whole" should be *a priori* limited to such situations as put into question the viability of the system of sovereign States, each having its own and separate power structure, subjects and territory. Indeed, the examples given in article 19, para. 3, may be regarded as pointing to cases in which the notion of the sovereign State itself fails to function, rather than to any particular conduct or protected interest.

## CHAPTER VI

### Draft articles

144. It would seem *a priori* impossible to translate the analysis given in the foregoing chapters into an exhaustive simple set of articles of parts 2 and 3 of the draft articles on State responsibility. Indeed, that analysis is predicated upon the concept of a continuous process of interaction, which defies a "crystallization" into the fixed and separate forms of source/obligation/breach/consequence/implementation.<sup>148</sup> In a sense this is recognized by the previous *obiter dicta* of the Commission referred to in paragraph 27 above. This does not mean that no articles can be drafted, but only that such articles must be flexible and must contain terms which leave room for a variety of applications. Even then some "Gordian knots" have to be cut, if only in the choice between what is, and what is not registered in those articles.

145. As explained in paragraph 25 above, article 1 could read as follows:

#### Article 1

**An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.**

#### Commentary

(1) The sole purpose of this introductory article is to lay a link between the articles in part 1, defining what is an internationally wrongful act of a State, and the articles of part 2, dealing with the legal consequences of such an internationally wrongful act. The article does not mean to say that any internationally wrongful act of a State automatically entails all the legal consequences mentioned in part 2. In the first place, "automatic", in this field, is contrary to the very idea of justice. The factual conduct of a State which is not in conformity with what is required of it by an international obligation—in other words the breach—may, with respect to one and the same obligation, be more or less serious, and the same goes for the factual effect of that conduct on the interests of another State or States. The same remarks are valid for the legal consequences of the breach, inasmuch as they refer to conduct of the author

State and other States, and the effects thereof are also to be taken into account. In short, even where the circumstances of the situation are not "circumstances precluding wrongfulness" in the sense of chapter V of part 1 of the draft articles, such circumstances may be aggravating or extenuating, and this inevitably influences the consequences of the breach in a given situation. A manifest "quantitative disproportionality" between breach and legal consequences should be avoided, but, while this principle can appear in a set of general draft articles on State responsibility (see art. 2), a further elaboration must be left to the States, international organizations or organs for the peaceful settlement of disputes which may be called upon to apply those articles.

(2) Not only the conduct constituting the internationally wrongful act and the conduct constituting a fulfilment of the (new) obligations or the exercise of the (new) rights mentioned in this article may be, as such or in its effects, more or less serious, but also the (primary) obligations to which they refer are not all of the same character. To a certain extent, the draft articles of part 2 may reflect these qualitative differences between primary obligations. But an exhaustive treatment cannot be given to this aspect, in view of the great variety of primary obligations.

(3) In respect of both the matter referred to in paragraph (1) above and the aspect mentioned under paragraph (2), the rules of international law establishing the primary obligation, and possibly other rules of international law, may themselves contain prescriptions relating to the (new) obligations and the (new) rights entailed by a breach of the primary obligation or obligations involved. Such prescriptions would then prevail over the present articles of part 2 (see art. 3).

146. Article 2 could read as follows:

#### Article 2

**The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.**

#### Commentary

See the commentary to article 1, paragraph (1).

147. As explained in paragraph 31 above, article 3 could read as follows:

<sup>148</sup> Actually, while the rules of State responsibility are concentrated on conduct which is a breach, similar questions arise with respect to conduct which is in conformity with rules of international law, particularly rules of procedure and rules of statutes. The various degrees of validity/invalidity of a legal act, and the various degrees of acquisition/non-acquisition or loss of a legal status are then the legal consequences involved in this type of question. We have noted analogies before. (Cf. the preliminary report, para. 39 (*Yearbook* . . . 1980, vol. II (Part One), p. 114, document A/CN.4/330).)



### Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

#### Commentary

- (1) See the commentary to article 1, paragraph (3).
- (2) Ideally, States and other subjects of international law, in making a rule of international law establishing an obligation, should at the same time envisage the possibility that a State would not act in conformity with what is required of it by that obligation, and prescribe the legal consequences of such a situation. In actual fact, this very often does not happen. Apart from the reason that one is hesitant "to make a last will and testament for a new-born baby", States often consider, at the time of stipulating obligations, that a non-performance of such obligations may create a totally new international situation, the consequences of which they are not willing to describe at that time; governments generally do not like to answer hypothetical questions. Nevertheless there exist rules of international law, in particular conventional rules, which do address the question, often in terms of procedures relating to the "implementation" of the treaty.
- (3) Such rules may also be adopted by States at a later stage and then refer either to specific primary obligations stipulated in an earlier treaty, or to obligations generally or a category or categories of obligations. A typical example are treaties relating to dispute settlement. Such treaties may even contain provisions relevant for the determination of the substantive (new) obligations and (new) rights entailed by an internationally wrongful act of a State.<sup>149</sup>
- (4) In a sense, rules of international law establishing a primary obligation and prescribing at the same time the legal consequences of a breach of such an obligation may be compared with the treaties referred to in article 33, 2 (b), of part 1 of the draft articles, inasmuch as they both envisage circumstances beyond the facts directly addressed in the primary obligation.
- (5) Article 3 has the effect of giving the special articles of part 2 the character of rules which apply to the legal consequences of an internationally wrongful act only, *unless otherwise provided for*. Actually, the special provisions are only presumptions as regards the intention of States which establish or accept rights and obligations between them. This not only applies to matters as referred to in paragraphs (1) and (2) of the commentary to article 1 and the matter of "implementation", but also to the question of which State or States are considered to be injured by a breach of an obligation.

148. Article 4 could read as follows (see para. 105 above):

<sup>149</sup> Compare Article 36, para. 2 (a) and Article 41 of the Statute of the International Court of Justice; compare also the second report, paras. 41–43 (*Yearbook* . . . 1981, vol. II (Part One), pp. 83–84, document A/CN.4/344).

### Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

#### Commentary

- (1) One of the more important elements in the progressive development of international law is the recognition of the existence of peremptory norms of general international law. The legal consequences of such norms, that is, of conduct of States in breach of (or in conformity with) such norms, may take different forms. Thus, under article 53 of the Vienna Convention on the Law of Treaties, States cannot conclude a valid treaty (i.e., a treaty having "legal force")<sup>150</sup> if its provisions provide for conduct contrary to a peremptory norm of general international law. Article 71, paragraph 1, of the convention deals with the legal relationship between the States having in fact concluded such a treaty; it appears from that article (in conjunction with article 69, paragraph 2) that the treaty still has some legal effects. The effect of a new peremptory norm on existing treaties is treated somewhat differently in article 71, paragraph 2, in view of the presumably non-retroactive effect of the peremptory norm. In the different context of article 18 of part 1 of the draft articles, some "retroactive effect" is given to the peremptory norm, but only to the extent such a norm makes an act of a State "compulsory". In the still different context of article 33 of part 1 of the draft articles, the obligation arising out of a peremptory norm is made resistant against state of necessity as a ground for precluding the wrongfulness of an act of a State.
- (2) The present article deals with still another context, namely the context of article 1. It states that no derogation from a peremptory norm is permitted even as a legal consequence of an internationally wrongful act. Obviously, one cannot exclude that the same peremptory norm or a later one permits such derogation, particularly as a legal consequence of conduct of a State which is itself incompatible with a peremptory norm. But this would still be an exception to be provided for by a peremptory norm itself.

149. Article 5 could read as follows (see para. 104 above):

### Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

<sup>150</sup> See article 69, para. 1.

### Commentary

(1) Article 103 of the United Nations Charter stipulates that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any international agreement, their obligation under the present Charter shall prevail.

(2) The legal principle underlying this provision is valid also in respect of obligations not imposed by "any other international agreement". In particular, the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice, the provisions of the Charter with respect to the functions and powers of the organs of the United Nations, and the inherent right of self-defence as referred to in Article 51 of the Charter, also apply to and prevail over the legal relationships between States resulting from an internationally wrongful act of a State, to the extent that such legal relationships are covered by the scope of the Charter.

(3) In this connection, due account should be taken of 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>151</sup> and the Definition of Aggression.<sup>152</sup> 150. Article 6 could read as follows (see paras. 130-143 above):

### Article 6

**1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:**

**(a) not to recognize as legal the situation created by such act; and**

**(b) not to render aid or assistance to the author State in maintaining the situation created by such act; and**

**(c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).**

**2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.**

**3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.**

### Commentary

(1) Draft article 19 of part 1 of the draft articles stipulates the possibility of an internationally wrongful act "which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole".

(2) Draft article 19 does not and cannot indicate how and when such recognition by that community as a whole takes place. Neither does it specify the special legal consequences entailed by an international crime having been committed by a State. The present article intends, to a certain extent, to fill this gap.

(3) The way in which the international community as a whole determines *in abstracto* which international obligations are "so essential for the protection of fundamental interests of the international community" that their breach justifies special legal consequences falls outside the scope of the draft articles on State responsibility.

(4) The present draft article cannot, however, fail to take account of the possibility that "the international community as a whole" determines the content of those special legal consequences and the procedural conditions under which they shall be applied. Indeed, in respect of the first example of such an international crime, given in part 1 of the draft in article 19, paragraph 3 (a), namely "a serious breach" of the prohibition of "aggression", the international community as a whole must be considered to adhere to the Charter of the United Nations, including the powers and functions of the competent organs of the United Nations and the right recognized in Article 51 of the Charter. Other cases of international crime may well create a situation in which the provisions of the United Nations Charter relating to the maintenance of international peace and security are also directly applicable. But if this is not the case—and such situations cannot be excluded *a priori*—the special legal consequences and the way they are to be "implemented" are as yet unclear.

(5) The definition of "international crime" in article 19, paragraph 3, of part 1 of the draft articles implies that the international community as a whole is injured by such wrongful act. It may therefore be presumed that the organized international community, that is, the United Nations Organization, has a role to play in determining the special legal consequences entailed by such act, even if the maintenance of international peace and security is not considered to be involved. On the other hand, the notion of a right of individual "self-defence", recognized in Article 51 of the United Nations Charter, cannot be held to be directly applicable.

(6) Nevertheless the notion of international crime seems to imply that each individual State has at least an obligation—implying a right—not to act in such a way as to condone such crime. Paragraph 1 of article 6 analyses this obligation.

(7) Paragraph 1 (a) stipulates the obligation not to recognize as legal the situation created by the international crime. The formula is inspired by the rule embodied in the 1970 Declaration on Principles of International Law which states that: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". Obviously, international crimes other than a serious breach of the prohibition of aggression may not create a situation in which the author State purports to exercise sovereign rights over a given area. Nevertheless, one might well imagine that

<sup>151</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>152</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

an international crime creates a legal situation under the municipal law of the author State which, as such, could be recognized by another State within that other State's jurisdiction, possibly by virtue of the application of a treaty between the author State and the other State, which deals in general terms with legal co-operation between the two States.

(8) In this connection, it should be noted that the ICJ, in its Advisory Opinion of 21 June 1971, states, within the context of non-recognition of the continued presence of South Africa in Namibia, that "the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation".<sup>153</sup> It would not seem that this statement should be construed as an exception to the duty of non-recognition, but rather as a reminder of the fact that—like any other right or obligation—the obligation not to recognize as legal should not be interpreted blindly, but in its context and in the light of its object and purpose, as a countermeasure against the international crime—that is, an act of a State—itsself.

(9) Paragraph 1 (b) is necessarily drafted in rather vague terms. Its formulation is inspired by, on the one hand, article 27 of part 1 of the draft articles and, on the other hand, by article 71 *in fine* of the Vienna Convention on the Law of Treaties; both articles, of course, deal with a context different from the present one.

(10) While paragraph 1 (a) deals with the result of the international crime—the situation created by such crime—subparagraph (b) refers to the author of the crime. It prohibits international co-operation with the author State to the extent that such co-operation helps the author State to maintain the situation created by the crime. This is much broader than aid or assistance rendered for the commission of an internationally wrongful act (art. 27 of part 1), which in its turn, of course, includes aid or assistance rendered for the continuation of the international crime. On the other hand, it clearly does not cover international co-operation with the author State in fields which have nothing to do with the international crime or the situation created thereby. Obviously a State other than the author State may wish to avoid any type of international co-operation with the author State, and may do so without infringing any legal obligation which is incumbent upon it. But the present article deals with an obligation not to render aid and assistance, an obligation which, under paragraph 3 of the article would prevail over other obligations.

(11) In this connection, it is interesting to note that the ICJ, in its aforementioned Advisory Opinion of 21 June 1971, in respect of the application of existing bilateral treaties with South Africa, stipulates a duty to refrain from such application only to the extent that it "involve[s] active\* intergovernmental co-operation"<sup>154</sup> and, as regards the government entering into economic and other forms of relationships or dealings, prohibits only such transactions and dealings "which may *entrench\** its authority over the Territory".<sup>155</sup>

<sup>153</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, I.C.J. Reports 1971, p. 56, para. 125.

<sup>154</sup> *Ibid.*, p. 55, para. 122.

<sup>155</sup> *Ibid.*, p. 56, para. 124.

(12) Furthermore, as will be explained in respect of paragraph 2 of draft article 6, paragraph 1 also covers the possibility that, by analogous application of the United Nations system, obligations going beyond those mentioned in subparagraph (a) may be imposed on a State.

(13) While paragraphs 1 (a) and (b) deal with the two sides of the relationship between the author State and any other State, subparagraph (c) refers to the relationship between those other States. Its formulation is inspired by Article 49 of the United Nations Charter. This subparagraph takes into account the fact that often a measure taken by one State loses its actual effect if it is evaded through or substituted by dealings connected with another State. This may happen even if both States, in their relationship with the author State, take the same measures. A mutual assistance between those other States is then required and justified by the solidarity in the face of an infringement of fundamental interests of the community of States as a whole. Here again, through procedures as referred to in paragraph 2 of the present draft article, the scope and modalities of such mutual assistance may be specified. On the other hand, preservation of existing relationships between two or more of those other States may require particular modalities of such mutual assistance.

(14) As indicated in paragraph (5) of this commentary, it may be presumed that the international community as a whole, in "recognizing" as a crime the breach by a State of certain international obligations, at the same time accepts a role of the organized international community, i.e., of the United Nations system, in the further stages of determining the legal consequences of such a breach and of the "implementation" of State responsibility in that case. Actually, in all the cases mentioned by way of (possible) examples of international crime in article 19, paragraph 3, of part 1 of the draft, the United Nations system has been involved in some way or another.

(15) The foundation of this role of the United Nations is not necessarily to be found only in the text of the United Nations Charter itself. Thus, for example, the ICJ, in all its decisions relating to Namibia, accepted a link between the legal relationships created by the Mandates System and the functions and powers of United Nations organs, even though no "succession" of the United Nations Organization to the League of Nations (in a sense comparable to a succession of States) had taken place.<sup>156</sup>

(16) The first part of paragraph 2 of draft article 6 ("Unless otherwise provided for by an applicable rule of international law . . .") underlines the character of a

<sup>156</sup> In this connection, particular reference should be made to the separate opinions of Sir Hersch Lauterpacht, one annexed to the Advisory Opinion of the ICJ of 7 June 1955: *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, I.C.J. Reports 1955, p. 67, and the other, to the Advisory Opinion of 1 June 1956: *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, I.C.J. Reports 1956, p. 23. These opinions are based on the notion that the "jurisdiction" of the United Nations organs in this case was a "jurisdiction whose source is of a dual character inasmuch as it emanates both from the Charter and the Mandate" (I.C.J. Reports 1955, p. 112). Cf. Riphagen in *Netherlands International Law Review*, vol. VI, p. 234 (article cited in footnote 142 above) and Riphagen, "The legal consequences of illegal acts under public international law", *ibid.*, vol. XX, No. 1 (1973), p. 27.

*presumptio juris tantum*. Strictly speaking, that part is redundant in view of the provisions of draft article 3 of part 2, of which it is an application. A reminder, however, does not seem amiss here.

(17) Paragraph 2 of article 6 is, of course, without prejudice to the provisions of draft article 5 of part 2 of the draft. If the United Nations Charter directly applies in a given case, this application prevails.

(18) Paragraph 2 of article 6 accordingly refers to a situation in which the jurisdiction of the United Nations organs is of a dual character and emanates from a combination of Charter provisions with other rules of international law, *in casu* with the rules referred to in article 19, paragraph 2, of part 1 of the draft. The question arises whether such a combination may not require an adaptation of the component elements of the combination. Indeed, one might argue that, normally, if a body of rules of international law is established through one and the same instrument, the contents of the component parts of that instrument are usually adapted. In combining (a part of) such an instrument with (a part of) another instrument, such mutual adaptation is not always guaranteed and may still have to be performed.<sup>157</sup>

<sup>157</sup> Thus, for example, in his separate opinion annexed to the ICJ's Advisory Opinion of 7 June 1955 (see footnote 156 above), Sir Hersch Lauterpacht held that "... there is room, as a matter of law,\* for the modification of the voting procedure of the General Assembly in respect of a jurisdiction whose source is of a dual character ...", but that such modifications should not be "inconsistent with the fundamental structure of the Organization" (*I.C.J. Reports 1955*, p. 112). On the other hand, the ICJ itself rather seems to consider, in

(19) In view of the "dual character" of the "jurisdiction" of United Nations organs under paragraph 2, it may be argued that the decisions of those organs do not create "obligations under the present Charter" in the sense of Article 103 of the Charter. In any case, the obligations directly flowing from paragraph 1 of the present article cannot be qualified as such. On the other hand, the performance of the latter obligations, and the exercise of rights implied thereby, may conflict with obligations and rights under other agreements and rules of international law not embodied in agreements—both obligations and rights in the relationships with the State author of the international crime and obligations and rights in the relationships between the other States. Accordingly, paragraph 3 of the present draft article 6 provides for the obligations and rights under paragraphs 1 and 2, a position intermediary between the obligation stipulated in Article 103 of the Charter of the United Nations.<sup>158</sup>

the case of the combination of the Mandates System and the United Nations Charter, that the Charter only provides for a "machinery of implementation", to be applied as such and without adaptation (and, for that matter, without requiring the consent of the mandatory power). Compare also the "autonomy" of dispute settlement procedures provided for in treaties dealing primarily with substantive matters, procedures which remain applicable also in case the treaty is unilaterally considered to be terminated. In order not to prejudice this issue, the words "*mutatis mutandis*" have been added in paragraph 2 of the present draft article.

<sup>158</sup> Actually, the hierarchy of Article 103 is sometimes reflected in exceptions to obligations under other agreements. See, for example, article XXI, para. (c) of the General Agreement on Tariffs and Trade (see footnote 53 above).

## CHAPTER VII

### Articles to be drafted

151. The draft articles presented in chapter VI replace articles 1–3 as proposed in the second report. Articles 4 and 5 as proposed in the second report deal with different matters, and are also withdrawn, since their contents should be adapted to the decisions the Commission may take on articles 1–6, proposed in the present report.

152. As a matter of fact, the text of article 4 as presented in the second report deals with a part of the catalogue of possible legal consequences of internationally wrongful acts. Subject to the decisions the Commission may take at its thirty-fourth session, it would seem preferable to the Special Rapporteur that this catalogue be dealt with exhaustively in a new article or articles to follow the new article 6.

153. Article 5, as proposed in the second report, was

meant to deal with a particular type of (primary) relationships. As explained in earlier chapters of the present report, the Special Rapporteur feels that part 2 of the draft articles on State responsibility should, in a general way, distinguish between various types of legal relationships in connection with the different legal consequences of a breach of an international obligation flowing from such relationship. The precise drafting of an article corresponding to article 5, as presented in the second report, depends, of course, on the drafting of the article or articles relating to the catalogue of such legal consequences.

154. In future reports, the Special Rapporteur intends to elaborate, in the form of draft articles, the approach set out in the present report, as well as to present draft articles for part 3, concerning the "implementation" of State responsibility.

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

[Agenda item 4]

DOCUMENT A/CN.4/360\*

## Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur

[Original: English]  
[23 June 1982]

### CONTENTS

Chapter		Paragraphs	Page
I.	A REVIEW AND FORECAST OF PROGRESS.....	1-49	51
A.	Introduction.....	1-5	51
B.	Three basic aims.....	6-11	52
	1. Alignment with the régime of State responsibility.....	6-8	52
	2. Emphasis upon prevention, as well as reparation .....	9-10	53
	3. A balance between freedom to act and duty not to injure .....	11	53
C.	Corollaries of achieving the basic aims.....	12-29	53
	1. A supportive relationship with State responsibility .....	12-15	53
	2. A concern with the progressive development of international law .....	16-18	55
	3. Foreseeability and the duty not to cause harm .....	19-23	55
	4. The distribution of costs and benefits.....	24-29	57
D.	Use of terms, causality, scope and related questions .....	30-49	58
	1. Rules and guidelines .....	30-33	58
	2. "Loss or injury": the ambit of reparation claims .....	34-35	59
	3. "Acts" and "activities": the role of causality .....	36-42	59
	4. "Territory or control": the question of scope .....	43-49	60
II.	OUTLINE OF THE TOPIC .....	50-53	62
	Schematic outline.....	53	62

## CHAPTER I

### A review and forecast of progress

#### A. Introduction

1. The preliminary and second reports on this topic<sup>1</sup> were mainly concerned with identifying its boundaries, its relationship with State responsibility, its motivations and its dynamic principles. In its report to the General Assembly on the work of its thirty-third session, the International Law Commission indicated that the focus of its attention would now turn to the inner content of the topic and that its early preoccupation with doctrinal considerations would begin to be balanced by greater attention to the practice of States in constructing

multilateral treaty régimes.<sup>2</sup> An examination of other aspects of State practice would follow in due course.

2. At the thirty-sixth session of the General Assembly, in the Sixth Committee, the Commission was given every encouragement to pursue this programme with a mixture of caution and boldness, finding firm foundations in existing law and building creatively upon those foundations a structure that would serve the cause of interdependence in the modern world. There was pre-dominant support for principles that the Commission has already identified, and sufficient debate on points of substance to direct and inform the Commission's further course of action. In particular, there was virtually

\* Incorporating A/CN.4/360/Corr. 1.

<sup>1</sup> See *Yearbook* . . . 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2, and *Yearbook* . . . 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, respectively.

<sup>2</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 151, para. 195.

complete agreement that the Commission had learned as much as it could by looking at the topic from the outside: some issues that had remained speculative might well be resolved if we were now to undertake an inventory of contents. Only then would the time be ripe to begin the construction of draft articles.

3. Indeed, several representatives suggested that the Special Rapporteur might now feel he had received sufficient guidance to enable him to produce a schematic outline of a set of draft articles.<sup>3</sup> The Special Rapporteur is grateful for the suggestion and believes that this is the best way to proceed. It is also a method which should suit the convenience of the Commission, and the exigencies of its timetable, during the current session. The General Assembly's immediate expectations can be met without placing any added strain upon a heavily burdened Drafting Committee. A bridge can be provided, in the interest of economy of effort, between the preliminary work of the Commission on this topic in the quinquennium that has just ended and the more substantive work that the newly constituted Commission must undertake. Moreover, while the topic of the non-navigational uses of international watercourses awaits the attention of a new Special Rapporteur, his work can be made a little easier by continued exploration of issues that are germane to every situation in which actions taken in one country produce effects in another.<sup>4</sup>

4. Of course, it should be made very clear that a schematic outline is not a substitute for the proof of any of the propositions it may briefly indicate. Every element in the schema must later be tested by reference to received principles of international law and emerging State practice, or acceptability to States in the light of their experience and perceived needs. If in any case that test is not satisfied, the schematic outline must be revised. Nevertheless, such an outline is likely to influence the final result of the Commission's work because it will set a pattern of inquiry and expectation. Therefore, while matters of detail are always important, they should at this stage be evaluated, not in isolation, but with an eye to the mosaic of which they form a part.

5. Accordingly, this report will contain two chapters only, and the second of these will comprise the schematic outline of the topic. So that the shape of this outline is not buried deep in commentary, it will be set out sparsely, and as far as possible, explanations will be relegated to footnotes. In the next section of the present chapter, it is proposed summarily to review the main aims upon which this report and the two previous reports were predicated. In this and the following sections, attention will be paid to each of the major areas of doubt or disagreement that have emerged in past debates, whether in the Commission or in the Sixth Committee. Modifications introduced in the present report to take account of views expressed in these

debates will also be noted, and there will be a brief review of other factors that have influenced the construction of the schematic outline. On the other hand, the outline itself should serve to dispel some misunderstandings that have arisen because there was no working model to which reference could be made.

## B. Three basic aims

### 1. ALIGNMENT WITH THE RÉGIME OF STATE RESPONSIBILITY

6. The Special Rapporteur's first concern was to align the new topic with that of State responsibility. In one sense, this was a mere matter of definition. State responsibility is engaged only when a wrongful act has been committed. The present topic is by definition concerned only with a situation where the conduct of the State having territorial or other controlling jurisdiction has not been shown to be wrongful.<sup>5</sup> Yet this truism does not dispose of the matter, because some have regarded the duty to provide reparation for loss or injury without reference to wrongfulness as a separate system of obligation. In their view, therefore, this different régime of responsibility (or, in the English language only, "liability")<sup>6</sup> is independent of the ordinary régime of State responsibility and can in appropriate cases be substituted for it.<sup>7</sup>

7. A more general view—as debates in the Commission and in the Sixth Committee would seem to have shown—is that "strict" or "absolute" or "no-fault" liability is at present a product only of particular conventional régimes, and that any attempt to generalize this principle would be resisted as an unwarranted intrusion upon the liberty of action of sovereign States.<sup>8</sup> On the other hand, many would hold that the latter principle is indispensable in limited contexts and must therefore be accorded a régime of its own, if it cannot be assigned an appropriate place within the orthodox structure of customary international law. A warning note to this effect was sounded in last year's debate in the Sixth Committee of the General Assembly.<sup>9</sup>

<sup>5</sup> See the preliminary report, para. 13 (*Yearbook* . . . 1980, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

<sup>6</sup> For a discussion of the choice of the term "liability" in the English language title of the topic, see the preliminary report, paras. 10–12 (*ibid.*, pp. 250–251).

<sup>7</sup> See the preliminary report, paras. 19–25 and para. 51 (*ibid.*, pp. 253–254 and p. 262), and the second report, paras 15–21 (*Yearbook* . . . 1981, vol. II (Part One), pp. 107–108, document A/CN.4/346 and Add.1 and 2.).

<sup>8</sup> See the second report, paras. 11–12 (*Yearbook* . . . 1981, vol. II (Part One), p. 106, document A/CN.4/346 and Add.1 and 2). See also, for example, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook* . . . 1981, vol. I, p. 220, 1685th meeting, paras. 25–26; Mr. Sucharitkul (*ibid.*, p. 224, 1686th meeting, para. 20); and Mr. Ushakov (*ibid.*, p. 225, paras. 28–29). See the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the USSR, Mr. Verenikin (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 42nd meeting, para. 27); of the German Democratic Republic, Mr. Görner (*ibid.*, 46th meeting, para. 36); of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, paras. 19 and 26); of Pakistan, Mr. Shah (*ibid.*, 49th meeting, para. 48); and of Austria, Mr. Klein (*ibid.*, 52nd meeting, para. 52).

<sup>9</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 37); of the United States of America, Mr. Rosenstock (*ibid.*, 45th meeting, para. 72); of the German Democratic Republic, Mr. Görner (*ibid.*, 46th meeting, para. 35); of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, para. 72); of Poland, Mr. Mickiewicz (*ibid.*, 48th meeting, para. 10); of Finland,

<sup>3</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the United States of America, Mr. Rosenstock (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th meeting, para. 73) and the representative of Japan, Mr. Hayashi (*ibid.*, 48th meeting, para. 59).

<sup>4</sup> See in this volume, p. 65, the third report on the law of the non-navigational uses of international watercourses (document A/CN.4/348).

8. In summary, the position on this first doctrinal issue is as follows. Within the Commission, at its thirty-second and thirty-third sessions, there has been emphatic support, without any dissenting voice, for the view that this topic is concerned with "primary" rules of obligation, and that it in no way modifies the "secondary" rules of State responsibility.<sup>10</sup> In the Sixth Committee, the response has been almost—though not quite—as uniform; but, in both the Commission and the Sixth Committee, the decision carries with it a burden of doubts and anxieties. Chief among these is the fear that the desire for doctrinal orthodoxy will rob the present topic of its innovative character, submerging it in the old law it was designed to supplement. These and other worries are further considered in later sections of this chapter.

## 2. EMPHASIS UPON PREVENTION, AS WELL AS REPARATION

9. The Special Rapporteur's second major concern was to ensure that the topic would give pride of place to the duty, wherever possible, to avoid causing injuries, rather than to the substituted duty of providing reparation for injury caused.<sup>11</sup> There has in principle been complete support for this objective,<sup>12</sup> but again, there is a small, nagging doubt whether such an objective is compatible with others. To establish independently enforceable rules of prevention would be to depart entirely from the cardinal principle that the present topic is not concerned with rules of prohibition; and at that point, every fear referred to in the preceding paragraph would be justified.

Mr. Rotkirch (*ibid.*, para. 21); of Italy, Mr. Sperduti (*ibid.*, para. 40); of Spain, Mr. Lacleta Muñoz (*ibid.*, para. 51); of Egypt, Mr. El-Banhawy (*ibid.*, 49th meeting, para. 67); of Bulgaria, Mr. Kostov (*ibid.*, 51st meeting, para. 7); of Tunisia, Mr. Bouony (*ibid.*, 52nd meeting, paras. 6–7); of Morocco, Mr. Gharbi (*ibid.*, para. 45); of Austria, Mr. Klein (*ibid.*, para. 52); and of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, para. 22).

<sup>10</sup> See *Yearbook* . . . 1980, vol. II (Part Two), p. 160, para. 138, and *Yearbook* . . . 1981, vol. II (Part Two), p. 147, paras. 170–171.

<sup>11</sup> See the preliminary report, paras. 4–9 (*Yearbook* . . . 1980, vol. II (Part One), pp. 248–250, document A/CN.4/334 and Add.1 and 2), and the second report, paras. 5–6 and 56–72 (*Yearbook* . . . 1981, vol. II (Part One), pp. 104–105 and 116–121, document A/CN.4/346 and Add.1 and 2). See also the report of the Commission on its thirty-third session, paras. 167 and 179 (*Yearbook* . . . 1981, vol. II (Part Two), pp. 146 and 148).

<sup>12</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook* . . . 1981, vol. I, p. 224, 1686th meeting, paras. 23–24); Mr. Šahović (*ibid.*, p. 226, para. 37); Mr. Njenga (*ibid.*, p. 229, 1687th meeting, para. 19); Sir Francis Vallat (*ibid.*, p. 230, para. 29); and Mr. Tabibi (*ibid.*, p. 250, 1690th meeting, para. 33). However, see also the observations of Mr. Ushakov (*ibid.*, p. 225, 1686th meeting, para. 29, and pp. 254–255, 1690th meeting, para. 70). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Brazil, Mr. Calero Rodrigues (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, para. 36); of the United States of America, Mr. Rosenstock (*ibid.*, 45th meeting, paras. 70 and 72); of Argentina, Mr. Mahourat (*ibid.*, para. 62); of Iraq, Mr. Al-Qaysi (*ibid.*, 46th meeting, para. 71); of Romania, Mr. Mazilu (*ibid.*, 47th meeting, para. 46); of Algeria, Mr. Bedjaoui (*ibid.*, para. 72); of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 21); of the Bahamas, Mr. Maynard (*ibid.*, 51st meeting, para. 19); of Cyprus, Mr. Jacovides (*ibid.*, para. 50); of Tunisia, Mr. Bouony (*ibid.*, 52nd meeting, para. 7); of Morocco, Mr. Gharbi (*ibid.*, para. 45); of Austria, Mr. Klein (*ibid.*, para. 52); of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, paras. 22 and 24). On the other hand, see the observations of the representative of the United Kingdom, Sir Ian Sinclair (*ibid.*, 40th meeting, para. 9); of the USSR, Mr. Verinikin (*ibid.*, 42nd meeting, para. 27); of the Ukrainian SSR, Mr. Makarevitch (*ibid.*, 44th meeting, para. 15); and of the Byelorussian SSR, Mr. Rassolko (*ibid.*, 45th meeting, para. 26).

10. In fact, however, as the schematic outline will show, no departure has been proposed from the concept inherent in the present title of the topic. The obligation with which the topic is ultimately concerned is that of making reparation for a loss or injury actually sustained.<sup>13</sup> Under this topic, only a failure to comply with that obligation of reparation can engage the rules of State responsibility for wrongfulness.<sup>14</sup> Nevertheless, this melancholy end-result does not represent the main thrust or focus of the topic, which is concerned with minimizing the risk of loss or injury, and of making appropriate advance provision for such risks as cannot reasonably be avoided.

### 3. A BALANCE BETWEEN FREEDOM TO ACT AND DUTY NOT TO INJURE

11. This leads naturally to the last of the three major concerns that have preoccupied the Special Rapporteur in his earlier reports—namely, that the assessment of an obligation to make reparation under the present topic must always depend upon a balance of interest test broadly corresponding to Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),<sup>15</sup> and that the duty to construct régimes to minimize loss or injury entails the same balance of interest test.<sup>16</sup> Once again, there has been in principle no opposition to this objective, and a great deal of support for it;<sup>17</sup> but there remains a pervasive uncertainty whether articles developed under the present topic can play a role that is different from, and compatible with, the rules that immediately engage State responsibility for the wrongfulness of causing loss or injury.

## C. Corollaries of achieving the basic aims

### 1. A SUPPORTIVE RELATIONSHIP WITH STATE RESPONSIBILITY

12. A key to resolving the uncertainty described in the preceding paragraph lies in the achievement of the

<sup>13</sup> See section 4 of the schematic outline, in chapter II below.

<sup>14</sup> *Ibid.*, sections 2 and 3 of the outline.

<sup>15</sup> "Principle 21

"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 as areas beyond the limits of national jurisdiction." (*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), p. 5).

<sup>16</sup> See the preliminary report, paras. 54–61 (*Yearbook* . . . 1980, vol. II (Part One), pp. 263–265, document A/CN.4/334 and Add.1 and 2), and the second report, paras. 41–67 and 81 (*Yearbook* . . . 1981, vol. II (Part One), pp. 112–119 and 122, document A/CN.4/346 and Add.1 and 2). See also the Commission's report on its thirty-third session, paras. 143–144 (*Yearbook* . . . 1980, vol. II (Part Two), p. 161) and the report on its thirty-third session, paras. 175–177 and 180 (*Yearbook* . . . 1981, vol. II (Part Two), pp. 148–149).

<sup>17</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Riphagen (*Yearbook* . . . 1981, vol. I, pp. 221–222, 1686th meeting, paras. 2–3); Mr. Sucharitkul (*ibid.*, p. 224, para. 26); Mr. Njenga (*ibid.*, p. 229, 1687th meeting, para. 22) and Mr. Aldrich (*ibid.*, p. 251, 1690th meeting, para. 37). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Mexico, Mr. Vallarta (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 53rd meeting, para. 22).



first aim, described in paragraphs 6–8. Once it has been established that the present topic is not an exception to the régime of State responsibility for wrongfulness and does not compete with that régime, there is no need to face the formidable problem of finding a dividing line between the two régimes. When the Commission first identified and named the present topic, it chose to speak not of “lawful acts”, but of “acts not prohibited by international law”. The Commission did so in the knowledge that it would often be highly controversial whether or not loss or injury of the kind with which this topic is concerned was caused wrongfully.<sup>18</sup> If rules made in pursuance of the present topic could not be applied until the question of lawfulness or unlawfulness had been resolved, they would be worthless—both because that prior question is so difficult to resolve and because the rules would in any case be limited to the scattered areas of known deficiency in the coverage afforded by existing obligations entailing State responsibility for wrongfulness.<sup>19</sup>

13. In fact, the boot is on the other foot. Sometimes it cannot be established whether loss or injury is caused by wrongfulness, except by recourse to the procedures for balancing interests that must be articulated in pursuance of the present topic. The *Trail Smelter*<sup>20</sup> tribunal, in its second and final award,<sup>21</sup> identified and applied in this way a broad rule of customary law containing a balance of interest test. As an example of such a rule in a conventional setting, paragraph 4 of article 194 of the recent Convention on the Law of the Sea<sup>22</sup> may be instanced:

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

14. To give effect to such a rule, a balance of interest test has to be applied to find the point of intersection of harm and wrong. The importance and urgency of the measures taken to control pollution, and the reasonableness of the standards that govern its conduct, must be assessed in relation to their consequences for other States. This always entails a true weighing of opposing interests, putting a little more into one scale and taking a little from the other, until the parties to the negotiation or the adjudicator of the dispute perceive that the scales are evenly balanced. It is never a matter of putting everything into one scale and deciding, either that an activity gives rise to loss or injury and must therefore be stopped, or that the activity is beneficial and that the loss or injury it causes must therefore be endured.

15. Characteristically—and this is what happened in

the *Trail Smelter* case—when a need arises to fix the point of wrongfulness, attention will first be focused on the conditions subject to which the activity can be continued without entailing wrongfulness; and these conditions will often include an obligation to provide reparation for any loss or injury that may be caused.<sup>23</sup> Thus the determination of wrongfulness entailing State responsibility and the adjustment of the rights and interests of the parties pursuant to the present topic are simply two sides of the same coin.<sup>24</sup> It is especially significant that this bonding between the two systems of obligation is reflected in the construction of three key provisions of the Law of the Sea Convention:<sup>25</sup> article 139, relating to rights and obligations in the area of the sea-bed and ocean floor beyond national jurisdiction; article 235, relating to the protection and preservation of the marine environment; and article 263, relating to marine scientific research.<sup>26</sup> It is also noteworthy that

<sup>23</sup> See the second report, para. 39 (*Yearbook . . . 1981*, vol. II (Part One), p. 112, document A/CN.4/346 and Add.1 and 2).

<sup>24</sup> See in this connection the observations at the thirty-third session of the Commission of Sir Francis Vallat, who noted that the concepts of acts not prohibited by international law and of internationally wrongful acts were not mutually exclusive (*Yearbook . . . 1981*, vol. I, p. 230, 1687th meeting, para. 28), and of Mr. Reuter, who noted that the relationship to the concept of classical responsibility for internationally wrongful acts was a confirmation of the dual nature of the cases falling within the scope of the topic (*ibid.*, pp. 220–221, 1685th meeting, para. 28). See also the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the German Democratic Republic, Mr. Görner (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee, 46th meeting*, para. 35).

<sup>25</sup> See footnote 22 above.

<sup>26</sup> “Article 139. Responsibility to ensure compliance and liability for damage

“1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

“2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

“3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.”

“Article 235. Responsibility and liability

“1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

“2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

“3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.”

<sup>18</sup> See the preliminary report, para. 14 (*Yearbook . . . 1980*, vol. II (Part One), p. 251, document A/CN.4/334 and Add.1 and 2).

<sup>19</sup> See the preliminary report, paras. 26–31 (*ibid.*, pp. 254–256), and the second report, paras. 17–18 and 56–67 (*Yearbook . . . 1981*, vol. II (Part One), pp. 107–108 and 116–119, document A/CN.4/346 and Add.1 and 2).

<sup>20</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1911 *et seq.* (first award) and pp. 1938 *et seq.* (second award).

<sup>21</sup> See the second report, paras. 22–40 (*Yearbook . . . 1981*, vol. II (Part One), pp. 108–112, document A/CN.4/346 and Add.1 and 2).

<sup>22</sup> Signed at Montego Bay (Jamaica) on 10 December 1982 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF.60/122).



article 59 of the same convention, dealing with the basis for resolving conflicts regarding rights and jurisdiction in the exclusive economic zone, uses wording which suggests that these conflicts should be resolved within the ambit of the present topic and without reference to the question of wrongfulness.<sup>27</sup>

## 2. A CONCERN WITH THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

16. Of course, when dangers are foreseeable, it is far better that the rights and interests of the States concerned should be regulated before loss or injury occurs. That is the policy implicit, for example, in Principle 21 of the Stockholm Declaration,<sup>28</sup> and it is a view upon which States act in concluding the large and fast-growing number of global, regional and local treaties which deal with such questions.<sup>29</sup> Each of these treaties embodies a régime drawing upon principles that should be given general expression in articles developed pursuant to this topic. Moreover, from time to time, as in Principle 22 of the Stockholm Declaration<sup>30</sup> and in articles 139 and 235 of the Convention on the Law of the Sea, referred to in the preceding paragraph, States solemnly declare their duty to develop the law relating to these matters; and it is appropriate that the Commission should endeavour to assist States to discharge that duty.

17. In the submission of the Special Rapporteur,

### *"Article 263. Responsibility and liability"*

"1. States and competent international organizations shall be responsible for ensuring that marine scientific research, whether undertaken by them or on their behalf, is conducted in accordance with this Convention.

"2. States and competent international organizations shall be responsible and liable for the measures they take in contravention of this Convention in respect of marine scientific research conducted by other States, their natural or juridical persons or by competent international organizations, and shall provide compensation for damage resulting from such measures.

"3. States and competent international organizations shall be responsible and liable pursuant to article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf."

The terminology used in these articles (which was that of the draft convention) is discussed at length in the preliminary report, footnote 17 (*Yearbook* . . . 1980, vol. II (Part One), pp. 250-251, document A/CN.4/334 and Add.1 and 2).

### <sup>27</sup> *"Article 59. Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone"*

"In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole."

<sup>28</sup> See footnote 15 above.

<sup>29</sup> Some of these treaties are discussed in the preliminary report, paras. 21, 28, 48 and 58 (*Yearbook* . . . 1980, vol. II (Part One), pp. 253, 255, 261 and 264, document A/CN.4/334 and Add.1 and 2), and in the second report, paras. 17 and 70-72 (*Yearbook* . . . 1981, vol. II (Part One), pp. 107-108 and 119-121, document A/CN.4/346 and Add.1 and 2).

### <sup>30</sup> *"Principle 22"*

"States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction." (*Report of the United Nations Conference on the Human Environment* . . . , p. 5).

Principles 21 and 22 of the Stockholm Declaration exactly represent the relationship between the goals of prevention and of reparation for which the Commission should strive. It is at the point of failure to make due reparation—and not until that point—that the procedures available under rules made pursuant to the present topic should become exhausted. Then—as in the case, for example, of the régime established by the Convention on International Liability for Damage caused by Space Objects<sup>31</sup>—it will be the failure to provide due reparation in respect of a loss or injury, and not the mere occurrence of that loss or injury, that engages the State's responsibility for wrongfulness.

18. Yet, long before that point is reached, the acting State—if the risk of loss or injury was foreseeable—will have had every encouragement to make proper provision, in consultation and negotiation with States likely to be affected, to minimize the risks and to arrange suitable coverage for any risks that are regarded as unavoidable and acceptable. Failing agreement, the acting State will have had the duty to make its own régime, based upon its own conscientious estimate of the dangers to which other States and their citizens might be exposed. Failing all else, if loss or injury does occur, the acting State can negotiate a settlement with the other State or States concerned on the basis of a reconstruction of its actual conduct in relation to the activity and the terms that a régime of prevention and reparation might reasonably have included. This must be the main thrust of rules developed pursuant to the present topic (see Chapter II below). It is in that sense that the topic may fairly be described as an auxiliary set of rules of a mainly procedural character.

## 3. FORESEEABILITY AND THE DUTY NOT TO CAUSE HARM

19. In the second report on this topic, the Special Rapporteur made a rather free and unguarded use of the expression "duty of care"<sup>32</sup>—partly because this concept has been a starting-point for learned writers who wished to trace the good foundations of the present topic in existing law,<sup>33</sup> and partly because the phrase connotes a level of obligation which, without automatic commitment to any strict or absolute standard, is proportionate to every foreseeable need.<sup>34</sup> As the debates in the Commission and the Sixth Committee have shown, the phrase has too many overtones to justify its retention in the vocabulary of the present topic. For some the phrase—even when applied to "acts not prohibited by international law"—suggests irresistibly a standard which, if neglected, will entail the responsibility of a State for a wrongful act.<sup>35</sup> For others,

<sup>31</sup> Convention commended by the General Assembly in its resolution 2777 (XXVI) of 29 November 1971, and signed on 29 March 1972 (United Nations, *Juridical Yearbook* 1971 (Sales No. E.73.V.1), p. 111).

<sup>32</sup> See the second report, paras. 68-72 (*Yearbook* . . . 1981, vol. II (Part One), pp. 119-121, document A/CN.4/346 and Add.1 and 2).

<sup>33</sup> See, in particular, the authorities discussed in paras. 44-52 (*ibid.*, pp. 113-115).

<sup>34</sup> Cf. the observations of the Special Rapporteur on State responsibility (part 1), Mr. Ago, quoted in the preliminary report, para. 53 (*Yearbook* . . . 1980, vol. II (Part One), p. 263, document A/CN.4/334 and Add.1 and 2).

<sup>35</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Ushakov (*Yearbook* . . . 1981, vol. I, p. 225, 1686th meeting, paras. 28-33), Mr. Yankov (*ibid.*, p. 227, 1687th meeting).

(Continued on next page.)

there is an implication that the contrasted concept of "strict" or "absolute liability" has been wholly rejected, despite its continual use in the construction of conventional régimes—and especially those régimes concerned with activities which have a low accident rate, but a probability of extensive loss or injury if an accident does occur.<sup>36</sup>

20. With regard to this latter question, there can be no doubt at all that strict liability is a very important and frequent ingredient in the construction of conventional régimes<sup>37</sup> and must be appropriately identified in whatever provisions are drafted pursuant to the present topic. It is equally clear that no automatic commitment to a strict liability standard would be generally acceptable,<sup>38</sup> though some would be inclined to reserve the question whether such a standard might be prescribed for special situations such as those of "ultra-hazard" described at the end of the preceding paragraph.<sup>39</sup> There are objections to such a course. It would not be easy to agree upon a definition of "ultra-hazard".<sup>40</sup> Moreover, a strict liability régime does not necessarily give the best protection to poten-

tial victims: it may be merely a stepping-stone to a severe limitation of liability, or a less costly substitute for feasible preventive measures.<sup>41</sup>

21. In any case, no one appears to advocate separate provision for "ultra-hazard" until the more general provisions proposed in this report and in previous reports have been constructed and evaluated. One great advantage of these proposals is that they place side by side, and on the same level, elements of prevention and of reparation for future loss or injury. This encourages an objective evaluation of the levels of protection thought necessary and possible in any given situation. Elements of reparation then fall into their proper perspective as a commutation of the duty of prevention, when the prevention of all risks can be achieved only by desisting from the activity or when the costs of the latter duty are punitive in relation to the magnitude of the risk and the added financial burden upon a beneficial activity. This is in contrast to the perspective which seems to have prevailed within the general area of environmental protection, where modest efforts have been made to upgrade standards of protection, but the problems of reparation for loss or injury have appeared so forbidding that Principle 22 of the Stockholm Declaration has virtually been left in cold storage.<sup>42</sup>

22. In sum, the discussions of the present topic reveal a widespread readiness to make cautious advances on a broad front, provided that the guiding principles are flexible enough to be just to everybody, including developing countries whose special needs were stressed in Principle 23 of the Stockholm Declaration.<sup>43</sup> For reasons mentioned in paragraph 19, it would be unwise again to employ the expression "duty of care"; but, before dismissing the phrase, it should be noted that it evoked from many—including some who were not in favour of retaining the phrase—a very positive response. It was noted, for example, that the duty to weigh the consequences of actions, and by that standard to judge their reasonableness, was a mark of

(Footnote 35 continued.)

meeting, para. 5), Mr. Verosta (*ibid.*, pp. 227–228, para. 9) and Mr. Barboza (*ibid.*, p. 229, para. 16). See also, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of the USSR, Mr. Verenikin (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, paras. 36–37), of the Ukrainian SSR, Mr. Makarevitch (*ibid.*, 44th meeting, para. 15), of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 22) and of Italy, Mr. Sperduti (*ibid.*, para. 40).

<sup>36</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook . . . 1981*, vol. I, p. 224, 1686th meeting, para. 23), and at the Sixth Committee of the General Assembly, in 1981, by the representative of Brazil, Mr. Calero Rodrigues (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, paras. 36–37), of Italy, Mr. Sperduti (*ibid.*, 48th meeting, para. 40), of Spain, Mr. Laclela Muñoz (*ibid.*, para. 51) and of Austria, Mr. Klein (*ibid.*, 52nd meeting, para. 52).

<sup>37</sup> See, for example:

Convention on International Liability for Damage caused by Space Objects (1971) (see footnote 31 above);

Vienna Convention on Civil Liability for Nuclear Damage (1963) (IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 7);

Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) and Additional Protocol (Paris, 1964) (*ibid.*, p. 22);

Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Brussels, 1971) (*ibid.*, p. 55);

Convention on the Liability of Operators of Nuclear Ships (Brussels, 1962) (*ibid.*, p. 34);

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 1969) (IMCO publication, Sales No. 77.16.E);

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Brussels, 1971) (IMCO publication, Sales No. 1972.10.E);

Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (London, 1977) (United Kingdom, *Final Act of the Intergovernmental Conference on the Convention on Civil Liability for Oil Pollution Damage from Offshore Operations*, Cmnd. 6791 (London, H.M. Stationery Office, 1977), p. 7).

<sup>38</sup> See, for example, the observations referred to in footnote 8 above.

<sup>39</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Ushkov (*Yearbook . . . 1981*, vol. I, p. 225, 1686th meeting, paras. 29 and 31) and of Mr. Barboza (*ibid.*, p. 228, 1687th meeting, para. 14).

<sup>40</sup> See the preliminary report, para. 18 (*Yearbook . . . 1980*, vol. II

(Part One), p. 252, document A/CN.4/334 and Add.1 and 2) and the second report, para. 11 (*Yearbook . . . 1981*, vol. II (Part One), p. 106, document A/CN.4/346 and Add.1 and 2).

<sup>41</sup> See the discussion of this point by P. M. Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (Paris, Pedone 1976), pp. 257 et seq.

<sup>42</sup> See, for example, the ECE Long-range Transboundary Air Pollution Convention, concluded on 13 November 1979 (ECE/HLM.1/2, annex I), which, in a footnote to the word "damage" in article 8 providing for the exchange of information on, *inter alia*, the effects of damage which may be attributed to long-range transboundary air pollution, records that the convention does not contain a rule on State liability as to damage.

<sup>43</sup> "Principle 23

"Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the system of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries." (*Report of the United Nations Conference on the Human Environment . . .*, p. 5.)

See also, for example, the observations at the thirty-third session of the Commission of Mr. Sucharitkul (*Yearbook . . . 1981*, vol. I, p. 224, 1686th meeting, para. 26) and the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Venezuela, Mr. Díaz González (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 46th meeting, para. 28), of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, para. 72), and of Mexico, Mr. Vallarta (*ibid.*, 53rd meeting, para. 24).

maturity in international law, paralleling developments that had long ago occurred in domestic legal systems.<sup>44</sup>

23. Some stressed that the first essential steps in reconciling interests—the duties to provide information, to consider representations and to negotiate in good faith—were triggered by the duty of care.<sup>45</sup> Some emphasized that it called, in the first instance, for measures to avoid or prevent harm, and not merely for a tariff to pay for harm done.<sup>46</sup> There was no disposition to doubt that a State's obligations in this area were commensurate with its means of knowledge and foresight about matters within its territory or control<sup>47</sup>—though it was pointed out that often developing States had limited means of knowledge about industries established in their territory.<sup>48</sup> The maxim *sic utere tuo ut alienum non laedas* had to be fashioned into a working rule of law,<sup>49</sup> and the criterion of foreseeability was fundamental, but would need to be supplemented by other relevant principles if such cases as those of unforeseen accidents were to be covered.<sup>50</sup>

#### 4. THE DISTRIBUTION OF COSTS AND BENEFITS

24. The other main principle derives from the balance of interest test. This principle is, first of all, a reminder that the underlying purpose of this topic is not merely to requite, or even to avoid, losses and injuries: it is to enable States to harmonize their aims and activities so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer. Every kind of factor may enter into the equation. For example, the common interest of the States concerned in ensuring the viability of an activity they all regard as essential may outweigh their desire to ensure that they and their citizens are fully protected or guaranteed against losses or injuries caused by that activity. This is part of the logic of an agreement which limits the quantum of reparation payable in respect of any one accident causing loss or injury.<sup>51</sup>

25. If the interests of the parties to such a negotiation

are not identical, other factors may be, for example, the importance of the activity in question to the national or regional economy of the country in which it is situated; its bearing upon employment opportunities in that country or region; the degree of difficulty and cost entailed in changing the site of the activity or its production methods, or in making different products and finding new markets for them; the probable frequency and severity of the losses or injuries that may be caused to the affected State and those within its protection; the ability and willingness of the affected State to contribute, financially or in other ways, to the solution of the problem. Again, it may be the main context of a negotiation to arrive at a formula for determining, in a given situation, the existence and scale of the harm with which the negotiations are concerned. The kinds and magnitude of loss or injury that are reparable may be determined by the application of such a formula, or in other agreed ways. The possibilities are necessarily as limitless as the freedom of the parties to reach their own agreements.

26. If consultation or negotiation between the States concerned fails to lead to the establishment of an agreed régime, and if loss or injury occurs, it is envisaged that the record of what transpired between them will still provide the best evidence of the context in which the affected State's right to receive reparation from the acting State must be assessed. Any past failure of either State to disclose relevant information will also provide an inference favourable to the other party. Subject to these matters of record, the negotiation between the States concerned to determine the affected State's entitlement to reparation will draw upon the same principles and wide range of factors as might have guided the original negotiation to establish an agreed régime. There will be, however, the important difference that a negotiation as to reparation would take place against the background of an obligation to provide the appropriate reparation for the loss or injury sustained, and that failure to reach a negotiated settlement would entail an obligatory reference to a disputes-settlement procedure.<sup>52</sup>

27. The reader may find it helpful to compare this brief account of the operation of the principle relating to the distribution of costs and benefits with the schematic outline contained in chapter II below. At the present juncture, the first point to emphasize is that the occurrence of loss or injury is a pure question of fact, and that its legal significance has to be estimated in whatever context the States concerned have themselves provided. If, for example, it is established that the States concerned had not regarded the kind of loss or injury that occurred as giving rise to any right of reparation—as might be the case where the loss or injury resulted from exposure to a level of pollution

<sup>44</sup> See the observations at the thirty-third session of the Commission of Sir Francis Vallat (*Yearbook . . . 1981*, vol. I, p. 230, 1687th meeting, paras. 29–30).

<sup>45</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, by the representative of the United States of America, Mr. Rosenstock (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th Meeting, para. 72).

<sup>46</sup> See, for example, the observations referred to in footnote 12 above.

<sup>47</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, by the representative of Venezuela, Mr. Díaz González (*ibid.*, 46th meeting, para. 26).

<sup>48</sup> See, for example, the observations referred to in footnote 43 above.

<sup>49</sup> See, for example, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Finland, Mr. Rotkirch (*ibid.*, 48th meeting, para. 21), of Italy, Mr. Sperduti (*ibid.*, para. 38) and of Cyprus, Mr. Jacovides (*ibid.*, 51st meeting, para. 50).

<sup>50</sup> See, for example, the observations in the Sixth Committee of the representative of Brazil, Mr. Calero Rodrigues (*ibid.*, 43rd meeting, para. 36).

<sup>51</sup> See for example, art. 11 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952) (United Nations, *Treaty Series*, vol. 310, p. 188); art. 111 of the Convention on the Liability of Operators of Nuclear Ships (Brussels, 25 May 1962) (see footnote 37 above); and art. V of the International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (see footnote 37 above).

See also, in this connection, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Mexico, Mr. Vallarta (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 53rd meeting, para. 23).

<sup>52</sup> In relation to the need for a disputes-settlement procedure, see the observations at the thirty-third session of the Commission of Mr. Yankov (*Yearbook . . . 1981*, vol. I, p. 227, 1687th meeting, para. 6), and in the Sixth Committee of the General Assembly, in 1981, by the representative of Romania, Mr. Mazilu (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 47th meeting, para. 46).

which had always been tolerated<sup>53</sup>—that circumstance would clearly be decisive of any claim.

28. The second point to emphasize is that any failure of co-operation at an earlier stage may justify an inference in favour of an opposite party.<sup>54</sup> For example, if a loss or injury results from an activity about which the acting State has failed to disclose information or to negotiate, that failure will strengthen the claim of the affected State to receive as reparation the full value of the loss or injury sustained. If, on the other hand, an earlier negotiation to establish an agreed régime broke down only because the acting State considered as exorbitant the measures of prevention and indemnification demanded, and the acting State has since applied unilaterally a régime that accorded the levels of protection it believed to be reasonable, there is no adverse inference to be drawn and no new element in the criteria that were relevant to the earlier negotiation, except that the event has proved the existence of a risk of loss or injury.

29. The last point to emphasize is that the principle relating to the distribution of costs and benefits applies with added cogency in the case of unforeseen accident; for in such a case it is at least unlikely that the distribution of costs and benefits will do less than vindicate the claim of the affected State to receive full reparation in respect of the loss or injury suffered by an innocent victim. In this connection, it is worth recalling that although the occurrence of any given accident is by definition unpredictable, the risk of loss or injury associated with a particular activity can usually be foreseen: the risk of damage caused by space objects is a good illustration. Therefore the unforeseen accidents with which we are dealing here are few in number and truly exceptional—so exceptional as almost to be bizarre. On reflection, it seems to the Special Rapporteur neither just nor necessary that these “hard luck”

<sup>53</sup> Such a situation may, for example, account for the reservation in a footnote to the ECE Long-Range Transboundary Air Pollution Convention (see footnote 42 above).

<sup>54</sup> Cf., though the position is not fully parallel, the following observations of the ICJ in its Judgment of 9 April 1949 in the *Corfu Channel* case (Merits):

“It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

“On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.” (*I.C.J. Reports 1949*, p. 18.)

cases—which fall outside the sphere of foreseeability, but well within the sphere of operation of the principle regulating the distribution of costs and benefits—should be deprived of the general protection which can be afforded by rules developed in pursuance of the present topic.<sup>55</sup>

## D. Use of terms, causality, scope and related questions

### 1. RULES AND GUIDELINES

30. The difficulties inherent in the use of the term “liability”—which, in English, is contrasted with the term “responsibility”, while in other official languages the same term serves both purposes—were discussed at some length in the preliminary report.<sup>56</sup> In English the term “liability” connotes precisely the subject-matter of the present topic—that is, obligations, arising without any breach of a rule of international law, to make reparation for losses or injuries suffered by other subjects of international law or by those within their protection. In this sense, the term “liability” has been used repeatedly in treaties concluded since the Second World War, including the recent Convention on the Law of the Sea.<sup>57</sup>

31. Nevertheless, the lack of suitable equivalents in other official languages make it inadvisable to use the term “liability” in drafts prepared pursuant to the present topic; and, indeed, there is no need to do so. Rights and obligations, however they arise, are commonly expressed in international agreements simply as statements of the conduct required to satisfy the right and comply with the obligation. The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness except ultimate failure, in case of loss or injury, to make the reparation that may then be required. In a sense, therefore, the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure, conducted by the parties themselves or by any person or institution to whom they agree to turn for help.

32. A reference to the schematic outline in chapter II will show how this works out in practice. There is a preliminary phase of consultation and fact-finding, without substantive commitment by the States concerned. There is a second phase of negotiation among those States to establish a régime reconciling their conflicting interests; but the only sanctions for refusal to negotiate or failure to reach agreement are a continuation of the conflict of interest, and the possibility that a State which has failed to co-operate may be at some disadvantage if a loss or injury entailing questions of reparation subsequently occurs. The question therefore arises whether the courses of conduct prescribed in these two phases of interaction are requirements or recommendations, rules or guidelines.

33. There is in any case no doubt that the provisions as drafted must contain a clear indication that failure to

<sup>55</sup> Cf. the recommendation in this regard made in the second report, paras. 73–77 (*Yearbook . . . 1981*, vol. II (Part One), pp. 121–122, document A/CN.4/346 and Add.1 and 2), and the conclusions expressed in the report of the Commission on its thirty-third session, paras. 182–183 (*Yearbook . . . 1981*, vol. II (Part Two), p. 149).

<sup>56</sup> See footnote 6 above.

<sup>57</sup> See footnote 26 above.

comply with the course of conduct prescribed will not in itself engage the responsibility of the State for wrongfulness. One way of achieving this result is by the substitution of "should" for "shall", converting what would otherwise be a rule into a guideline.<sup>58</sup> The Special Rapporteur believes, however, that this is not a desirable solution, because it may imply—incorrectly—that it is without legal significance whether the prescribed courses of action are followed or disregarded. It represents the position more accurately to keep the prescriptions in the form of rules, but to include—as has been done in sections 2 and 3 of the schematic outline—explicit statements that failure to take any step required by the rules set forth in those sections shall not in itself give rise to any cause of action.

## 2. "LOSS OR INJURY": THE AMBIT OF REPARATION CLAIMS

34. In this report, the phrase "loss or injury" has been used to convey more concretely the same meaning that was expressed in earlier reports by the word "harm".<sup>59</sup> The phrase would be defined to include all kinds of loss or injury, whether material or non-material. It was explained in paragraph 27 above that loss or injury is a pure question of fact, but that its legal significance has to be estimated with regard to any available criteria that help to establish the shared expectations of the States concerned. There may, for example, be a record of partial agreement in an uncompleted negotiation for a régime to regulate questions of this kind; and, failing any express agreement, the national laws of the States concerned may reflect a common standard; or there may be a local or regional standard that both States apply; or relevant normative materials such as the standards, for example, of the 1951 *International Labour Code*.<sup>60</sup>

35. The policy of the schematic outline is that, when States are consulting or negotiating to establish a régime of prevention and reparation, the kinds of loss or injury they wish to cover and the scale of reparation they envisage are matters for their own choice—though it will of course be a policy goal that the innocent victim should not be left without adequate redress, and that prevailing standards of reparation should at least be maintained. On the other hand, when there is a negotiation as to reparation for loss or injury, it should be conducted within an existing frame of reference, whether expressed in earlier communications between the States concerned, or derived from any standard common to those States. Thus the references to "shared expectations" in section 4 of the schematic outline are a threshold provision applicable only in the context of that section. The concept of "potentiality" of loss or injury, which gave great difficulty in the context of the second report and the discussions in 1981, was not justified and has not been maintained. In relation to the establishment of régimes of prevention and reparation, all loss or injury is prospective; in relation to the

establishment of an obligation to provide reparation, all loss or injury is actual.

## 3. "ACTS" AND "ACTIVITIES": THE ROLE OF CAUSALITY

36. As has been noted, the phrase "acts not prohibited by international law", in the title of the present topic, was chosen for one important reason only, and that was to make it clear that the scope of this topic was not confined to lawful acts (see para. 12 above). On the contrary, the great merit of removing the topic from the immediate sphere of State responsibility for wrongfulness was to enable the problems of accommodating different interests to be considered on their factual merits, without reference to the question of their wrongfulness or non-wrongfulness. This was the more important because many of the practical problems would concern borderline areas in which new rules of prohibition might be in course of formation to meet new dangers—caused, for example, by advances in technology.

37. Instead of attempting to decide whether a particular territorial use, involving the risk of loss or injury affecting other States, was unlawful—and therefore prohibited—the States concerned would direct their attention to the less intractable question whether they could agree to the continuance of that particular use upon conditions that offered adequate safeguards, and perhaps a better distribution of costs and benefits. Of course, this alternative procedure would in no way derogate from any rights or obligations that any State concerned might have by reference to existing rules of prohibition. In practice, however, on the rare occasions on which States have resolved disputes governed by a prohibitory rule containing a balance of interest test, they have tended to proceed by discovering first what distribution of burdens and benefits would satisfy their particular circumstances, and to apply or vary the rule of prohibition in accordance with that finding (see para. 15 above).

38. While the expression "acts not prohibited by international law" meets the essential purpose explained in the two preceding paragraphs, it sits rather strangely in the title of the topic, causing some readers to wonder what "act" of the State can engage its liability (or responsibility) for "injurious consequences" that cannot be said to be caused by the act—or even the omission—of the State.<sup>61</sup> For those concerned about the doctrinal question, there are perhaps reasonably convincing answers. Instead of alleging a breach of a rule of prohibition, we have raised essentially the same issue in the opposite way: upon what conditions can this activity continue, without giving rise to any risk of engaging the responsibility of the territorial State for wrongfulness? Put in another way, the tolerance by a State within its territory of an activity entailing loss or injury to another State is—like the demarcation of the seaward limit of the territorial sea—never without legal significance: in either case,

<sup>58</sup> See, in this connection, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook* . . . 1981, vol. I, p. 220, 1685th meeting, para. 24).

<sup>59</sup> See the preliminary report, paras. 32–38 (*Yearbook* . . . 1980, vol. II (Part One), pp. 256–258, document A/CN.4/334 and Add.1 and 2), and the second report, paras. 22–60 (*Yearbook* . . . 1981, vol. II (Part One), pp. 108–117, document A/CN.4/346 and Add.1 and 2).

<sup>60</sup> ILO publication, 2 vols. (Geneva, 1954).

<sup>61</sup> See, for example, the question raised at the thirty-third session of the Commission by Mr. Ushakov (*Yearbook* . . . 1981, vol. I, pp. 219 and 220, 1685th meeting, paras. 16 and 21); the comments on the title of the topic made at that session by Mr. Reuter (*ibid.*, p. 221, para. 30); and the observations on the questions of attribution and causality made at that session by Mr. Sucharitkul (*ibid.*, p. 224, 1686th meeting, para. 22).

the acting State owes a duty to do whatever is necessary to ensure that the boundary is drawn fairly between its own interests and those of other States.

39. Of those who have spoken on this topic, many appear to prefer a more robust answer. Perhaps the most important policy aim of the present topic is to promote agreements between States in order to reconcile, rather than inhibit, activities which are predominantly beneficial, despite some nasty side-effects. The way of doing this is to remove the problem—at least temporarily—from the immediate sphere of State responsibility for wrongfulness, so that practical issues can be evaluated in a wider context. It is this removal which gives free play to the principle of the distribution of costs and benefits and expands the principle of foreseeability. In this way, account can be taken of the probability of accidents which are not foreseeable individually but are highly predictable as a class.

40. Then, indeed, we shall have entered into the realm of causality, where duties of reparation flow, not from the “act” (or omission) of the State, but from “activities” within the territory or control of the State, giving rise to loss or injury. It is, however, important to understand that all of the régime-building takes place at one remove from the domain of State responsibility for wrongfulness. It is also important to realize that the proposals made in this report will not entail any automatic commitment to construct régimes of strict liability. They are a policy choice open to the negotiators, having regard to the nature of the danger, the effectiveness of the planned measures of protection, the desire of the States concerned to limit liability in the interest of preserving the economic viability of an essential activity, the need to conform to a pattern already more widely established to deal with a problem that cannot be localized, the possibility of distributing costs within the communities that principally benefit, and so on. The building blocks, or “factors” of which such a régime may be made, are listed—but not exhaustively—in section 6 of the schematic outline; the building techniques, and the architectural choices that ought to be considered are listed—again not exhaustively—in section 7.

41. At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss. The Special Rapporteur finds it hard to see how it could be otherwise, taking into account the realities of transboundary dangers and relations between States, and the existing elements of a developing chapter of international law. Every State needs to feel that law assures it large areas of liberty and initiative in its own territory, and more controlled areas of liberty and initiative in international sea and air space; but every State also needs to feel that the law does not leave it at the mercy of developments beyond its own borders. Yet, even at this final stage, the resort to strict liability is by no means automatic. The States concerned are compelled by nothing except the logic of their situations, the persuasiveness of the guiding principles in section 5, and the need to pay for damage done if no better arrangement can be worked out.

42. There are incidental questions that will call for consideration in due course. In this and in previous

reports, the term “activity” has been used in reference to anything done by human agency or at human instigation; but a perusal of the third report on the law of the non-navigational uses of international water-courses—and especially the draft article presented in paragraph 379<sup>62</sup>—has crystallized a suspicion that even this broad meaning should be cautiously extended to cover situations in which a danger is created by a human failure to act. If, for example, a convulsion of nature leaves an unstable crater lake impending over the territory of another State, and that other State is willing to shoulder the financial burden of activities to avert the danger, it is not unreasonable to place upon the first State a duty of co-operation.

#### 4. “TERRITORY OR CONTROL”: THE QUESTION OF SCOPE

43. In the second report, the content of the present topic was briefly compared and contrasted with that of State responsibility for the treatment of aliens.<sup>63</sup> It is common ground, not questioned by anyone, that matters relating to the treatment of aliens are outside the scope of the present topic.<sup>64</sup> In principle, though this is not always literally true, a transboundary element is an essential ingredient in the present topic: typically, the topic deals with activities in one country which produce adverse consequences in another country. Often, however, the distinction is only quasi-territorial: for example, the activities of one State’s ships on the high seas may give rise to incidental or accidental losses or injuries either to coastal States—in which case there is a literal transboundary element—or to other States which are users of the high seas—in which case the dividing line is between national jurisdictions.<sup>65</sup>

44. During the Commission’s discussion of the second report, there was a consensus that the term which best describes the quasi-territorial dividing line is “control”;<sup>66</sup> this meaning is fixed by the use of the term in the composite phrase “territory or control”. The ambit of this phrase does not extend to matters in which the territorial jurisdiction of a receiving State is paramount; it does extend to situations in which jurisdiction is evenly shared, as with rights of navigation through the territorial sea or through a maritime exclusive economic zone. A ship in innocent passage is within the concept, whereas a ship permitted to enter a foreign port is not. Immunity from local jurisdiction is not a relevant criterion, because it entails an increase, rather than abatement, in the responsibilities of the receiving State; but any abdication of territorial power or authority would go to the question of control.

45. In this way, the term “control” has a critical role to play in determining the scope of provisions elaborated in pursuance of this topic, and it must therefore be carefully defined. In earlier discussions, attention has been drawn to situations in which high technology industries are, so to speak, “exported” to countries in which economic conditions and regulatory standards

<sup>62</sup> See, in this volume, p. 65, document A/CN.4/348.

<sup>63</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 105, document A/CN.4/346 and Add.1 and 2, para. 8.

<sup>64</sup> See the report of the Commission on its thirty-third session, para. 186 (*Yearbook . . . 1981*, vol. II (Part Two), p. 150).

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, para. 185.



allow cheaper production. It has been pointed out not only that this may entail the exporting of pollution, while profits of the industry are repatriated to the exporting country, but also that developing countries may lack the experience and high technology skills to regulate such an activity effectively.<sup>67</sup> Quite conceivably, there are situations of this kind in which the "exporting" State should be prepared to share with the receiving State authority and responsibility for the establishment and monitoring of appropriate technical standards; the arrangements made might have a bearing upon the definition and application of the term "control".

46. There is, however, a much broader question which attracts a great deal of interest and some unease. What are the natural boundaries of this topic? What unexpected consequences might arise from a failure to restrict its application to the areas in which practice is most developed? In particular, might the topic become either a rogue elephant or a useful beast of burden in connection with international economic issues—especially those relating to the adumbration of the new international economic order?<sup>68</sup> To avoid the paralyzing effects of uncertainty, the Special Rapporteur has twice put forward a possible boundary line. First, the topic could be limited to dangers arising out of the physical use of the environment.<sup>69</sup> Secondly, it could be said—for reasons that are again touched upon in paragraphs 13–15 and 36–37 of the present report—that the situations with which this topic deals do not arise unless there is, lurking in the background, some emerging or imperfectly formulated rule of obligation, or one which cannot be invoked because its application is precluded.<sup>70</sup>

47. Neither of these proposals gave anyone much comfort. A limitation based upon dangers arising from the physical uses of the environment would have been far too arbitrary—a judgment of Solomon that would require the baby to be cut in half.<sup>71</sup> The question of a direct connection with the physical environment may be less significant than the question whether the affected State is well placed to look after its own interests. For example, the régime of the Warsaw

Convention, limiting liability for the carriage of passengers on international air services,<sup>72</sup> is in some ways comparable with the conventional régimes concerned with accidents arising from the sea carriage of oil.<sup>73</sup> All these régimes concern the protection of an essential industry against contingent claims for which it might be difficult to make adequate advance provision: but, in the case of the Warsaw Convention, the purpose is to dissuade the affected State from making good its losses on whatever scale its domestic law may sanction. It is, therefore, probably true that neither the principles in section 5 of the schematic outline, nor the factors enumerated in section 6, are appropriate to the process that led to the striking of the balance represented by the Warsaw Convention.

48. On the other hand, a limitation in terms of relationship to existing or emerging rules of wrongfulness was difficult to formulate, and inappropriate: to the extent that such a limitation was valid, it did not need to be stated, and, as discussions in the Sixth Committee proved, it would increase fears that the present topic was becoming lost in the toils of State responsibility for wrongfulness.<sup>74</sup> The best course was to suspend judgment about the unresolved questions of scope until the content of the topic had been more fully explored. Meanwhile, it should be recognized that the materials on which the Special Rapporteur must rely would largely be found in the area of the use of the physical environment.<sup>75</sup> With this pragmatic approach to the question of scope, the Special Rapporteur is very content. He understands it to be his duty to keep that question under observation, despite the immediate preoccupation with the flood of materials relating to the physical uses of the environment.

49. In any event, it makes very good sense to proceed empirically, examining materials and demonstrating principles which appear to be consistently reflected in those materials. The Special Rapporteur takes this opportunity to draw attention to, and express appreciation for, the very substantial work being undertaken by the Codification Division of the United Nations Secretariat systematically to assemble, examine and classify international transactions of all kinds bearing on the subject matter of the present topic. Beginning with his next report, the Special Rapporteur hopes to make a proper use of these materials; and he has no doubt that they will also prove to be of great interest and assistance to his colleagues.

<sup>67</sup> See, for example, the observations at the thirty-second session of the Commission of Mr. Sucharitkul (*Yearbook* . . . 1980, vol. I, p. 246, 1631st meeting, paras 4–5), and also the observations referred to in footnote 43 above.

<sup>68</sup> See, for example, the observations at the thirty-third session of the Commission of Mr. Reuter (*Yearbook* . . . 1981, vol. I, p. 220, 1685th meeting, para. 27), and of Mr. Riphagen (*ibid.*, p. 221, 1686th meeting, para. 2). Cf. the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Jamaica, Mr. Robinson (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 41st meeting, para. 27) and of Algeria, Mr. Bedjaoui (*ibid.*, 47th meeting, paras. 70–72).

<sup>69</sup> See the preliminary report, para. 65 (*Yearbook* . . . 1980, vol. II (Part One), pp. 265–266, document A/CN.4/334 and Add.1 and 2).

<sup>70</sup> See the second report, paras. 82–84, and the draft article 1, subpara. (b), proposed in para. 93 (*Yearbook* . . . 1981, vol. II (Part One), pp. 122–123, document A/CN.4/346 and Add.1 and 2).

<sup>71</sup> See the report of the Commission on its thirty-second session, para. 139 (*Yearbook* . . . 1980, vol. II (Part Two), p. 160).

<sup>72</sup> Convention for the Unification of certain Rules regarding International Carriage by Air (Warsaw, 12 October 1929) (League of Nations, *Treaty Series*, vol. CXXXVII, p. 12).

<sup>73</sup> See footnote 37 above.

<sup>74</sup> See, for example, the observations referred to in footnote 35 above.

<sup>75</sup> See, in this connection, the observations in the Sixth Committee of the General Assembly, in 1981, of the representative of Algeria, Mr. Bedjaoui (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 47th meeting, para. 74). See also footnote 71 above.

## CHAPTER II

## Outline of the topic

50. Most questions affecting the schematic outline that follows have been discussed in the preceding chapter. Perhaps the final question is that of assessing the value of a proposed set of articles that contain many guidelines, but only one obligation the breach of which will engage international responsibility for a wrongful act. The justification must relate to the subject-matter of the topic. The wrongfulness of causing loss or injury in another State is not, in principle, doubtful; but it is equally clear in State practice that, if a State goes about its legitimate business in a reasonable manner, the causing of incidental loss or injury to another State will not necessarily engage the international responsibility of the acting State. Between these opposite poles there is a wilderness that cannot be reduced to order by prohibitory rules of general application. The boundaries of each State's rights and obligations towards others have to be charted in some detail and with mutual accommodations. A certain amount of this detailed charting from time to time gets done—in the form of large multilateral treaties dealing with particular global problems, regional treaties, and bilateral treaties regulating various aspects of the management of an international frontier or border zone.

51. All of these arrangements are ultimately based upon the free play of negotiation between States, guided by a shared sense of principle, as well as by the practical need to accommodate interests. Yet, in the large areas that remain unregulated, recourse to legal principle is apt to appear unhelpful. The balanced interests of Principle 21 of the Stockholm Declaration,<sup>76</sup> and even of conventional legal rules containing an unresolved balance of interest test, afford States little more than a point of departure upon a journey so vaguely indicated that the law may seem to leave its clients to their own devices. Worse than that, the law may retreat into a labyrinth of its own devising, agonising over the doctrinal curiosity of obligations that do not arise from a breach of State responsibility, and that are not contained within the ordinary limits of foreseeability.

52. These inadequacies of international law are probably not the main reason for the frequent failure of States to achieve the goals that they themselves have identified, but the weakness of legal precept is certainly a contributing reason. The extraordinary disparity between policy aims and achievements in the area of the human environment seems to arise from compartmentalized thinking: prevention of loss or injury is a worthwhile aim, but reparation for loss or injury conjures up a vision of absolute and automatic commitment to a mechanized legal process with a system of values not accessible to ordinary men. It therefore seems worthwhile to arrest these tendencies; to recognize, for example, that reparation is in essence a cheaper and imperfect substitute for prevention; that liabilities arising without wrongfulness are no more than obligations to pay a fair price; that the present topic—despite its apparently anomalous character—can be explained as a method of ensuring that legal balance of interest tests have full recourse to all of the elements

that go to the making of an honest bargain; that there is no magic in legal formulas, but virtue in insisting that States which seek freedom to act and those which seek freedom from the adverse effects of such actions have equal protection in international law.

53. The following is the schematic outline:

## SCHEMATIC OUTLINE

## SECTION 1

1. *Scope*<sup>77</sup>

Activities within the territory of control of a State which give rise or may give rise<sup>78</sup> to loss or injury to persons or things within the territory or control of another State.

[NOTES: (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. *Definitions*

(a) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(b) "Activity" includes any human activity.<sup>79</sup>

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?<sup>80</sup>

(c) "Loss or injury" means any loss or injury, whether to the property of a State or to any person or thing within the territory or control of a State.<sup>81</sup>

(d) "Territory or control" includes, in relation to places not within the territory of the acting State,

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.<sup>82</sup>

3. *Saving*

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.<sup>83</sup>

## SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.<sup>84</sup>

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury

<sup>76</sup> See footnote 15 above.

<sup>77</sup> See paras. 46–48 above.

<sup>78</sup> See para. 35 above.

<sup>79</sup> See paras. 36–39 above.

<sup>80</sup> See para. 42 above.

<sup>81</sup> See paras. 27 and 34–35 above.

<sup>82</sup> See paras. 43–45 above.

<sup>83</sup> See para. 37 above.

<sup>84</sup> See paras. 19–23 and 39 above.



by an activity taking place within the territory or control of another State, the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable; and the acting State has thereupon a duty to provide all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes.

3. If, for reasons of national or industrial security, the acting State considers it necessary to withhold any relevant information that would otherwise be available, it must inform the affected State that information is being withheld. In any case, reasons of national or industrial security cannot justify a failure to give an affected State a clear indication of the kinds and degrees of loss or injury to which persons and things within the territory or control of that affected State are being or may be subjected; and the affected State is not obliged to rely upon assurances which it has no sufficient means of knowledge to verify.

4. If not satisfied that the measures being taken in relation to the loss or injury foreseen are sufficient to safeguard persons and things within its territory or control, the affected State may propose to the acting State that fact-finding be undertaken.

5. The acting State may itself propose that fact-finding be undertaken; and, when such a proposal is made by the affected State, the acting State has a duty to co-operate in good faith to reach agreement with the affected State upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. Both States shall furnish the inquiry with all relevant and available information.

6. Unless the States concerned otherwise agree,

(a) there should be joint fact-finding machinery, with reliance upon experts, to gather relevant information, assess its implications, and, to the extent possible, recommend solutions;

(b) the report should be advisory, not binding the States concerned.

7. The acting State and the affected State shall contribute to the costs of the fact-finding machinery on an equitable basis.

8. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless, unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.<sup>85</sup>

### SECTION 3

1. If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery or for the fact-finding machinery to complete its terms of reference, or (b) any State concerned is not satisfied with the findings or believes that other matters should be taken into consideration, or (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations at the request of any one of them with a view to determining whether a régime is necessary and what form it should take.

2. Unless the States concerned otherwise agree, the negotiations shall apply the principles set out in section 5; shall also take into account, as far as applicable, any relevant factor including those set out in section 6, and may be guided by reference to any of the matters set out in Section 7.

3. Any agreement concluded pursuant to the negotiations shall, in accordance with its terms, satisfy the rights and obligations of the States parties under the present articles;<sup>86</sup> and may also stipulate the extent to which these rights and obligations replace any other rights and obligations of the parties.

4. Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action. Nevertheless,

<sup>85</sup> See paras. 30–33 above.

<sup>86</sup> See paras. 24–25 and 40 above.

unless it is otherwise agreed, the acting State has a continuing duty to keep under review the activity that gives or may give rise to loss or injury; to take or continue whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking.<sup>87</sup>

### SECTION 4

1. If any activity does give rise to loss or injury, and the rights and obligations of the acting and affected States under the present articles in respect of any such loss or injury have not been specified in an agreement between those States, those rights and obligations shall be determined in accordance with the provisions of this section. The States concerned shall negotiate in good faith to achieve this purpose.

2. Reparation shall be made by the acting State to the affected State in respect of any such loss or injury,<sup>88</sup> unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States.<sup>89</sup>

3. The reparation due to the affected State under the preceding article shall be ascertained in accordance with the shared expectations of the States concerned and the principles set out in section 5; and account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchange or negotiations between them and to the remedial measures taken by the acting State to safeguard the interests of the affected State.<sup>90</sup> Account may also be taken of any relevant factors, including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7.

4. In the two preceding articles, “shared expectations” include shared expectations which

(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions,

(b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community.

### SECTION 5

1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection of the interests of affected States.<sup>91</sup>

2. Adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation;<sup>92</sup> but the standards of adequate protection should be determined with due regard to the importance of the activity and its economic viability.<sup>93</sup>

3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity; and standards of protection should take into account the means at the disposal of the acting State<sup>94</sup> and the standards applied in the affected State and in regional and international practice.

4. To the extent that an acting State has not made available to an affected State information that is more accessible to the acting State concerning the nature and effects of an activity, and the means of verifying and assessing that information, the affected State shall be allowed a liberal recourse to inferences of fact and circumstantial

<sup>87</sup> See paras. 30–33 above.

<sup>88</sup> See paras. 26, 29 and 41 above.

<sup>89</sup> See paras. 27 and 35 above.

<sup>90</sup> See paras. 26 and 32, and section 2, art. 8, and section 3, art. 4, above.

<sup>91</sup> See para. 10 above.

<sup>92</sup> See para. 9 above.

<sup>93</sup> See paras. 24–25 above.

<sup>94</sup> See paras. 22–23 above.

evidence in order to establish whether the activity does or may give rise to loss or injury.<sup>95</sup>

#### SECTION 6

Factors which may be relevant to a balancing of interests<sup>96</sup> include:

1. The degree of probability of loss or injury (i.e. how likely is it to happen?);
2. The seriousness of loss or injury (i.e. an assessment of quantum and degree of severity in terms of the consequences);
3. The probable cumulative effect of losses or injuries of the kind in question—in terms of conditions of life and security of the affected State, and more generally—if reliance is placed upon measures to ensure the provision of reparation rather than prevention (i.e. the acceptable mix between prevention and reparation);
4. The existence of means to prevent loss or injury, having regard to the highest known state of the art of carrying on the activity;
5. The feasibility of carrying on the activity by alternative means or in alternative places;
6. The importance of the activity to the acting State (i.e. how necessary is it to continue or undertake the activity, taking account of economic, social, security or other interests?);
7. The economic viability of the activity considered in relation to the cost of possible means of protection;
8. The availability of alternative activities;
9. The physical and technical capacities of the acting State (considered, for example, in relation to its ability to take measures of prevention or make reparation or to undertake alternative activities);
10. The way in which existing standards of protection compare with:
  - (a) the standards applied by the affected State; and
  - (b) the standards applied in regional and international practice;
11. The extent to which the acting State:
  - (a) has effective control over the activity; and
  - (b) obtains a real benefit from the activity;
12. The extent to which the affected State shares in the benefits of the activity;
13. The extent to which the adverse effects arise from or affect the use of a shared resource;
14. The extent to which the affected State is prepared to contribute to the cost of preventing or making reparation for loss or injury, or of maximizing its benefits from the activity;
15. The extent to which the interests of:
  - (a) the affected State, and
  - (b) the acting State
 are compatible with the interests of the general community;

<sup>95</sup> See paras. 28 and 32 above.

<sup>96</sup> *Idem*.

16. The extent to which assistance to the acting State is available from third States or from international organizations;

17. The applicability of relevant principles and rules of international law.

#### SECTION 7

Matters which may be relevant in negotiations concerning prevention and reparation<sup>97</sup> include:

##### I. *Fact-finding and prevention*

1. The identification of adverse effects and of material and non-material loss or injury to which they may give rise;
2. The establishment of procedural means for managing the activity and monitoring its effects;
3. The establishment of requirements concerning the structure and operation of the activity;
4. The taking of measures to assist the affected States in minimizing loss or injury.

##### II. *Compensation as a means of reparation*

1. A decision as to where primary and residual liability should lie, and whether the liability of some actors should be channelled through others;
2. A decision as to whether liability should be unlimited or limited;
3. The choice of a forum in which to determine the existing of liability and the amounts of compensation payable;
4. The establishment of procedures for the presentation of claims;
5. The identification of compensable loss or injury;
6. The test of the measure of compensation for loss or injury;
7. The establishment of forms and modalities for the payment of compensation awarded;
8. Consideration of the circumstances which might increase or diminish liability or provide an exoneration from it.

##### III. *Authorities competent to make decisions concerning fact-finding, prevention and compensation*

At different phases of the negotiations the States concerned may find it helpful to place in the hands of their national authorities or courts, international organizations or specially constituted commissions the responsibility for making recommendations or taking decisions as to the matters referred to under headings I and II.

#### SECTION 8

Settlement of disputes<sup>98</sup> (taking due account of recently concluded multilateral treaties that provide for such measures).

<sup>97</sup> See para. 40 above.

<sup>98</sup> See para. 26 above.

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

[Agenda item 5]

DOCUMENT A/CN.4/348\*

## Third report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur

[Original: English]  
[11 December 1981]

### CONTENTS

Chapter	Paragraphs	Page
I. STATUS OF WORK ON THE TOPIC .....	1-36	67
A. The Special Rapporteur's previous reports .....	1-3	67
B. Action by the Commission approving draft articles .....	4-9	67
C. Comment in the Sixth Committee of the General Assembly .....	10-36	69
1. General comment and comment on the systems approach .....	10-14	69
2. Scope of the articles .....	15-17	71
3. System agreements .....	18-26	71
4. Water as a shared natural resource .....	27-30	72
5. Relationship to other treaties in force .....	31-32	73
6. Summary of discussion in the Sixth Committee .....	33-35	73
7. Action by the General Assembly .....	36	74
II. ADDITIONAL DRAFT GENERAL PRINCIPLES .....	37-379	74
A. Desirability of presenting a more complete set of draft articles .....	37-40	74
B. The concept of "equitable participation" .....	41-91	75
1. Development of the general principle .....	43-48	75
2. International agreements and positions of States .....	49-72	76
3. Current state of doctrine .....	73-84	82
4. The proposed article .....	85-91	85
Article 6. <i>Equitable participation</i> .....	86	85
C. Clarifying the ascertainment of equitable use .....	92-110	87
1. The <i>Lake Lanoux</i> arbitration .....	93	87
2. Proposals submitted to the Asian-African Legal Consultative Committee .....	94	87
3. Resolutions of the International Law Association .....	95-98	87
4. Implications of international agreements .....	99-105	88
5. The proposed article .....	106-110	90
Article 7. <i>Determination of equitable use</i> .....	106	90
D. Responsibility for appreciable harm .....	111-186	91
1. The underlying principle .....	113-129	92
2. The matter of "appreciable" .....	130-141	98
3. Making the rule more definite and certain .....	142-155	100
4. The proposed article .....	156-186	103
Article 8. <i>Responsibility for appreciable harm</i> .....	156	103
E. Information and data .....	187-242	110
1. Prior consideration of the subtopic .....	188-192	110
2. Recent expert testimony, official and unofficial .....	193-217	111
3. State practice .....	218-229	117
4. The proposed article .....	230-242	119
Article 9. <i>Collection, processing and dissemination of information and data</i> ....	230	119
F. Environmental pollution and protection .....	243-336	122
1. Historical development of pollution control .....	249-252	123
2. The modern practice of pollution control .....	253-258	124
3. Doctrinal developments .....	259-262	126
4. New and existing pollution .....	263-268	127

\*Incorporating document A/CN.4/348/Corr.1.

Chapter	Paragraphs	Page
5. Pollution regulation on the basis of hazard .....	269–274	129
6. The trend towards pollution management by commission .....	275–284	132
7. Shared water resources and the environment .....	285–286	136
8. Health considerations .....	287–289	137
9. Global scope of the problem .....	290–295	138
10. Scientific studies on environmental questions .....	296–301	140
11. The special issue of the maritime interface .....	302–311	142
12. The proposed article .....	312–336	144
Article 10. <i>Environmental pollution and protection</i> .....	312	144
G. Prevention and control of water-related hazards .....	337–379	151
1. Floods .....	339–349	151
2. Ice conditions .....	350–352	155
3. Drainage .....	353–358	155
4. Flow obstructions .....	359–364	156
5. Avulsion .....	365	157
6. Siltation .....	366–367	158
7. Erosion .....	368–369	158
8. Saline intrusion .....	370–371	158
9. Natural hazards generally and drought .....	372–378	159
10. The proposed article .....	379	161
Article 11. <i>Prevention and mitigation of hazards</i> .....	379	161
III. INTRODUCTORY CONSIDERATION OF CERTAIN OTHER QUESTIONS .....	380–528	161
A. River regulation .....	381–389	161
1. Managing the supply .....	382	162
2. Restatement by the International Law Association .....	383–384	162
3. State practice .....	385–387	162
4. Distinguishing “regulation” from anti-hazard measures .....	388	164
5. The proposed article .....	389	164
Article 12. <i>Regulation of international watercourses</i> .....	389	164
B. Hydraulic installations and water security .....	390–430	164
1. The international problem .....	391–392	164
2. Protection in times of armed conflict .....	393–399	164
3. History of concern for water safety .....	400–404	166
4. Consideration by the International Law Association .....	405–407	167
5. Water resources: treaty practice and security .....	408–410	168
6. Terrorist acts of sabotage .....	411–414	168
7. The proposed article .....	415	169
Article 13. <i>Water resources and installation safety</i> .....	415	169
8. Correspondence of the proposed article 13 with the 1977 Geneva Protocols .....	416–430	169
C. Interaction with navigational uses .....	431–451	172
1. Previous consideration of the question of navigational uses .....	432–435	172
2. Navigation and provisional article 5 .....	436–437	172
3. <i>Ipsso facto</i> priority and equitable sharing .....	438–447	173
4. Clarifying priority with respect to residual articles .....	448–449	174
5. The proposed article .....	450–451	174
Article 14. <i>Denial of inherent use preference</i> .....	451	175
D. Administrative arrangements for international watercourse systems .....	452–471	175
1. Advances in State practice .....	453	175
2. The modern doctrine .....	454–459	176
3. Recent international action .....	460–462	177
4. The Dakar Interregional Meeting of international river organizations (1981) .....	463–465	178
5. Authoritative opinion .....	466–467	179
6. Recent studies .....	468–469	179
7. The proposed article .....	470–471	180
Article 15. <i>Administrative management</i> .....	471	181
E. Avoidance and settlement of disputes .....	472–498	181
1. Importance accorded to settlement of disputes .....	473	181
2. Accommodation in lieu of dispute .....	474–477	182
3. Utility of several “echelons” .....	478–479	182
4. Formal alternatives for the settlement of disputes .....	480–482	183
5. Conciliation and arbitration .....	483–486	183
6. Non-marine international waters and settlement of disputes .....	487–489	184
7. The work of the Institute of International Law .....	490–493	184
8. Settlement of disputes in the Helsinki Rules .....	494	185
9. Data sharing and avoidance of disputes .....	495–496	186
10. The proposed article: minimal provisions .....	497–498	186
Article 16. <i>Principles and procedures for the avoidance and settlement of disputes</i> .....	498	186
F. Concluding observations .....	499–528	187
1. Functions of these draft articles .....	500–501	187
2. Need for codification of the topic .....	502–507	188
3. Principles and rules reported and proposed .....	508–512	189

	Paragraphs	Page
4. Aspects not reported on in this report or in preceding reports .....	513-516	189
5. Preservation of wild and scenic watercourses .....	517-522	190
6. The question of particular uses .....	523-525	191
7. Final comments .....	526-528	191

## CHAPTER I

### Status of work on the topic

#### A. The Special Rapporteur's previous reports

1. In 1979, in the course of the thirty-first session of the International Law Commission, the Special Rapporteur presented his first report on the law of the non-navigational uses of international watercourses.<sup>1</sup> The report above all endeavoured to demonstrate, with respect to this unique topic, the necessity of aligning legal rules with the physical laws governing water's ubiquitous behaviour. To that end, considerable background data were provided to the Commission describing the operation of the hydrologic cycle. The report also explored the questions of scope and appropriate conceptual basis for the Commission's work, which had already come under scrutiny within the Commission and in the Sixth Committee of the General Assembly.<sup>2</sup> The divergence and convergence of those prior views were examined and a proposed manner of proceeding was suggested to the Commission together with initial draft articles of a possible framework convention—articles which were introduced on a tentative basis as food for thought rather than Commission disposition. Possible definitions of the term “international watercourse” were reviewed.

2. Comment in the Commission and in the Sixth Committee on the first report was considerable and instructive.<sup>3</sup> Delay in arriving at a specific content for or definition of the term “international watercourse” caused some concern, but the approach of a “framework instrument”<sup>4</sup> received broad support. States would be free and even encouraged to conclude specific agreements tailored to the unique characteristics and needs of particular international watercourses. The predominant view was that the product of the Commission's work should serve to provide, except for navigational uses, the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. That is, the Commission's articles would contain

general principles plus residual rules applicable to subject matters not covered by such agreements. Interest was expressed by some members of the Commission and of the Sixth Committee, as well as by the Special Rapporteur, in proceeding initially to codify and to develop the principles and rules pertaining to specific uses, but the view which prevailed was that the codification and progressive development first of general principles and rules would place the Commission's work on the most acceptable foundation.<sup>5</sup>

3. The Special Rapporteur accordingly prepared a second report for consideration by the Commission at its thirty-second session.<sup>6</sup> The comments on the first report by Commission members, and by delegations that had addressed the topic at the thirty-fourth session of the General Assembly, were taken into account. The articles tentatively submitted in the first report were substantially revised to adopt a “systems” approach to international watercourses, which was found to be especially suitable to the topic.<sup>7</sup> A bracketed article on the meaning of terms, offering for the time being alternative delineations of “international watercourse system”, and a draft article on water of international watercourses as a shared natural resource were added to the draft articles proposed.<sup>8</sup>

#### B. Action by the Commission approving draft articles

4. Consideration of that second report within the Commission during its thirty-second session yielded much valuable comment and substantial progress. The Commission, on the proposal of its Drafting

<sup>5</sup> *Yearbook* . . . 1980, vol. II (Part One), pp. 161-163, document A/CN.4/332 and Add. 1, paras. 6-26.

At its 1980 session, the Commission commenced its work on the topic

“by preparing draft articles for inclusion in a set of articles containing basic rules applicable to all international watercourse systems. These were to be coupled with distinct and more detailed agreements between States of an international watercourse system, which would take into account their needs and the characteristics of that particular watercourse system. At this stage in the work, the Commission intends to devote attention to the formulation of general, residual rules on the topic, designed to be complemented by other agreements which, when the States concerned choose to conclude them, will enable States of a particular watercourse system to establish more detailed arrangements and obligations governing its use.” (*Yearbook* . . . 1980, vol. II (Part Two), p. 109, para. 96).

<sup>6</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

<sup>7</sup> For the full exposition of the Special Rapporteur's process of reconsideration of the articles previously submitted, *ibid.*, p. 164, document A/CN.4/332 and Add.1, chap. II.

<sup>8</sup> On water as a shared natural resource, *ibid.*, p. 180, document A/CN.4/332 and Add.1, chap. III.

<sup>1</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 143, document A/CN.4/320.

<sup>2</sup> For an historical review of the work of the Commission on this topic, see the report of the Commission on the work of its thirty-second session, *Yearbook* . . . 1980, vol. II (Part Two), pp. 104-108, and United Nations, *The Work of the International Law Commission*, 3rd ed., (Sales No. E.80.V.11), pp. 91-94.

<sup>3</sup> See *Yearbook* . . . 1979, vol. I, pp. 104-116, 1554th and 1555th meetings, and “Topical summary, prepared by the Secretariat, of the discussion on the report of the International Law Commission, held in the Sixth Committee during the thirty-fourth session of the General Assembly” (A/CN.4/L.311).

<sup>4</sup> The final form of the draft articles will as usual be decided only at a later stage in the Commission's work on the topic.

Committee,<sup>9</sup> produced six draft articles and a "note" of understanding, with commentaries, for inclusion in its report on the work of its thirty-second session to the General Assembly.<sup>10</sup>

5. The Commission thus provisionally adopted draft articles 1 to 5 and article X. These articles cover scope, system States, system agreements, parties to the negotiation and conclusion of system agreements, use of water of international watercourses which constitutes a shared natural resource, and the relationship between the present articles and other treaties in force, respectively. The first five articles were revisions of equivalent articles proposed by the Special Rapporteur.<sup>11</sup> The additional article, labelled "X" for the time being, was put forward in order to make clear "that treaties in force" respecting particular international watercourse systems were not affected by the provisions of the articles on the topic.<sup>12</sup>

6. The Drafting Committee omitted a recommendation with respect to the proposed new draft article on "collection and exchange of information"<sup>13</sup> because it concluded that there was insufficient time to deal adequately with the issues raised by such an important matter.

7. In 1976 there had been general agreement in the Commission that determination of the extent of the term "international watercourses" was not required at the outset of the work.<sup>14</sup> At the thirty-second session in 1980, however, particularly in view of the use of the term "international watercourse system" in the draft articles, the Commission decided that it was now opportune to prepare a provisional indication of what the Commission meant by "watercourse system" and "international watercourse system". No definitive definition was attempted. Instead, a working hypothesis, subject to refinement and change, was arrived at, "which would give those who were called upon to compose and criticize the draft articles an indication of their scope".<sup>15</sup> The Commission therefore prepared the following note indicating its tentative understanding of the term "international watercourse system":

<sup>9</sup>Composed of Mr. Barboza, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Reuter, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat and the Special Rapporteur, with Mr. Verosta as Chairman; Mr. Yankov, Rapporteur of the Commission, and Mr. Riphagen also participated.

<sup>10</sup>*Yearbook . . . 1980*, vol. II (Part Two), pp. 108–136. Since, in the process of arriving at the language of the articles as initially approved and reported to the General Assembly, differences within the Commission were largely composed with the assistance of the Drafting Committee, observations upon the comments addressed to the precise terms of the articles in the Special Rapporteur's second report do not appear useful. Nonetheless, in support of the new texts brought before the Commission in this third report, specific mention will be made of comment that has influenced the Special Rapporteur's ultimate thinking.

<sup>11</sup>*Yearbook . . . 1980*, vol. II (Part One), pp. 167–178 and 180–198, document A/CN.4/332 and Add.1, paras. 52–63, 64–123, and 140–239.

<sup>12</sup>*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 25th meeting, para. 58.

<sup>13</sup>Art. 6 in the Special Rapporteur's second report. See *Yearbook . . . 1980*, vol. II (Part One), pp. 178–180, document A/CN.4/339 and Add.1, paras. 124–139.

<sup>14</sup>*Yearbook . . . 1976*, vol. II (Part Two), p. 162, para. 164.

<sup>15</sup>*Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 89.

#### Note

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>16</sup>

8. The importance of this initiative of the Commission and of the articles adopted justifies setting forth the language of these texts in full as the point of departure for additional articles. Moreover, that will facilitate evaluation of any suggestions for possible further refinement of the draft articles adopted in the light of comments at the thirty-fifth session of the General Assembly (see paras 10 *et seq.*, below), further study of State practice and the perceived imperatives of progressive development of the topic.

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

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

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

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

#### *Article 2. System States*

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

#### *Article 3. System agreements*

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

#### *Article 4. Parties to the negotiation and conclusion of system agreements*

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

<sup>16</sup>*Ibid.*, para. 90. For the substantive elucidation of the note by the Commission and the text of the six draft articles, with commentaries thereto, *ibid.*, pp. 109–136, paras. 91–98.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

*Article 5. Use of waters which constitute a shared natural resource*

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of the system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

*Article X. Relationship between the present articles and other treaties in force*

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

9. Within the Commission some difference of view persists with respect to, above all, the systems approach. However, all Commission members present but one approved the note above (para. 7) as submitted to the General Assembly. The opposing member regarded some of the terms, such as "hydrographic components", as lacking in specificity and partaking of "pseudo-scientific speculation"; he also felt that the treatment of a watercourse as international for some purposes but not for other purposes would lead to uncertainty and difficulty in application.<sup>17</sup>

**C. Comment in the Sixth Committee of the General Assembly**

**1. GENERAL COMMENT AND COMMENT ON THE SYSTEMS APPROACH**

10. The Sixth Committee of the General Assembly at its thirty-fifth session devoted significant attention to the law of the non-navigational uses of international watercourses, dealt with in chapter V of the Commission's 1980 report.<sup>18</sup> Most of the comment was favourable. It was said that notable progress had been achieved in laying down an acceptable basis for further work on an exceptionally sensitive area of international law; the supporting legal and technical documentation was regarded as most valuable. For example, the delegation of Egypt endorsed the method adopted by the Commission, which it found to be "based on the principle of goodwill, the positive use of law, humanitarian concerns, co-operation among the user States of watercourses and their responsibilities in the context of fundamental rules".<sup>19</sup> The representative of Yugoslavia

found the Commission's basis generally acceptable and "the working hypothesis defining the term 'international watercourse system' acceptable and suitable".<sup>20</sup> The representative of Italy, besides announcing his delegation's support for the concept of an international watercourse as adopted provisionally by the Commission and its preference for "international watercourse system" over the traditional notion of international river, emphasized the topic's "particular importance to newly independent countries, which could benefit greatly from the formulation of a series of equitable principles that could form the basis of agreements governing the use of the available resources".<sup>21</sup> The representative of Canada, in turn, stressed his delegation's view that the Commission must "be at the forefront of the development of new law and the promotion of new ideas", as well as engage in codification, and that the codification and progressive development of international law in the area of non-navigational uses of international watercourses "would be of great benefit to all Member States of the United Nations".<sup>22</sup> The representative of Sudan indicated that her delegation "had no difficulty in accepting [the provisional definition of 'international watercourse system']", without prejudice to its right to express reservations on any future amendments". Her delegation "also agreed with the formulation of 'basic general principles applicable to all international watercourse systems, but thought that the specific needs of riparian States and the physical and natural characteristics of different watercourses should also be taken into account".<sup>23</sup> The representative of Argentina submitted that the law of non-navigational uses of international watercourses "was perhaps the most important topic before the Commission"; the international community "had become aware that the world's resources were limited and that countries sharing natural resources such as water should seek to ensure their equitable and rational use".<sup>24</sup> A number of other comments supported these views. Moreover, it was stressed that a balance must be maintained between the requirements of sovereignty and the requirements of good-neighbourliness and the prohibition of abuses.<sup>25</sup>

11. At the same time, there were also some representatives who found the progress inadequate or the approach of the draft articles and note of understanding ill-advised. The representative of Poland felt that the term "international watercourse" still had not been

<sup>20</sup> *Ibid.*, 59th meeting, para. 34.

<sup>21</sup> *Ibid.*, 53rd meeting, paras. 19 and 20.

<sup>22</sup> *Ibid.*, 51st meeting, para. 21.

<sup>23</sup> *Ibid.*, 59th meeting, para. 36. The "framework instrument" approach, introduced in the first report and well received in the Sixth Committee in 1979, had been adopted precisely to meet the needs here emphasized. In 1980, comment on this point was limited but again favourable. See e.g. the statements of the following delegations: Tunisia, *ibid.*, para. 29; Spain, *ibid.*, 55th meeting, para. 17; Canada, *ibid.*, 51st meeting, paras. 23-24.

<sup>24</sup> *Ibid.*, 57th meeting, para. 15.

<sup>25</sup> *Ibid.*, 53rd meeting, para. 19 (Italy). However, the representative of the German Democratic Republic said that his country supported the view that every State had the sovereign right to decide the uses of watercourses in its territory, and was therefore opposed to any provision that made the uses of inland waters subject to the law of non-navigational uses of international watercourses (*ibid.*, 52nd meeting, para. 1). As expressed, that view would seem to deprive the topic under study of any reach whatsoever, which could not have been the General Assembly's expectation in requesting the Commission to undertake its codification and progressive development.

<sup>17</sup> *Ibid.*, p. 109, para. 94; see also *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 25th meeting, para. 50.

<sup>18</sup> See "Topical summary, prepared by the Secretariat, of the discussion of the report of the International Law Commission in the Sixth Committee during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 229-310.

<sup>19</sup> *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 56th meeting, para. 66. See also the evaluation of the representative of Nigeria (*ibid.*, 53rd meeting, paras. 10-12).

clarified and that the hypothesis of an international watercourse system based on the hydrographic elements "had not solved the problems involved in the creation of legal norms relating to international rivers, lakes or canals which formed or traversed international boundaries". He explained the constant increase in the number of bilateral agreements on the subject since the Second World War in part by "the need to settle many new technological problems".<sup>26</sup> The representative of Romania expressed the opinion that "the new concepts, based on the idea of a 'system', did not seem to be substantiated by State practice"; he reaffirmed on behalf of his delegation that "the problems of the utilization of international waters must be tackled in the light of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, which must be strictly observed".<sup>27</sup> The representative of Afghanistan stated that non-navigational uses of international waterways "had always been considered at the regional level, in the light of particular geographical or other requirements"; moreover, "the new concepts formulated by the Commission, based on the notion of systems, had no antecedents in State practice".<sup>28</sup> The representative of Bangladesh, however, did not share these criticisms, but rather foresaw "difficulties arising in the interpretation of the term 'international watercourse system'" because the Commission's note made it clear that "the watercourse was not absolutely but relatively international in character"; he pointed out moreover that it was "important to ensure that a watercourse passing from one State to another, or through many States, was given an international character, and that any diversion or any other use of water which was in any way detrimental to any State should be made absolutely illegal".<sup>29</sup>

12. Criticism of the Commission draft was expressed by the representative of Kenya, who said that his delegation considered it "essential that a functional definition of the international watercourse system" be produced, while recognizing the difficulties involved; his delegation was not in favour of the suggestion that "the entire international drainage basin, consisting of tributaries, lakes and canals, should be included . . . His delegation believed that every State should be able fully to utilize water within its territory for legitimate means and without external pressure, provided that it allowed an adequate volume of water to flow on to the other riparian States".<sup>30</sup> The representative of Spain reported that his Government had "serious misgivings" about the approach embodied in the concept of "international watercourse system", although "Spain believed that States sharing an international watercourse had an obligation to take due account of the interests of other riparian States".<sup>31</sup> The representative of Pakistan said that his delegation "regretted that the International Law Commission had not been able to agree on the adoption of a definition of an international watercourse".<sup>32</sup> The representative of Tunisia, while

generally praising the Commission's progress, found lacking, "norms for solving technical problems or settling controversies which might arise" as well as a provision "prohibiting pollution of watercourses or at least obliging States to take all possible precautions to avoid it".<sup>33</sup> The representative of Finland warned that "no final choice of a term [to express the basic concept] could be made before the Commission had examined the relevant factors determining the scope of the future framework treaty," and that that study "could not be postponed indefinitely".<sup>34</sup>

13. The observation of the representative of Iraq may serve to epitomize the general feeling of many, if not most, of the delegation:

It should be recognized that the complex and highly technical nature of the subject and its strong correlation to vital State interests did not make for easy solutions. The process of bringing about compatibility between the conflicting interests of States in order to draw up the general principles of a convention containing residuary rules was a very long one, and consequently expressions of dissatisfaction would probably still be heard for some time to come until a final all-embracing solution was found.<sup>35</sup>

14. The introduction of the concept of "system" into the draft provoked the most comment from representatives in the Sixth Committee. As indicated above, some representatives supported the new conceptual framework thereby provided, regarding it as useful or even a distinct advance.<sup>36</sup> To those to whom the systems approach was acceptable, the employment of the terms "international watercourse system" and "system State" gave no difficulty, although some felt a need for more clearly identifying the elements or components of the system and, in due course, spelling out the implications in terms of specific legal rules.<sup>37</sup> At least one representative, who had previously objected to consideration of the drainage basin concept, found "system" tantamount to "basin" and consequently opposed the Commission's decision to employ the terms "international watercourse system" and "system State".<sup>38</sup> The reaction in the Assembly, in spite of limited explicit dissent,<sup>39</sup> was fundamentally receptive

<sup>33</sup> *Ibid.*, para. 30.

<sup>34</sup> *Ibid.*, 48th meeting, para. 58. Finland was also concerned that the Commission realize that its most important goal was the codification of material rules applicable in all cases when needed, irrespective of the existence of any supplementary agreement (*ibid.*, para. 59).

<sup>35</sup> *Ibid.*, 54th meeting, para. 7.

<sup>36</sup> See in this connection the remarks of the representative of India (*ibid.*, para. 41). See also the observations of the representatives of Algeria (*ibid.*, 55th meeting, para. 34) Sri Lanka (*ibid.*, 52nd meeting, para. 57), Argentina (*ibid.*, 57th meeting, paras. 16-17), and the United States of America (*ibid.*, 56th meeting, para. 19).

<sup>37</sup> See e.g. the observations of the representative of Tunisia (*ibid.*, 58th meeting, para. 30). The representative of the Ukrainian SSR found shortcomings in that the complex concept of the system of international watercourses should be the subject of a precise definition; to be useful the definition should identify the elements of the system and explain the relationship between them (*ibid.*, 56th meeting, para. 39). The representative of Nigeria, on the other hand, noted that the term "system" had already been employed in a number of treaties and had its scientific connotation in its favour (*ibid.*, 53rd meeting, para. 11).

<sup>38</sup> See the remarks of the representative of Brazil (*ibid.*, 51st meeting, paras. 29-30).

<sup>39</sup> It should be noted that the representative of the USSR said it would be preferable to retain the expression "international watercourse", which could be defined on the basis of existing international law; he reported that his delegation found the Commission's definition of "international watercourse system" totally unsatisfactory (*ibid.*, 52nd meeting, para. 74).

<sup>26</sup> *Ibid.*, 58th meeting, para. 19.

<sup>27</sup> *Ibid.*, 50th meeting, paras. 5 and 7.

<sup>28</sup> *Ibid.*, 60th meeting, paras. 4 and 6.

<sup>29</sup> *Ibid.*, 59th meeting, para. 48.

<sup>30</sup> *Ibid.*, 56th meeting, para. 61.

<sup>31</sup> *Ibid.*, 55th meeting, para. 17.

<sup>32</sup> *Ibid.*, 58th meeting, para. 9.



to the Commission's working hypothesis and to the essential approach embodied in the draft articles so far adopted by the Commission.

## 2. SCOPE OF THE ARTICLES

15. Observations directed to article 1, "Scope of the present articles", in large part focused on the term "international watercourse systems", comment with respect to which has been reviewed above. In addition, however, one representative found the language of the second part of paragraph 1 ("measures of conservation related to the uses of those watercourse systems and their waters") unclear. He pointed out that flood control and flow regulation, for instance, were not uses in the ordinary sense, nor were they strictly speaking conservation measures related to the uses.<sup>40</sup>

16. Paragraph 2 of article 1, dealing with the relationship between the Commission's articles and navigational uses, received slightly more attention. One representative noted that the situation of non-navigational uses affecting navigational uses, and vice versa, might often occur.<sup>41</sup> Another representative declared that his delegation wanted to give further study to the provision, since it had the indirect effect of bringing navigational uses within the scope of these articles.<sup>42</sup> It may be fair to say that, subject to some clarification, the language of article 1 was found acceptable by most delegations.

17. Similarly, article 2, defining "system State", met with general approval, except from those opposed to the notion of system altogether. The language was found sufficiently concise to leave no room for ambiguity by one representative.<sup>43</sup> There was some feeling, however, that the concept of "system State" was not clearly defined by the article.<sup>44</sup>

## 3. SYSTEM AGREEMENTS

18. The underlying rationale of article 3, "System agreements", was welcomed by a good number of representatives. Article 3 expresses in normative terms the "framework instrument" approach broadly commended in the Sixth Committee in 1979 (see para. 2 above) and again in 1980. For example, the wording of article 3 was held to allow sufficient latitude to the system States on all or part of an international watercourse system; it had the advantage also of allowing agreements pertaining to subsystems, which might differ from each other a great deal.<sup>45</sup> With few exceptions, paragraph 1 of the article was well received.<sup>46</sup>

<sup>40</sup> *Ibid.*, 48th meeting, para. 59 (Finland). It was apparent that the representative intended that such matters be within the scope of the articles.

<sup>41</sup> *Ibid.*, 53rd meeting, para. 21 (Italy).

<sup>42</sup> *Ibid.*, 51st meeting, para. 15 (United Kingdom). The third comment, by the representative of Jamaica, was to the effect that the final phrase, "or are affected by navigation", was not relevant since such situations came under the law of State responsibility (*ibid.*, 54th meeting, para. 4).

<sup>43</sup> *Ibid.*, 55th meeting, para. 34 (Algeria).

<sup>44</sup> See the question raised by the representative of Iraq (*ibid.*, 54th meeting, para. 9).

<sup>45</sup> *Ibid.*, 55th meeting, para. 34 (Algeria). See also the suggestion and illustration presented by the representative of Italy in that connection (*ibid.*, 53rd meeting, para. 21).

<sup>46</sup> The representative of the USSR considered the "system agreements" concepts unclear and unacceptable, since it gave certain States in the system "rights" under the articles (*ibid.*, 52nd meeting,

19. With respect to paragraph 2 of article 3, however, concern was expressed by several representatives. Since States should not in general conclude treaties or take measures unilaterally that adversely affect a third party's interests, the clause concerning limited system agreements was not quite clear, according to the representative of Finland.<sup>47</sup> The representative of Ethiopia took the position that as a matter of principle the right of all riparian States to participate in any negotiation on a system agreement should not be qualified; he thus opposed inclusion of the term "appreciable extent", stating that it would create unnecessary problems of interpretation.<sup>48</sup> The terms "appreciable extent" and "affected adversely" were also regarded by some other representatives as hard to define and likely to cause problems of interpretation.<sup>49</sup>

20. Other representatives found no problem with paragraph 2 of the article. It was observed that the expression "to an appreciable extent", as employed in that paragraph, provided added flexibility, giving greater opportunity to system States to raise objections if their use of the waters was adversely affected.<sup>50</sup> The view widely espoused by specialists in international water resources, that the best way of dealing with a watercourse is as a whole, found support in the Sixth Committee as it had in the Commission; the examples of the Amazon, the Plata, the Niger and the Chad basins were cited. But it was said that agreements of a general nature did not inhibit the parties from entering into specific or partial agreements, in line with the general development objectives of the basins in question; nevertheless, there were some issues arising out of watercourse pollution that necessitated co-operative action on the part of all riparian States and required unified treatment and the conclusion of agreements among the parties concerned; this was an obligation that flowed from customary international law.<sup>51</sup>

21. With regard to paragraph 3 of article 3, setting forth the obligation to negotiate in good faith, some representatives, in approving it, treated it as a special application of the principle recognized in Article 33 of the Charter of the United Nations, which provides for negotiation as one of the methods of peaceful settlement of international disputes.<sup>52</sup> One delegation was of the opinion that the Commission had concluded, by the language of paragraph 3, that a general principle of international law existed requiring negotiation generally among States in dealing with international fresh water resources, rather than only where conflicting interests made negotiation necessary. While not object-

para. 74). However, the representative of Nigeria stated that paragraphs 1 and 2 of article 3 created "no legal problems" (*ibid.*, 53rd meeting, para. 11).

<sup>47</sup> *Ibid.*, 48th meeting, para. 60. The representative of Finland went on to say that the Commission still needed to study and elaborate one of the basic principles of international water law, equitable utilization, which would involve it in the classic problem concerning the limits of the sovereign rights of co-riparian States over the water resources within their territories.

<sup>48</sup> *Ibid.*, 51st meeting, para. 50.

<sup>49</sup> See the comments of the representative of India, suggesting that "substantial extent" might be preferable (*ibid.*, 54th meeting, para. 44).

<sup>50</sup> *Ibid.*, 59th meeting, para. 48 (Bangladesh).

<sup>51</sup> *Ibid.*, 56th meeting, para. 69 (Egypt).

<sup>52</sup> For example, *ibid.*, 53rd meeting, para. 11 (Nigeria), and 54th meeting, para. 44 (India).

ing to that conclusion, the representative of that delegation pointed out that the obligation to negotiate should be considered not in the abstract but in relation to a dispute or a situation where measures planned or undertaken by one basin State might adversely affect the interest of another basin State; negotiations would thus be necessary to avoid a conflict.<sup>53</sup>

22. However, the very concept of a duty to negotiate seemed likely to conflict with the sovereign rights of every State over its territory and its national resources, in the view of one representative.<sup>54</sup> Another representative posed the question of who would be empowered to say that negotiation "in good faith" of a system agreement was required and commented that the subjective nature of that expression and the expression "to an appreciable extent, affected adversely" (in paragraph 2 of article 3) might make it relatively easy to undermine article X, which purported to preserve other treaties in force.<sup>55</sup> And one delegation considered that it would be very difficult to maintain that the obligation to negotiate system agreements stemmed from customary international law; it must be unequivocally stipulated that the system States were completely free to make such agreements as they considered appropriate.<sup>56</sup>

23. Article 4, "Parties to the negotiation and conclusion of system agreements", received indications of satisfaction but also some expressions of dissatisfaction. One representative found considerable difficulty with the draft articles and the commentary because, among other things, they maintained the position, which his delegation was inclined to support, that there would be no obligation to negotiate where an international watercourse was hardly used; yet the right to participate in negotiations was said to be complementary to the duty to negotiate. Consequently, there could be no question of a third State's having the right to participate in negotiations between States which, because of their geographical situation, needed to conclude a watercourse agreement, where that third State was under no duty to negotiate.<sup>57</sup>

24. One representative suggested that, since article 4 left room for serious disagreement, the articles should

provide for compulsory recourse for settlement of disputes, such as arbitration, where negotiations on system agreements had been unsuccessful.<sup>58</sup> Some delegations raised technically involved questions but did not challenge the principles contained in the article.<sup>59</sup> On the other hand, the representative of Algeria stated that, although there was the risk of some uncertainty in respect of precisely what constituted an "appreciable extent", he considered the solution in article 4 technically unimpeachable.<sup>60</sup>

25. Paragraph 2 of article 4 provides for the "to an appreciable extent" test, which stimulated discussion there and wherever it occurred in the draft articles. For example, the representative of Nigeria indicated that the criterion already most frequently adopted for determining the extent of the use or enjoyment of an international watercourse was "appreciable extent", which expression in his delegation's view provided an acceptable yardstick. Thus paragraph 2 of the article was considered useful.<sup>61</sup>

26. In summary, it may be said that the Commission's employment of "appreciable extent" brought no more than the anticipated and justifiable concern for the term's indefiniteness but no proposals for a less vague standard. The basic propositions of the article, the entitlement to participate in the negotiation of system agreements and to become a party where the agreement was system-wide, were favourably regarded in the Sixth Committee.

#### 4. WATER AS A SHARED NATURAL RESOURCE

27. Draft article 5, "Use of waters which constitute a shared natural resource", elicited numerous comments. Some representatives found even the concept "shared natural resource" controversial or without relevance to the topic;<sup>62</sup> one did not object to the concept but felt that the meanings and the elements needed clarification;<sup>63</sup> one expressed the view that "shared natural resource" was perhaps not the most appropriate term to use.<sup>64</sup> The principle of permanent sovereignty over natural resources applied to international watercourses and, even if the waters of such watercourses were to be regarded as a "shared natural resource", a term which the Ethiopian representative did not see as relevant, that principle nevertheless applied.<sup>65</sup> Another representative felt that inclusion of the shared resources concept, the acceptance of which he regarded as without intrinsic value, would make the Commission's work more difficult.<sup>66</sup> The fact that

<sup>53</sup> *Ibid.*, 48th meeting, para. 59 (Finland).

<sup>54</sup> *Ibid.*, 45th meeting, para. 17 (Federal Republic of Germany).

<sup>55</sup> *Ibid.*, 50th meeting, para. 48 (France).

<sup>56</sup> *Ibid.*, 54th meeting, para. 56 (Turkey). In connection with the duty to negotiate, the representative of Brazil challenged the use in the Commission's commentary of language in the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases to support a duty to negotiate agreements in the area of international watercourses, maintaining that the delimitation of maritime boundaries and the use of international rivers were basically different situations, and that the reference of the International Court of Justice to the "unity of deposits" as a factor to be considered had nothing to do with the obligation to negotiate (*ibid.*, 51st meeting, para. 32).

<sup>57</sup> *Ibid.*, 57th meeting, para. 5 (Honduras). The same representative also raised the issue of what the consequences would be for a third State that did not make timely use of the "opportunity to participate" (*ibid.*, para. 6). The representative of Honduras was also critical of the working hypothesis expressed in the Commission's note of understanding of what was meant by the term "international watercourse system". He drew attention to the alternative idea raised by the Special Rapporteur at the 1556th meeting of the International Law Commission of possibly including in the draft articles an optional clause that would enable States to specify that, as far as they were concerned, the articles applied to successive or contiguous rivers, to river basins or to international drainage basins (*ibid.*, para. 2).

<sup>58</sup> *Ibid.*, 48th meeting, para. 44 (Japan).

<sup>59</sup> See e.g. the statement of the representative of Italy (*ibid.*, 53rd meeting, paras. 21-22).

<sup>60</sup> *Ibid.*, 55th meeting, para. 35. The representative of India expressed agreement with para. 1 of article 4 (*ibid.*, 54th meeting, para. 45).

<sup>61</sup> *Ibid.*, 53rd meeting, para. 12. The representative of Iraq commented upon matters discussed in the commentary to article 4 which can be considered at a later stage (*ibid.*, 54th meeting, paras. 11-12).

<sup>62</sup> See e.g. the observation of the representative of Turkey (*ibid.*, 54th meeting, para. 58).

<sup>63</sup> *Ibid.*, para. 46 (India).

<sup>64</sup> *Ibid.*, para. 4 (Jamaica).

<sup>65</sup> *Ibid.*, 51st meeting, para. 51 (Ethiopia).

<sup>66</sup> *Ibid.*, para. 34 (Brazil). The representative of France hoped that any reference to the idea would be deleted from the articles (*ibid.*, 50th meeting, para. 49).

article 5 supposed the existence of some international watercourse systems that constituted a shared natural resource and others that did not was unsatisfactory to one delegation.<sup>67</sup>

28. Apart from these criticisms and some feeling that the concept of shared natural resources was too new in international practice for the Commission to embrace it, the reception of article 5 was positive. That several United Nations and other bodies had already developed and recommended the concept of shared natural resources was stressed. The delegations that welcomed inclusion of the article saw it as containing the substantive rule governing the use of such waters; it was accepted that an international watercourse system was an archetypical example of shared natural resources, whose use must be regulated in a spirit of equity, co-operation and solidarity. Codification of the notion on the basis of the obligation to co-operate in that sphere, as implied in the Charter of Economic Rights and Duties of States, would make a significant contribution to international law and international co-operation.<sup>68</sup>

29. One delegation, while praising the articles and commentaries presented by the Commission as responding to the expectations of the 1977 United Nations Water Conference with respect to the topic of shared water resources, found the Commission's definition in article 5 perhaps not quite adequate for the purposes of the future framework treaty. The problem was that, if the use of the waters did not have the specified effect within the territory of another State, in accordance with the proposed language, those waters were not considered part of a shared natural resource. Such a narrow definition may require reconsideration. The fact of shared natural resources had long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources.<sup>69</sup>

30. The representative of a system State in the Mekong considered it illusory to attempt to apply the principle of permanent sovereignty over natural resources to water that flowed in an international watercourse through various successive territories; the concept of a shared natural resource was in such a case inevitable. The representative further stated that unilateral action should give way to consultations and the adoption of concerted measures; the Commission, having reached that important conclusion, would now have to examine the methods and criteria for the use and equitable distribution of shared resources.<sup>70</sup>

##### 5. RELATIONSHIP TO OTHER TREATIES IN FORCE

31. The Commission wished to forestall possible conflicts between the framework articles it was elaborating and the provisions of treaties in force relating to a particular international watercourse system. Accordingly, an article, for the time being called article X, had been propounded stating that the draft articles did

not affect such treaties, except that the operation of paragraph 3 of article 3, containing the obligation to negotiate in good faith for the purpose of concluding system agreements, was not prejudiced by this disclaimer.<sup>71</sup> Consequently the article, as a technical clause, was welcomed by some representatives.<sup>72</sup>

32. Other representatives, however, deemed the article to be unsatisfactory, since it gave rise to new problems.<sup>73</sup> One delegation urged the Commission to be careful not to reopen situations that had been settled for the time being by practice or by treaty, and thus wondered whether article X was broad enough.<sup>74</sup> Finally, one delegation stated that without doubt further thought would have to be given to the relationship between article X and other articles, but welcomed the article in question subject to further refinement.<sup>75</sup>

##### 6. SUMMARY OF DISCUSSION IN THE SIXTH COMMITTEE

33. As might be expected when dealing with a subject regarded by one and all as sensitive and difficult, although of vital importance, the views expressed on the topic of the law of the non-navigational uses of international watercourses during the 1980 session of the Sixth Committee were varied. Some delegations appeared to be withholding comment, at least to some extent, perhaps preferring to judge the Commission's work only after a complete set of articles, or at least articles on general principles, had been reported. But many delegations contributed substantive observations on the progress thus far achieved, accepting the virtual necessity of proceeding step by step.

34. Because in 1980 the Commission submitted to the General Assembly for the first time a number of draft articles, comments in the Sixth Committee on those articles, and on the Commission's working hypothesis, have been given relatively extensive treatment in the Special Rapporteur's third report.<sup>76</sup> Clearly, views were expressed in the Sixth Committee on several aspects of the work that are difficult if not impossible to reconcile. Any Special Rapporteur must endeavour to meet, in so far as he can, the apprehensions and criticisms of as many States as possible, while giving appropriate weight to the views and expectations of the large majority. The weight to be accorded majority views is not necessarily determinative in the sphere of progressive development at large, since new international law cannot be imposed upon an unwilling minority. But perhaps majority views carry special weight in a case such as this, in which the majority is truly worldwide, embracing States of diverse geographical, cultural and ideological character. The expectations of the majority in this case appear to embrace codification of the principles and rules of international law on the

<sup>67</sup> *Ibid.*, 52nd meeting, para. 74 (USSR).

<sup>68</sup> See especially the statements of the representatives of Thailand (*ibid.*, 56th meeting, para. 51), Egypt (*ibid.*, para. 72), Algeria (*ibid.*, 55th meeting, para. 36), Argentina (*ibid.*, 57th meeting, paras. 18–20), the United States of America (*ibid.*, 56th meeting, para. 21) and the Netherlands (*ibid.*, 44th meeting, paras. 38–39).

<sup>69</sup> *Ibid.*, 48th meeting, para. 61 (Finland).

<sup>70</sup> *Ibid.*, 56th meeting, para. 51 (Thailand).

<sup>71</sup> The delegation of Bangladesh regarded this limitation on article X to be an important one, stating that if the treaty has been concluded without the free will and consent of a party, or if there had been coercion or intimidation, the "good faith" criterion would not have been met and the treaty would not deserve protection under article X (*ibid.*, 59th meeting, para. 50).

<sup>72</sup> For example, *ibid.*, 54th meeting, para. 59 (Turkey).

<sup>73</sup> *Ibid.*, 52nd meeting, para. 74 (USSR), and 56th meeting, para. 39 (Ukrainian SSR).

<sup>74</sup> *Ibid.*, 45th meeting, para. 17 (Federal Republic of Germany).

<sup>75</sup> *Ibid.*, 51st meeting, para. 15 (United Kingdom).

<sup>76</sup> For a fuller exposition, see "Topical summary . . ." (A/CN.4/L.326).

topic, and the progressive development as well of principles and rules calculated to serve the pressing needs of States in various stages of development, of a deteriorating environment, and of an increasingly interdependent world. As always, the elements and expressions of progressive development must be most carefully assembled, delimited, and drafted. But such provisions must not be foreclosed or unduly weakened simply because of some statements of the obvious, that is, that they have not yet become accepted international law.

35. It is submitted that the Commission is entitled to interpret the record of discussion at the thirty-fifth session of the General Assembly as predominant affirmation of the essential soundness of its basic approach and of the progress achieved thus far. It was fully recognized by the Sixth Committee that the work submitted so far on the topic was tentative and incomplete, and that the Commission would in due course reconsider each of its draft articles in light of the comments of States and its further study. In so doing, the Commission will naturally give the fullest consideration to the points of criticism made by a number of representatives in the Sixth Committee.

## 7. ACTION BY THE GENERAL ASSEMBLY

36. The report of the Sixth Committee on its consideration, at the thirty-fifth session of the General Assembly, of the report of the Commission on the work of its thirty-second session,<sup>77</sup> contained a draft resolution proposed for adoption by the Assembly. The draft resolution emphasized "the need for the progressive development of international law and its codification" and noted "with appreciation the progress made by the International Law Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses". It approved the programme of work planned by the Commission for 1981 and recommended that the Commission "proceed with the preparation of draft articles" on the topic of international watercourses.<sup>78</sup> The draft resolution, adopted by consensus in plenary meeting on 15 December 1980, became General Assembly resolution 35/163.

<sup>77</sup> *Official Records of the General Assembly, Thirty-fifth Session, Annexes*, agenda item 106, document A/35/71.

<sup>78</sup> *Ibid.*, para. 8.

## CHAPTER II

### Additional draft general principles

#### A. Desirability of presenting a more complete set of draft articles

37. Some members of the Sixth Committee, as well as of the Commission itself, expressed the desire to have before them a relatively full set of the general articles that the Commission, or at least the Special Rapporteur, had in mind,<sup>79</sup> before committing themselves to a particular approach to this singularly difficult topic. The principles and rules of international law in this field are clearly interrelated. Appraisal of any one general norm depends to some extent upon the norms imbedded in other articles. With a more complete set of draft articles all concerned could perceive the important interrelationships and ramifications as well as evaluate more confidently the essential approach pursued. These considerations are persuasive. Accordingly, the following sections (together with his earlier reports) constitute a best effort under the circumstances to lay before a successor Special Rapporteur and the Commission a picture of the salient general principles and rules of the law of the non-navigational uses of international watercourses as these have come to be understood by the Special Rapporteur.

38. In this, his last report, then, the Special Rapporteur endeavours to set forth certain of the most basic principles and rules regarded as necessary to complete the expression of his findings to date on the topic

assigned to him. In an effort not to obscure this hopefully rounded whole, and for want of time, the documentation for these additional propositions has largely been pared down to the most indicative of current State practice and the most fruitful and cogent sources for undertaking a progressive development of the law. The fact that the Special Rapporteur will no longer enjoy responsibility for the topic leads him to advance his suggestions in a particularly tentative, and at some points skeletal form, in the knowledge that they will inevitably benefit from the reconsideration of a successor Special Rapporteur and the critical analysis of the Commission.

39. Articles on equitable utilization are initially presented, followed by an article on the fundamental and yet intricate principle of responsibility for appreciable harm. An article on information and data, which was put forward in the Special Rapporteur's first and second reports in tentative form, has been reconsidered, recast and also is included. Finally, problems of environmental protection and of pollution, and of the control of hazards and harmful effects, are addressed.

40. A third chapter sketches remaining subtopics believed by the Special Rapporteur to give rise to pertinent general principles and rules, but for which it was not possible to condense and fully assemble the multifaceted and voluminous State practice and professional literature in time for submission of this report. Included are river regulation, hydraulic installations and water security, interaction with navigational uses, administrative arrangements for international watercourse systems, and dispute settlement and avoidance. The very tentative articles suggested, which are undoubtedly especially in need of further work, are nonetheless, as with the previous articles submitted,

<sup>79</sup> See, for example, the concern expressed by Sir Francis Vallat at the 1555th meeting of the Commission (*Yearbook* . . . 1979, vol. I, p. 116, para. 34). See also the remarks of Mr. Reuter (*Yearbook* . . . 1980, vol. I, p. 127, 1607th meeting, para. 25); of Mr. Barboza (*ibid.*, p. 133, 1608th meeting, para. 33); of Mr. Francis (*ibid.*, p. 136, 1609th meeting, para. 18); and of Mr. Tsuruoka (*ibid.*, p. 140, 1610th meeting, para. 6).

the product of study of State practice and of the challenges facing system States with respect to the development, use, protection and control of their shared water resources.

### B. The concept of "equitable participation"

41. Within its own territory, a State is indubitably entitled to make use of the waters of an international watercourse system with respect to which it is a system State. This entitlement is not only an attribute of sovereignty but also, in the case of shared resources, may be grounded in the fundamental principle of "equality of right".<sup>80</sup> Each system State enjoys this right of course, but, where the quantity or quality of the water is such that all the reasonable and beneficial uses of all the system States cannot be realized to their full extent, what is termed a "conflict of uses" results. International practice then recognizes that some adjustments or accommodations are required in order to preserve each system State's equality of right. Such adjustments or accommodations are to be calculated on the basis of equity,<sup>81</sup> failing specific agreement with respect to each system State's "share" in the uses of the waters. Indeed, a number of international agreements expressly or implicitly apply this "equitable share" concept, which may be seen as evidence of the force of the principle in customary international law.<sup>82</sup>

42. There may be, aside from the rule that no State may cause appreciable harm to another State, no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State "is entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters".<sup>83</sup>

### 1. DEVELOPMENT OF THE GENERAL PRINCIPLE

43. The general principle, while perhaps not ancient, is not of recent origin. Its emergence is involved with such resolution as there is of the long-standing conflict

among competing theories in this realm—territorial integrity, absolute sovereignty, limited territorial sovereignty, and community in the waters<sup>84</sup>—and can be seen to have evolved gradually into its contemporary expression: equitable utilization.

44. Early formulations of the doctrine can be found in national practice, particularly in connection with adjudications within federal States. Initially it was linked with a finding of injury. In 1927, the Constitutional Law Court of Germany declared as a matter of international law that "no State may substantially impair the natural use of the flow of such [an international] river by its neighbour".<sup>85</sup> But the Court went beyond the "duty not to injure the interests of other members of the international community":

The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.<sup>86</sup>

45. The Supreme Court of the United States of America, in deciding interstate river disputes between states of the Union, treats the litigants as if sovereign, and therefore applies what it regards to be the international law on the subject matter.<sup>87</sup> So acting, the Court concluded in 1907, for example, that there must be adjustment "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream".<sup>88</sup> And where the Court could find no need in the State of Washington for the waters in question, it determined that the State of Oregon's diversion during water-scarce times of all the Walla Walla River's flow was not necessarily inconsistent with the principle of equality of right.<sup>89</sup>

46. The Italian Court of Cassation delivered an opinion in connection with an international watercourse, the River Roya, regulated under a treaty between France and Italy, which expresses the principle without using the precise terms:

International law recognizes the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation . . . However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever regime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this regime, the opportunity of the

<sup>80</sup> See the major study by J. Lipper, "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), pp. 15–88, especially pp. 23–38 and 44–47.

<sup>81</sup> If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances" (art. 3 of the resolution on "utilization of non-maritime international waters (except for navigation)" adopted by the Institute of International Law at its Salzburg session in September 1961). Art. 2 of that resolution provides:

"Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin" (*Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, t. II, p. 382; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076).

<sup>82</sup> Concerning the impact of the principle on the Columbia River Treaty and Protocol of 1964 (Canada–United States of America), see R. W. Johnson, "The Columbia Basin", *The Law of International Drainage Basins* (op cit.), pp. 167–170, 203–207, 234–240.

<sup>83</sup> This is the formulation used in art. IV of the "Helsinki Rules on the Uses of the Waters of International Rivers" (ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 486; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 357–359, document A/CN.4/274, para. 405).

<sup>84</sup> For a review of these doctrines, see J. Berberis, *Los recursos naturales compartidos entre estados y el derecho internacional* (Madrid, Técnos, 1979), pp. 16–23, and Lipper, *loc. cit.*, pp. 16–40.

<sup>85</sup> *Württemberg and Prussia v. Baden* (the *Donauversinkung* case) (1927) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin, de Gruyter), vol. 116 (1927), p. 1; *Annual Digest of Public International Law Cases, 1927–1928* (London, 1931), p. 128).

<sup>86</sup> *Ibid.*, p. 131.

<sup>87</sup> See, *inter alia*, *Kansas v. Colorado* (1902) (*United States Reports*, 1910, vol. 185, p. 125) and *Kansas v. Colorado* (1907) (*ibid.*, 1921, vol. 206, p. 46); *State of North Dakota v. State of Minnesota* (1923) (*ibid.*, 1924, vol. 263, p. 365); *Connecticut v. Massachusetts* (1931) (*ibid.*, 1931, vol. 282, p. 660).

<sup>88</sup> *Kansas v. Colorado* (1907) (*ibid.*, 1921, vol. 206, p. 100).

<sup>89</sup> *Washington v. Oregon* (1936) (*ibid.*, 1936, vol. 297, p. 517). See also *Nebraska v. Wyoming et al.* (1945) (*ibid.*, 1946, vol. 325, p. 589), involving a conflict between "established" uses and planned uses of greater benefit.

other States to avail themselves of the flow of water for their own national needs.<sup>90</sup>

47. In the case of *New Jersey v. New York*, the United States Supreme Court expressed the same principle as follows:

... New York has the physical power to cut off the water within its jurisdiction. But clearly the exercise of such power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the river that must be reconciled as best they may be.<sup>91</sup>

In short, disputes over the right to use waters flowing across sovereign lines must be adjusted on the basis of "equality of rights". But such equality does not necessarily mean equal division.<sup>92</sup> As stated in the report of the Indus (Rau) Commission, also involving a controversy between federal provinces, in this case in India (Sind and Punjab):

If there is no . . . agreement, the rights of the several Provinces and states must be determined by applying the rule of 'equitable apportionment', each unit getting a fair share of the common river . . .<sup>93</sup>

48. In the *Lake Lanoux* arbitration between France and Spain, decided in 1957, the Tribunal was of the opinion:

that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned,

<sup>90</sup> *Société énergie électrique du littoral méditerranéen v. Campagna imprese elettriche liguri* (1939) (*Annual Digest and Reports of Public International Law Cases, 1938-1940* (London, 1942), p. 121).

<sup>91</sup> *United States Reports*, 1931, vol. 283, pp. 342-343. In the *Trail Smelter* arbitration between Canada and the United States of America, the tribunal said:

"There are . . . as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution" (*United Nations, Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1964).

The text of the decision is reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 193-194, document A/5409, paras. 1053-1054. In that connection, see generally H. Lauterpacht, "Decisions of municipal courts as a source of international law", *The British Year Book of International Law*, 1929 (London), vol. 10, p. 65.

<sup>92</sup> This rule, enunciated in 1907 in the *Kansas v. Colorado* case (*United States Reports*, 1921, vol. 206, p. 100), has been followed in all like United States cases. See *State of Wyoming v. State of Colorado et al.* (1922) (*ibid.*, 1923, vol. 259, p. 419); *Connecticut v. Massachusetts* (1931) (*ibid.*, 1931, vol. 282, p. 660); *New Jersey v. New York* (1931) (*ibid.*, 1931, vol. 283, p. 336); *Hinderlider, State Engineer et al. v. La Plata River and Cherry Creek Ditch Co.* (1938) (*ibid.*, 1938, vol. 304, p. 92); *Nebraska v. Wyoming et al.* (1945) (*ibid.*, 1946, vol. 325, p. 589).

"... such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plane on which all States stand'" (*Connecticut v. Massachusetts* (1931) (*ibid.*, 1931, vol. 282, p. 670)).

Such a 50-50 division is feasible where only two system States are involved and agreement has been concluded to that effect; practical considerations render such simple solutions unrealistic in most cases.

<sup>93</sup> *Report of the Indus Commission and Printed Proceedings* (Simla, 1941; reprinted in Lahore, 1950), pp. 10-11; quoted in M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1964), vol. 3, p. 943.

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>94</sup>

At the subsequent point in the opinion the Tribunal declared:

France may use its rights; it may not disregard Spanish interests.

Spain may demand respect for its rights and consideration of its interests.<sup>95</sup>

## 2. INTERNATIONAL AGREEMENTS AND POSITIONS OF STATES

49. States have espoused the principle of equality of right in a number of treaties and pronouncements, although in earlier and simpler times the tendency was to "divide" the quantity of water.

50. The growth of diverse uses and the more recent adoption of a "management" approach to increasingly critical shared water resources gradually led system States—particularly where more than two States were concerned—to the more flexible and apt employment of the concept of equitable shares in the uses of waters, thus leaving behind the vexatious and unproductive concern over "ownership" of the perpetually transient waters.

51. Examples of recognition of the principle, often reflected as a half-and-half sharing, can be found in numerous bilateral agreements and pronouncements. Austria, in discussions with Bavaria, agreed to this position:

It is recognized that neither State enjoys exclusive rights over the total volume of the waters of contiguous waterways, but that, by virtue of general principles of law, each of them . . . may claim the right to exploit half the volume of the waters of the waterways in question.<sup>96</sup>

52. On behalf of the Sudan, the United Kingdom in 1929 assured Egypt that "the natural and historic rights of Egypt in the waters of the Nile" would be respected.<sup>97</sup>

<sup>94</sup> *Yearbook . . . 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068. For the full text of the award, see *United Nations, Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 285 (in French). The Tribunal was interpreting the Additional Act to the Treaty of Bayonne of 1866, observing that "when there is a matter for interpretation this should be done according to international law; . . . it is therefore permissible to take into consideration the spirit which governed the Pyrenees treaties and the generally accepted rules of international law" (see *Yearbook . . . 1974*, vol. II (Part Two), p. 195, document A/5409, para. 1063).

<sup>95</sup> *Yearbook . . . 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068. See also J. G. Laylin and R. L. Bianchi, "The role of adjudication in international river disputes: the Lake Lanoux case", *The American Journal of International Law* (Washington, D.C.), vol. 53, 1959, pp. 30-49; A. Gervais, "L'affaire du lac Lanoux", *Annuaire français de droit international*, 1960 (Paris), vol. VI, pp. 372-434. The record of relevant decisions by tribunals, international and quasi-international, is sparse, but see the summaries contained in: Whiteman, *op. cit.*, pp. 1050-1073; W. L. Griffin, "The use of waters of international drainage basins under customary international law", *The American Journal of International Law*, vol. 53, 1959, pp. 59-69; and the 1963 report of the Secretary-General on legal problems relating to the utilization and use of international rivers (*Yearbook . . . 1974*, vol. II (Part Two), pp. 187-199, document A/5409, part three).

<sup>96</sup> Austrian statement of principles regarding successive rivers, in "Legal aspects of hydro-electric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1 (1952), p. 49). At that time, however, Austria maintained that the waters of successive watercourses were at the complete disposition of the State within which the water was flowing (*ibid.*, p. 51).

<sup>97</sup> Exchange of notes between the United Kingdom and Egypt in



53. Despite earlier identification of the United States of America with the "absolute sovereignty" or Harmon doctrine, the United States Secretary of State, in connection with the ratification in 1945 of the 1944 Mexico-United States Rio Grande Treaty, stated that the two countries would now be able to "co-operate as good neighbours in developing the vital water resources of the rivers in which each has an equitable interest".<sup>98</sup>

54. In connection with differences with Canada over the interpretation of the 1909 Treaty between Canada

regard to the use of the waters of the River Nile for irrigation purposes (League of Nations, *Treaty Series*, vol. XCIII, p. 92).

<sup>98</sup>United States of America, *The Department of State Bulletin*, vol. XII, No. 304, April 1945, p. 742. See also United States of America, Memorandum of the Department of State of 21 April 1958, "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay River system under customary international law and the Treaty of 1909" (85th Congress, 2nd Session, Senate document No. 118, pp. 88-91), quoted in part by Whiteman *op. cit.*, pp. 939-942.

For the history of the tentative use and then the discrediting of the "Harmon doctrine", see Lipper, *loc. cit.*, pp. 20-40, and documents and works there cited, and K. Krakau, *Die Harmon Doktrin—eine These der Vereinigten Staaten zum internationalen Flussrecht* (Hamburg, Institut für Auswärtige Politik, 1966), especially pp. 29 *et seq.*, 36 *et seq.* and 86 *et seq.* The question is dealt with in G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1940), vol. 1, but with no reference to the opinion formulated by Attorney General Harmon in 1895 on whether certain diversions of the Rio Grande River within United States territory were in violation of Mexican rights according to the "principles of international law, independent of any treaty or convention" (*Official Opinions of the Attorneys General of the United States* (Washington, D.C., U.S. Government Printing Office, 1898), vol. XXI, pp. 280-283). Harmon's opinion was roundly criticized by international water law specialists. See, *inter alia*, the landmark work by H. A. Smith, *The Economic Uses of International Rivers* (London, King, 1931), pp. 40-43. In vol. 3 of the *Digest of International Law* prepared by M. M. Whiteman, the only reference to Harmon is in an excerpt from a "Memorandum of the Legal Adviser of the Department" [of State], Hackworth, of 26 May 1942, in which he reviews existing international agreements with respect to "the use of rivers and lakes having an international aspect" and where he concludes his review

"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"

(Whiteman, *op. cit.*, p. 950). Indeed, there is no evidence that the Department of State adopted Harmon's view or applied it in practice, except for the formal caveat in art. V of the 1906 Convention between Mexico and the United States of America, which stipulates that the United States does not "in any way concede the establishment of any general principle or precedent by the concluding of this treaty" (Organization of American States, *Ríos y lagos internacionales (utilización para fines agrícolas e industriales)*, 4th ed., rev. (Washington, D.C., 1971), p. 397), although the purpose of the convention as stated by the United States was to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes (Hackworth, *op. cit.*, p. 584). For the prompt retreat of the United States Attorneys General from the position taken by Harmon, see D. R. Deener, *The United States Attorneys General and International Law* (The Hague, Nijhoff, 1957), especially pp. 253-257 and 308-309. The former United States-Canada International Waterways Commission, however, had in 1906 taken the position "that the exercise of sovereign power over waters within the jurisdiction of a country cannot be questioned" (*Compiled Reports of the International Waterways Commission, 1905-1913*, Sessional Paper No. 19a, Canada, vol. 47, 1913, p. 363). But see the statement made on 24 January 1945 by F. B. Clayton, Counsel for the United States Section, International Boundary and Water Commission, United States and Mexico: "... Attorney General Harmon's opinion has never been followed" (United States of America, *Hearings before the Senate Committee on Foreign Relations*, 79th Congress, 1st session, part 1, pp. 97-98).

and the United States of America,<sup>99</sup> the United States, terming the "absolute sovereignty" or Harmon opinion approach as "special pleading"<sup>100</sup> and contrary to customary international law, took the position that:

1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each coriparian.

...

2. (a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.<sup>101</sup>

55. The Canadian position in the negotiation of the 1909 Treaty with the United States reportedly favoured an international judicial tribunal to decide all cases, existing and future, in accordance with principles to be set forth in the said treaty:

These principles, apparently believed in general to be existing law, were:

1. Navigation was not to be impaired by other uses.
2. Neither country could make diversions or obstructions which might cause injury in the other without the latter's consent.
3. Each country would be entitled to the use of half the waters along the boundary for the generation of power.
4. Each country would be entitled to an "equitable" share of water for irrigation.<sup>102</sup>

56. The position of the United States on such matters generally has been expressed as follows:

The view that a State has under existing international law the sovereign legal right (as distinguished from physical power) to use as it chooses the parts of a system of international waters while within its territory, is tantamount to a view that there is no international law except treaty law—that a State is subject only to such obligations as it has expressly agreed to. Under this view a State would have no legal obligations to its coriparians with regard to a system of international

<sup>99</sup>Treaty between the United States and Great Britain—Boundary Waters between the United States and Canada (United States of America, *Treaty Series*, No. 548 (Washington, D.C., 1924)).

<sup>100</sup>Quoting G. Schwarzenberger, *International Law*, 2nd ed. (London, Stevens, 1949), vol. 1, p. 13.

<sup>101</sup>United States of America, Memorandum of the Department of State, "Legal aspects of the use of systems of international waters . . ." (*op. cit.*), pp. 9, 59-62, 89-90). The provision of the Treaty in question was art. II, under which each party reserved to itself "exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters". In the dispute over Great Lakes diversions, however, Canada itself had spurned the absolute sovereignty approach. See United States of America, Department of State, *Papers relating to the Foreign Relations of the United States*, 1926 (Washington, D.C., 1941), vol. I, p. 580; Hackworth, *op. cit.*, p. 621; C. B. Bourne, "The Columbia River controversy", *The Canadian Bar Review* (Ottawa), vol. XXXVII, No. 2, May 1959, p. 444. For other rejections of the Harmon doctrine, see e.g. E. Jiménez de Aréchaga, "International legal rules governing use of waters from international watercourses", *Inter-American Law Review* (New Orleans, La.), vol. II, No. 2, 1960, p. 328, and I. Seidl-Hohenveldern, "Austrian views on international rivers", *Schriftenreihe Annales Universitatis Saraviensis, Rechts und Wirtschaftswissenschaftliche Abteilung* (Cologne, Heymann, 1962), p. 191.

<sup>102</sup>As summarized in United States of America, Memorandum of the Department of State, "Legal aspects of the use of systems of international waters . . ." (*op. cit.*), p. 58. The United States position at that time was, with regard to boundary water, "that while each country had interests which must be respected by the other, navigational uses were not necessarily superior to other uses, and equal division of the waters would not necessarily be equitable in all situations" (*ibid.*). "There is no evidence in the record that the United States negotiators intended the general reservation of jurisdiction and control to incorporate the Harmon opinion in the treaty . . . the truism that a State is sovereign in its territory does not lead to the conclusion that a State may legally make unlimited use of waters within its territory" (*ibid.*, pp. 60-61).

waters, or any other matter, until it had become a party to treaties with them. That this view is false is demonstrated by the fact of international relations that sovereignty is restricted by principles accepted as customary international law, in accordance with which the International Court of Justice, or other international tribunal, would pronounce judgment.

It is accepted legal doctrine that the existence of customary rules of international law, i.e. of practices accepted as law, may be inferred from similar provisions in a number of treaties [citations omitted].

Well over 100 treaties which have governed or today govern systems of international waters have been entered into all over the world. These treaties indicate that there are principles limiting the power of States to use systems of international waters without regard to injurious effects on neighboring States. These treaties restrict the freedom of action of at least one, and usually of both or all, of the signatories with regard to waters within their respective jurisdictions. The number of States parties to these treaties, their spread over both time and geography, and the fact that in these treaties similar problems are resolved in similar ways, make of these treaties persuasive evidence of law-creating international customs . . .<sup>103</sup>

57. Apart from the significant treaties just cited between Mexico and the United States and Canada and the United States, long lists have been compiled of provisions in international agreements that restrict water use or flow.<sup>104</sup> Illustrations of express recognition of the principles of equality of right and of equitable utilization by such agreements follow.

58. One of the oldest treaties that comprehends the equitable and reasonable use rule was that signed at Bayonne between Spain and France in 1866.<sup>105</sup> Portugal and Spain, in "Regulations concerning the conterminous rivers between the two nations", expressly determined in 1866 that their Frontier Treaty of 1864<sup>106</sup>

<sup>103</sup> *Ibid.*, p. 63, followed by an analysis of selected relevant treaties. A prior memorandum from the Office of the Legal Adviser of the United States Department of State had concluded, with respect to the use of water as between upper and lower riparian States: "... common interests are recognized and ... adjustments are made by agreement on the basis of comity and equity" ("Riparian rights as between countries", memorandum of 17 August 1944 by the Legal Adviser, G. H. Hackworth, quoted in Whiteman, *op cit.*, pp. 942-943). In 1924, the United States Congress acted to authorize co-operation with Mexico in a study regarding the equitable use of the waters of the Rio Grande below Fort Quitman; eventually negotiations, widened to include the Colorado, resulted in the 1944 treaty between the two countries. Accepting Mexico's suggestion in 1943 to refer technical aspects of the negotiations to the International Boundary and Water Commission, the United States advised that it "concurs fully with the concepts of the Government of Mexico to the effect that the problems to be solved looking to the desired just division of the waters of these two international streams comprehend primarily a mutual determination of sound and practical assumptions to provide the basis of a formula on equitable apportionment" (*ibid.*, pp. 945 and 958). On equitable utilization aspects, see also C. Meyers, "The Colorado Basin", *The Law of International Drainage Basins* (*op cit.*), pp. 538-540 and 571, and documents and works there cited.

<sup>104</sup> See Smith, *op cit.* (51 treaties from 1785 to 1930); "Legal aspects of hydro-electric development . . ." (E/ECE/136-E/ECE/EP/98/Rev. 1, annex 1) (some 40 additional treaties); A. M. Hirsch, "Utilization of international rivers in the Middle East—a study of conventional international law", *The American Journal of International Law*, vol. 50, 1956, pp. 81-100; F. Berber, *Die Rechtsquellen des Internationalen Wassernutzungsrechts* (Munich, Oldenberg, 1955)—English trans.: *Rivers in International Law* (London, Stevens, 1959).

<sup>105</sup> *British and Foreign State Papers, 1865-1866* (London, 1870), vol. 56, p. 226. See also the award in the *Lake Lanoux* arbitration, cited in para. 48 above.

<sup>106</sup> See especially art. 28 of the Treaty (*British and Foreign State Papers, 1871-1872* (London, 1877), vol. LXVII, p. 941). See also United Nations, *Legislative Texts and Treaty Provisions concerning*

had "provided that the waters . . . shall be used in common by the people of both kingdoms . . .", and therefore, "in order to prevent the artificial diversion of the course of the rivers, as well as to make the common use thereof practicable", found it "expedient to set forth and apply the recognized principles of international law in the matter".<sup>107</sup> Haiti and the Dominican Republic, in their Treaty of peace, friendship and arbitration of 1929, incorporated these provisions:

In view of the fact that rivers and other streams rise in the territory of one of the two States and flow through the territory of the other or serve as boundaries between them, the two High Contracting Parties undertake not to carry out or be a party to any constructional work calculated to change their natural course or to affect the water derived from their sources.

This provision shall not be so interpreted as to deprive either of the two States of the right to make just and equitable use, within the limits of their respective territories, of the said rivers and streams for the irrigation of the land or for other agricultural and industrial purposes.<sup>108</sup>

Austria and Bavaria, resolving a dispute over the waters tributary to the Schinsee after the First World War, came to this agreement, which recognizes that division simply by volume might not be the optimum solution:

(a) It is recognized that neither State enjoys exclusive rights over the total volume of the waters of contiguous waterways, but that, by virtue of general principles of law, each of them—apart from exceptions arising from special legal circumstances—may claim the right to exploit half the volume of the waters of the waterway in question;

(b) To ensure that the hydro-electric development of a particular waterway takes place under the most favourable economic conditions, it would be desirable, in each individual case, to seek by common agreement what manner of developing the hydro-electric resources of the waterway is calculated to give the highest yield from both the technical and economic standpoints;

(c) Should the study point to the conclusion that the most rational solution is not the sharing of the volume of the waters but some other form of exploitation such as a division based on the gradient of the river bed, the right to the harnessing, in one or the other State, of the hydro-power in question and to the use of the volume of water belonging to the other State will be conceded on condition that the economic interests of the renouncing State and the possible rights of private individuals concerned be safeguarded. That being so the latter State would not refuse to the other State, or to a national of the other State seeking the concession, the right of harnessing the volume of water to which it or he is entitled.<sup>109</sup>

59. Following an extensive review of State practice, the authors of one study were able, over 20 years ago, to find the following:

While practice indicates that a State may unilaterally develop a section of an international river that is within its territory, it seems safe to conclude that the nature and extent of such unilateral development is limited by the equitable doctrine that one [may] not use his property in a manner to interfere inequitably with the use by another of his property. This conclusion is supported by both the domestic jurisprudence of a large number of States and international

*the Utilization of International Rivers for other Purposes than Navigation* (Sales No. 63.V.4), p. 893.

<sup>107</sup> *British and Foreign State Papers, 1871-1872* (*op. cit.*), p. 952. By an exchange of notes, the two countries in 1912 agreed that "the two nations shall have the same rights in the border sections of the rivers, each accordingly being entitled to half the flow of water existing at the various seasons of the year" (United Nations, *Legislative Texts* . . . , p. 909).

<sup>108</sup> Art. X (League of Nations, *Treaty Series*, vol. CV, p. 225).

<sup>109</sup> As recorded in "Legal aspects of hydro-electric development . . ." (E/ECE/136-E/ECE/EP/98/Rev. 1, pp. 49-50).



agreements. Frequently, when a State contemplates a use which is expected to cause serious and lasting injury to the interests of another State in the river, development has not been undertaken until there has been agreement between the States. Such agreements do not follow any particular pattern but resolve immediate problems on an equitable basis . . .<sup>110</sup>

60. The United Kingdom Foreign Secretary instructed his representative in the negotiations with Egypt, which yielded the 1929 agreement concerning the Nile, to this effect:

The principle is accepted that the waters of the Nile, that is to say, the combined flow of the White and Blue Niles and their tributaries, must be considered as a single unit, designed for the use of the peoples inhabiting their banks according to their needs and their capacity to benefit therefrom; and, in conformity with this principle, it is recognized that Egypt has a prior right to the maintenance of her present supplies of water for the areas now under cultivation, and to an equitable proportion of any additional supplies which engineering works may render available in the future.<sup>111</sup>

The Governments of Egypt and Sudan, after discussing established rights with respect to Nile waters, agreed that any additional supplies must be apportioned equitably; however, agreement on the specifics of equitable division was not attained at that time.<sup>112</sup> In their 1959 Nile Waters Agreement, the rights of each party to certain quantities of water were confirmed in the context of a much wider agreement. Article 3, paragraph 2, of the Agreement provides:

. . . when the Republic of Sudan is ready to utilize its share according to the agreed programme, it shall pay to the United Arab Republic a share of all the expenses in the same ratio as the Sudan's share in benefit is to the total benefit of the project; provided that the share of either Republic shall not exceed one half of the total benefit of the project.<sup>113</sup>

And article 5, paragraph 2, stipulates:

As the riparian States, other than the two Republics, claim a share in the Nile waters, the two Republics have agreed that they shall jointly consider and reach one unified view regarding the said claims. And if the said consideration results in the acceptance of allotting an amount of the Nile water to one or the other of the said States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan.<sup>114</sup>

61. In the treaty of 1933 between Brazil and Uruguay on the legal status of their frontier, it was provided that "each of the two States shall be entitled to dispose of

half the water flowing in the frontier watercourses".<sup>115</sup> Haiti and the Dominican Republic, in their Treaty of peace, friendship and arbitration of 1929, agreed as follows:

In view of the fact that rivers and other streams rise in the territory of one of the two States and flow through the territory of the other or serve as boundaries between them, the two High Contracting Parties undertake not to carry out or be a party to any constructional work calculated to change their natural course or to affect the water derived from their sources.

This provision shall not be so interpreted as to deprive either of the two States of the right to make just and equitable use, within the limits of their respective territories, of the said rivers and streams for the irrigation of the land or for other agricultural and industrial purposes.<sup>116</sup>

62. The 1921 Treaty of friendship between Persia and the Russian Socialist Federal Soviet Republic provided that the two States "shall have equal rights of usage over the Atrak River and the other frontier rivers and waterways".<sup>117</sup> In its final Protocol, the Commission on the delimitation of the Turkish-Syrian border declared in 1930:

As the vicinity of the Tigris imposes specific obligations on the riparians, it becomes necessary to establish rules concerning the rights of each sovereign State in its relations with the other.

All questions, such as navigation, fishing, industrial and agricultural utilization of the waters, and the policing of the river, shall be resolved on the basis of complete equality.<sup>118</sup>

And in the 1946 Treaty of friendship and neighbourly relations between Iraq and Turkey, "the maintenance of a regular water supply and the regulation of the water flow . . . with a view to avoiding . . . floods during the annual periods of high water" was stipulated, and the importance of conservation works was recognized with respect to the Tigris and Euphrates rivers and their tributaries. Turkey agreed, moreover, to inform Iraq of its plans for conservation works on the rivers or their tributaries "in order that these works may as far as possible be adapted, by common agreement, to the interests of both Iraq and Turkey".<sup>119</sup>

63. The principle of division has in some instances been extended to power generated from the waters of an international watercourse. In 1949 Italy and Switzerland agreed, with respect to the construction and operation of a dam in the Reno di Lei, that 30 per cent of the power produced would be for Italy and 70 per cent for Switzerland.<sup>120</sup>

<sup>110</sup>C. Eagleton, "The law and uses of international rivers", research project conducted under the auspices of the New York University School of Law, 30 June 1959, pp. 4-6 (mimeo.), reproduced in Whiteman, *op. cit.*, pp. 874-875.

<sup>111</sup>*Egypt No. 1 (1928)—Papers regarding Negotiations for a Treaty of Alliance with Egypt*, Cmd. 3050 (London, H.M. Printing Office, 1928), p. 31.

<sup>112</sup>Sudan, Ministry of Irrigation and Hydro-Electric Power, *The Nile Waters Question* (Khartoum, 1955), p. 13. The exchange of notes of 1929 between the United Kingdom and Egypt concerning the utilization of the Nile waters provided that any increase in the use of Nile waters in Sudan would be such "as does not infringe Egypt's natural and historical rights . . . and its requirements of agricultural extension, subject to satisfactory assurances as to the safeguarding of Egyptian interests as detailed in later paragraphs" (League of Nations, *Treaty Series*, vol. XCIII, p. 44).

<sup>113</sup>United Nations, *Treaty Series*, vol. 453, p. 70.

<sup>114</sup>*Ibid.*, p. 72. For detailed documentation and discussion of the considerations of equity with respect to Nile waters and the positions of the other riparians, see especially S. Hosni, "The Nile regime", *Revue égyptienne de droit international* (Cairo), vol. 17, 1961, p. 70; G. Badr, "The Nile waters question: background and recent development" (*ibid.*, vol. 15, 1959, p. 94); Whiteman, *op. cit.*, pp. 1002-1013; Garretson, "The Nile Basin", *The Law of International Drainage Basins* (*op. cit.*), pp. 270-292, and works there cited.

<sup>115</sup>Article XIX (League of Nations, *Treaty Series*, vol. CLXXXI, p. 85).

<sup>116</sup>Art. 10 (*ibid.*, vol. CV, p. 225).

<sup>117</sup>Art. 3 (*ibid.*, vol. IX, p. 403). The Persia-USSR Agreement of 1926 defined the parties' rights over the 14 streams involved more specifically; for example, seven tenths of the flow of the Tedjen River were apportioned to the USSR and three tenths to Persia, and after Persian needs were met, the USSR had the right to the remaining flow; most rivers were equally divided (United Nations, *Legislative Texts* . . . , p. 371).

<sup>118</sup>France, Ministry for Foreign Affairs, *Rapport à la Société des Nations sur la situation de la Syrie et du Liban (année 1930)* (Paris, 1931), annex 1, p. 177.

<sup>119</sup>United Nations, *Treaty Series*, vol. 37, pp. 287 and 291. For analyses, additional examples and qualifications for the region, see Hirsch, *loc. cit.*, pp. 84-94 and 98-100. See also the provisions on sharing of the 1953 Agreement between Jordan and Syria concerning the utilization of the waters of the Yarmuk (United Nations, *Treaty Series*, vol. 184, p. 15).

<sup>120</sup>Whiteman, *op. cit.*, p. 1034. See also the 1953 agreement

(Continued on next page.)

64. In 1938, Guatemala and El Salvador concluded a boundary treaty which contains this stipulation: "Each Government reserves the right to utilize half the volume of water in frontier rivers, either for agricultural or industrial purposes; . . ." <sup>121</sup> A subsequent draft treaty between the two countries guaranteed Guatemala a stipulated amount of electricity, and indemnification for the flooding of Guatemalan territory, from a power and storage dam project undertaken by El Salvador on the Lempa River to regulate the waters of Lake Güija (shared by the two countries) and to generate electricity. <sup>122</sup> Uruguay and Argentina, in their 1946 Agreement concerning the utilization of the rapids of the Uruguay River in the Salto Grande area and its Additional Protocol, agreed upon use of the river's waters in common, in equal parts; electricity from the dam at Salto Grande, now completed, was included, although Argentina was allowed to use more than its 50 per cent share initially. <sup>123</sup>

65. One of the prime cases of equitable apportionment or utilization is that of the modern Indus Waters Treaty of 1960 between India and Pakistan, concluded with the participation of the World Bank. <sup>124</sup> The settlement was the culmination of an involved process of negotiation. <sup>125</sup> And Denmark and Germany, in their 1922 Agreement relating to frontier watercourses, expressed the basic principle as follows:

The proprietors on both banks of any one of the watercourses mentioned in article 1 have equal rights as regards the use of the water, so that if irrigation works are erected upon one bank only half of the water of the watercourses may be assigned to these works. The Frontier Water Commission shall establish detailed regulations for the apportionment of the water in connection with the erection of irrigation works.

If, however, all the proprietors and usufructuaries of the land on the opposite bank . . . give their assent, more than half the water may be applied to irrigation works on one bank. <sup>126</sup>

66. While agreements of recent vintage between and among system States have carried these principles forward, they embody as well the more comprehensive approach of multiple uses, including hydropower, plus concern for certain harmful effects of water, such as floods and obstructions to navigation, even where the agreements were not system-wide or oriented towards joint management. Thus in a 1957 agreement, Norway and the USSR declared that they were "desirous . . . of utilizing the waterpower of the Pasvik (Paatso) river . . . for their mutual benefit on the basis of an equitable apportionment". <sup>127</sup> Austria and the Federal Republic

of Germany, together with the Free State of Bavaria, entered into an agreement in 1952 for the purpose of promoting the "joint development and utilization of water power on the frontier section of the Danube". <sup>128</sup>

67. As recently as 1973, Paraguay and Brazil concluded a treaty concerning the hydroelectric utilization of the water resources of the Paraná River, resulting specifically in the immense Itaipú project, which shares power in traditional terms:

The energy produced by the hydroelectric utilization scheme referred to in article I shall be divided into equal parts between the two countries and each one shall have the right to acquire . . . the energy not utilized by the other country for its own consumption. <sup>129</sup>

In article I, the two countries agreed "to utilize for hydroelectric purposes, jointly and in accordance with the provisions of this Treaty and annexes thereto, the water resources of the Paraná River owned in condominium by the two countries". <sup>130</sup>

68. Yugoslavia and its neighbours, on the other hand, have taken a comprehensive systems and water economy approach. The Agreement with Albania of 1956 is illustrative:

1. The contracting parties undertake, pursuant to the provisions of this Agreement, to examine and to resolve by agreement all questions of water economy, including measures and works which may affect the quantity and quality of the water and which are of interest to both or either of the contracting parties, having due regard to the maintenance of a common policy in water economy relations and recognizing the rights and obligations arising out of such policy.

2. The provisions of this Agreement shall apply to all water economy questions, measures and works on watercourses which form the State frontier and watercourses, lakes and water systems which are intersected by the State frontier (especially Lake Ohrid, the Crni Drim, the Beli Drim, Lake Skadar and the Bojana), and which are of interest to both contracting parties, and in particular to:

- (a) The utilization of water power;
- (b) The regulation and canalization of watercourses and lakes and the maintenance of their beds;
- (c) The discharge of water, drainage and similar measures;
- (d) Protection against flooding;
- (e) Storage and retention works;
- (f) Water supply and pipe-laying;
- (g) Navigation;
- (h) Ground water;
- (i) Protection against soil erosion;
- (j) The utilization of water in agriculture;
- (k) Hydrological studies, the preparation of projects and the execution of works;
- (l) Fishing;
- (m) The apportionment of the cost of survey, planning and construction works, and of operation and maintenance;
- (n) The exchange of data and plans and of information on the above questions; and
- (o) The exchange of data on water levels.

3. The expression "water system" shall mean, in this Agreement, all watercourses (surfaces or underground, natural or artificial), installations, measures and works which may affect watercourses from the standpoint of water economy, and installations forming or intersected by the State frontier.

4. The expression "water economy" shall mean, in this Agreement, everything covered by the sense of the French expression "régime des eaux".

(Footnote 120 continued.)

(exchange of notes) between Portugal and the United Kingdom on, *inter alia*, the Shiré Valley project survey (hydro-electric power and irrigation) (United Nations, *Treaty Series*, vol. 175, p. 14).

<sup>121</sup> League of Nations, *Treaty Series*, vol. CLXXXIX, p. 295.

<sup>122</sup> Signed 15 April 1957. See Whiteman, *op. cit.*, p. 1036.

<sup>123</sup> United Nations, *Treaty Series*, vol. 671, p. 26. The 1913 Convention between France and Switzerland on the management of the hydraulic power of the Rhone River stipulated in art. 5 that each party was entitled to a share of the power in proportion to the "fall of the river at right angles to the portions of the banks belonging to it" (United Nations, *Legislative Texts* . . . , p. 709).

<sup>124</sup> United Nations, *Treaty Series*, vol. 419, p. 125.

<sup>125</sup> For the explication and analysis, see R. Baxter, "Thé Indus Basin", *The Law of International Drainage Basins* (*op. cit.*), pp. 443-485, and documents and works there cited.

<sup>126</sup> Art. 35 (League of Nations, *Treaty Series*, vol. X, p. 221).

<sup>127</sup> United Nations, *Treaty Series*, vol. 312, p. 274.

<sup>128</sup> United Nations, *Legislative Texts* . . . , p. 476.

<sup>129</sup> Art. XIII (United Nations, *Treaty Series*, vol. 923, p. 95).

<sup>130</sup> *Ibid.*, pp. 92-93.

5. The question of fishing shall be regulated by a separate Protocol which shall constitute annex II to this Agreement.<sup>131</sup>

The earlier Frontier Treaty between the Soviet Union and Romania, concluded in 1949, is less systematic but essentially of the same genre.<sup>132</sup>

69. Many modern treaties apparently take the principle of shared rights or common use as a presumed point of departure and proceed, without articulating any general rule, to spell out the specifics of their sharing of responsibilities, of the arrangements for various kinds of improvement and maintenance works, of co-ordination of activities (including information and data collection and exchange) and settlement of differences, usually through the creation of a joint commission or similar institution; the notion of equal division of water by volume is now ordinarily absent. The Agreement between Czechoslovakia and Hungary of 1954 concerning the settlement of technical and economic questions relating to frontier watercourses is a prime example.<sup>133</sup>

70. There also exists a series of quite recent agreements among developing countries in which the system States have felt it not only unnecessary to iterate their respective rights or shares, but have instead taken practical steps to bring about integrated management of their international watercourse systems. The Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin, entered into in 1977 by Burundi, Rwanda and the United Republic of Tanzania, is the most recent and far-reaching example.<sup>134</sup> Similarly comprehensive approaches, designed to achieve not just "equitable" but optimum utilization by fully international, system-wide organizations have been taken by some of or all the system States of several other international watercourses.<sup>135</sup> These include the Senegal Basin,<sup>136</sup> the

Niger Basin,<sup>137</sup> the Gambia Basin,<sup>138</sup> and the Lake Chad Basin.<sup>139</sup> In such arrangements for the integrated development, use and protection of shared water resources, the residual duty to utilize waters equitably has been taken for granted and surpassed by recognition of the need to achieve the optimum use of waters rationally, by installing machinery for system-wide planning and implementation of the system States' projects and programmes as co-ordinated or joint ventures.

71. The Treaty for Amazonian co-operation indicates the parties'

... common aim of pooling the efforts being made, both within their respective territories as well as among themselves, to promote the harmonious development of the Amazon region, to permit an equitable distribution of the benefits of said development among the contracting parties so as to raise the standard of living of their people ...<sup>140</sup>

Article I of the Treaty commits the parties "to undertake joint actions and efforts to promote the harmonious development of their respective Amazonian territories in such a way that these joint actions produce equitable and mutually beneficial results and achieve also the preservation of the environment, and the conservation and rational utilization of the natural resources of those territories".<sup>141</sup> The approach of regarding the rights of a system State as essentially "against" those of others, the defensive attitude of rivals<sup>142</sup> or contenders—each guarding his own—has been replaced by affirmative participation in some of or all the activities affecting available water resources, including flood control, river regulation, disease prevention, anti-pollution measures, drought mitigation and land use planning, as well as water uses; the costs of these joint undertakings are shared equitably.<sup>143</sup>

<sup>131</sup> Art. 1 (United Nations, *Legislative Texts* . . . , pp. 441–442). See also the 1954 Agreement between Yugoslavia and Austria and annexed Statute (United Nations, *Treaty Series*, vol. 396, pp. 100 and 108); the 1958 Agreement between Yugoslavia and Bulgaria and annexed Statute (*ibid.*, vol. 367, pp. 104 and 114); and the 1955 Agreement between Yugoslavia and Romania and annexed Statute (United Nations, *Legislative Texts* . . . , pp. 928 and 931).

<sup>132</sup> *Ibid.*, p. 919.

<sup>133</sup> United Nations, *Treaty Series*, vol. 504, p. 254. See also, *inter alia*, the 1959 Agreement between Greece and Yugoslavia (*ibid.*, vol. 363, p. 135); the 1970 Agreement between Greece and Yugoslavia (see *Yearbook* . . . 1974, vol. II (Part Two), p. 319, document A/CN.4/274, para. 305); the agreements of 1954 (Kosi project) and 1959 (Gandak project) between Nepal and India (United Nations, *Legislative Texts* . . . , pp. 290 and 295); and the 1946 Protocol between Iraq and Turkey (United Nations, *Treaty Series*, vol. 37, p. 287).

<sup>134</sup> The parties commit themselves to develop in the basin not only the uses of their shared water resources, but also "agriculture, mining industries and tourism" in general. The Agreement focuses on the powers, functions and structuring of their international organization for these purposes; it is open for accession by Uganda, the fourth system State. In the 1969 Treaty of Brasilia, Argentina, Bolivia, Brazil, Paraguay and Uruguay agreed to combine their efforts for the purpose of promoting the harmonious development and physical integration of the River Plate Basin (United Nations, *Treaty Series*, vol. 875, p. 11); see also *Yearbook* . . . 1974, vol. II (Part Two), pp. 291–292, document A/CN.4/274, para. 61.

<sup>135</sup> See the language of "sharing" and "of making the optimum utilization of the water resources of their region by joint efforts" in the preamble to the 1977 Bangladesh–India Agreement on sharing of the Ganges' waters (*International Legal Materials* (Washington, D.C., vol. XVII, No. 1, Jan. 1978), p. 103).

<sup>136</sup> The Organization for the Development of the Senegal River, including a General Secretariat, was created by the Nouakchott Convention of 11 March 1972 between Mali, Mauritania and Senegal; on the same date, a separate Convention was adopted on the Statute

of the Senegal River (TD/B/609/Add.1, vol. IV). In 1975, the organization was restructured and an Office of the High Commissioner created. These developments had been preceded in 1968 by a Statute of the Organization of the Senegal Riparian States (United Nations, *Treaty Series*, vol. 672, p. 251), on the basis of a 1963 Convention (see *Yearbook* . . . 1974, vol. II (Part Two), p. 289, document A/CN.4/274, paras. 36–39) and of a 1964 Convention (*ibid.*, pp. 289–290, paras. 45–50).

<sup>137</sup> See the 1963 Act of Niamey regarding navigation and economic co-operation between the States of the Niger Basin (United Nations, *Treaty Series*, vol. 587, p. 11), concluded by all nine system States, and the 1964 Agreement concerning the Niger River Commission and navigation and transport on the River Niger (*ibid.*, p. 21).

<sup>138</sup> See *inter alia* the 1965 Convention between Gambia and Senegal for the integrated development of the Gambia River Basin (*Cahiers de l'Afrique équatoriale* (Paris), 6 March 1965); the 1968 Agreement on the integrated development of the Gambia River Basin (Senegalo–Gambian Permanent Secretariat, *Senegalo–Gambian Agreements, 1965–1976* (Banjul), No. 3); the 1976 Convention on the establishment of the Co-ordinating Committee for the Gambia River Basin project (*ibid.*, No. 23).

<sup>139</sup> See the 1964 Convention and Statute relating to the development of the Chad Basin (*Journal officiel de la République fédérale du Cameroun* (Yaoundé), 4th year, No. 18, 15 Sept. 1964, p. 1003).

<sup>140</sup> From the preamble. The text of the Treaty was distributed to the General Assembly as document A/35/580 (to be issued as No. 19194 in the United Nations *Treaty Series*). The signatories are Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela.

<sup>141</sup> *Ibid.*, To this end, they are to "exchange information and prepare operational agreements and understandings" (*ibid.*). See also the 1971 Agreement between Finland and Sweden on frontier waters (United Nations, *Treaty Series*, vol. 825, p. 272).

<sup>142</sup> The word "rival" derives from the Latin *rivalis*, i.e. one living on the opposite bank of a stream from another.

<sup>143</sup> See e.g. the 1961 Treaty between Canada and the United States

(Continued on next page.)

72. The more traditional approach, however, is still employed in some recent agreements. For example, the preamble of the 1971 Convention between Ecuador and Peru invokes the doctrine of reasonable and equitable utilization and the principles of the 1933 Declaration of Montevideo.<sup>144</sup> A Mixed Commission was created and multipurpose utilizations and the exchange of data were also provided for.<sup>145</sup>

### 3. CURRENT STATE OF DOCTRINE

73. Basing themselves on the practice of States, reviewed illustratively above, virtually all the commentators<sup>146</sup> writing in the field sustain the existence of equitable utilization as a rule of general international law where the system States have conflicting uses or plans for the further development of their shared water resources.<sup>147</sup>

74. One of the earliest and most influential studies was by H. A. Smith, in 1931, based on a comprehensive survey of treaties. He distilled the following legal principles:

(1) . . . every river system is naturally an indivisible unit, and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions. It is the positive duty of every Government concerned to co-operate to the extent of its power in promoting this development, though it

cannot be called upon to imperil any vital interest or to sacrifice without full compensation and provision for security any other particular interest of its own, whether political, strategic or economic, which the law of nations recognizes as legitimate . . .

The following inferences may reasonably be drawn:

(2) No State is justified in taking unilateral action to use the waters of an international river in any manner which causes or threatens appreciable injury to lawful interests of any other riparian State.

(3) No State is justified in opposing the unilateral action of another in utilizing waters, if such action neither causes nor threatens any appreciable injury to the former State.

(4) Where any proposed employment of waters promises great benefits to one State and only minor detriment to another, it is the duty of the latter State to acquiesce in the employment proposed, subject to full compensation and adequate provision for future security.

(5) Where any proposed employment of waters by one State threatens to injure the legitimate and vital interests of another, the latter is justified in offering an absolute opposition to the employment proposed but any difference as to the existence or non-existence of such a vital interest should be regarded as a justifiable dispute . . .

(6) Where the differences between States relate to technical matters, their solution, failing direct agreement, should be referred to international commissions possessing the appropriate technical qualifications.

(9) Generally it is the duty of all riparian States to consult fully and freely with one another with regard to all questions that may arise concerning the use of international rivers, whether navigable or not, and to abstain from any unilateral action that may affect the interests of other riparian States without giving these States every opportunity of studying and expressing their opinion upon the questions involved.<sup>148</sup>

75. Sir Humphrey Waldock, with Brierly, found "that some broad principles of international river law have now come into existence, though their precise formulation may still remain to be settled". He stated them as follows:

(1) Where a river system drains the territories of two or more States, each State has the right to have that river system considered as

(Footnote 143 continued)

of America relating to co-operative development of the water resources of the Columbia River Basin and subsequent agreements related thereto (United Nations, *Treaty Series*, vol. 542, p. 244, and vol. 714, p. 298), and Johnson, *loc. cit.*, pp. 167-171, 216-241, and documents and works there cited. See also the 1973 Treaty concerning the Plata River and its maritime outlet between Argentina and Uruguay (see *Yearbook . . . 1974*, vol. II (Part Two), pp. 298-300, document A/CN.4/274, paras. 115-130); and the 1967 Treaty between Austria and Czechoslovakia concerning the regulation of water management questions relating to frontier waters (United Nations, *Treaty Series*, vol. 728, p. 352).

<sup>144</sup>In regard to this set of principles on the agricultural and industrial uses of international rivers, see para. 78 below.

<sup>145</sup>See especially arts. 1-7 of the Convention (Ecuador, *Registro oficial* (Quito), 2nd year, No. 385, 4 January 1972, p. 1).

<sup>146</sup>An exception is Berber, *Rivers in International Law*, *op. cit.*; however, Berber takes a restrictive view of customary international law as his point of departure. See in that connection J. Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", *Revue égyptienne de droit international* (Cairo), vol. 16, 1960, pp. 30-31; Barberis, "L'élément matériel de la coutume internationale d'après la Cour de La Haye", *Nederlands Tijdschrift voor Internationale Recht* (Leyden), vol. XIV, 1967, p. 367; R. D. Hayton, "The formation of the customary rules of international drainage basin law", *The Law of International Drainage Basins* (*op. cit.*), pp. 834-895, and works there cited.

<sup>147</sup>See e.g. J. Dräger, *Die Wasserentnahme aus internationalen Binnengewässern* (Bonn, Röhrscheid, 1970); Griffin, *loc. cit.*, pp. 50-80; Lipper, *loc. cit.*; Andrassy, *loc. cit.*, pp. 23-40; J. L. Brierly, *The Law of Nations*, 6th ed., rev., H. Waldock, ed. (Oxford, Clarendon Press, 1963), pp. 231-232; F. Villagrán Kramer, "El aprovechamiento de las aguas del lago de Güija", *Revista de la Asociación Guatemalteca de Derecho Internacional*, No. 3, Jan. 1959, pp. 95-121; Barberis, *Los recursos . . .* (*op. cit.*), pp. 35-45, and works and examples there cited; R. B. Bilder, "International law and natural resources policies", *Natural Resources Journal* (Albuquerque, N.M.), vol. 20, 1980, p. 451; E. Hartig, *Internationale Wasserversorgung und Internationales Recht* (Vienna, Springer, 1955). See also Asian-African Legal Consultative Committee, *Report of the Twelfth Session* (Colombo, 18-27 Jan. 1971) (New Delhi, 1972), containing the report of the Sub-Committee on the Law of International Rivers, for various proposals on the subject, and *Report of the Eleventh Session* (Accra, 19-29 Jan. 1970) (New Delhi), pp. 191-240, and works and documents there cited, all of which embrace equitable utilization.

<sup>148</sup>Smith, *op. cit.*, p. 150. Treatise writers had earlier stated similar conclusions, drawing chiefly on "the law of international neighbourhood rights". See e.g. E. Caratheodory, *Du droit international concernant les grands cours d'eaux* (Leipzig, Brockhaus, 1861), p. 32; L. von Bar, "L'exploitation industrielle des cours d'eaux internationaux au point de vue du droit international", *Revue générale de droit international public* (Paris), vol. XVII, 1910, p. 281; A. Lederle, *Das Recht der internationalen Gewässer unter besonderer Berücksichtigung Europas* (Mannheim, Bensheimer, 1920), pp. 51 *et seq.* and 60 *et seq.*; H. P. Farnham, *The Law of Waters and Water Rights; International, National, State, Municipal and Individual, including Irrigation, Drainage and Municipal Water Supply* (Rochester, N.Y., The Lawyers Co-operative Publishing Co., 1904); G. R. Björkstén, *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht* (Helsinki, Tilgmann, 1925), pp. 8 and 166 *et seq.*; P. Fauchille, *Traité de droit international public*, 8th ed., rev., *Manuel de droit international public* prepared by H. Bonfils (Paris, Rousseau, 1925), vol. I, part 2, pp. 450 *et seq.* Similar conclusions will be found, for example, in C. Sosa-Rodríguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (Paris, Pedone, 1935); A. W. Quint, "Nouvelles tendances dans le droit fluvial international", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XII, 1931, p. 325; E. Kaufmann, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1935-IV* (Paris, Sirey, 1936), vol. 54, p. 309; G. Sauser-Hall, "L'utilisation industrielle des fleuves internationaux", *Recueil des cours . . . 1953-II* (Leyden, Sijthoff, 1955), vol. 83, pp. 555 and 557; P. Fedozzi, *Traitato di diritto internazionale* (Padua, CEDAM, 1933); O. Gönnerwein, *Die Freiheit der Flussschifffahrt* (Stuttgart, Kohlhammer, 1940), p. 65 *et seq.*; "Legal aspects of hydro-electric development . . ." (E/ECE/136-E/ECE/EP/98/Rev. 1).

a whole and to have its own interests taken into account together with those of other States;

(2) each State has in principle an equal right to make the maximum use of the water within its territory, but in exercising this right must respect the corresponding rights of other States;

(3) where one State's exercise of its rights conflicts with the water interests of another, the principle to be applied is that each is entitled to the equitable apportionment of the benefits of the river system in proportion to their needs and in the light of all the circumstances of the particular river system;

(4) a State is in principle precluded from making any change in the river system which would cause substantial damage to another State's right of enjoyment without that other State's consent;

(5) it is relieved from obtaining that consent, however, if it offers the other State a proportionate share of the benefits to be derived from the change or other adequate compensation for the damage to the other State's enjoyment of the water;

(6) a State whose own enjoyment of the water is not substantially damaged by a development in the use of a river beneficial to another State is not entitled to oppose that development.<sup>149</sup>

76. The relevant portions of the "Salzburg resolution" of the Institute of International Law and of the Helsinki Rules of the International Law Association have already been quoted.<sup>150</sup> However, reference to some additional collective conclusions of learned professional bodies is merited. At the Tenth (Buenos Aires) Conference of the Inter-American Bar Association in 1957, a resolution was adopted which reads in part:

I. . . . the following general principles, which form part of existing international law, are applicable to every watercourse or system of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States (such a system being referred to hereinafter as a "system of international waters"):

1. Every State having under its jurisdiction a part of a system of international waters has the right to make use of the waters thereof insofar as such use does not affect adversely the equal right of the States having under their jurisdiction other parts of the system.

2. States having under their jurisdiction a part of a system of international waters are under a duty, in the application of the principle of equality of rights, to recognize the right of the other States having jurisdiction over a part of the system to share the benefits of the system . . . ;

3. States having under their jurisdiction part of a system of international waters are under a duty to refrain from making changes in the existing regime that might affect adversely the advantageous use by one or more other States having a part of the system under their jurisdiction except in accordance with: (i) an agreement with the State or States affected or (ii) a decision of an international court or arbitral commission; . . .<sup>151</sup>

77. The following year, the International Law Association adopted its "New York resolution", the most pertinent portions of which are as follows:

*Agreed principles of international law*

1. A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal).

<sup>149</sup> Brierly, *op cit.*, pp. 231–232. This restatement may be compared with the somewhat less advanced formulation by the Institute of International Law in its Madrid resolution of 1911, "International regulations regulating the use of international watercourses" (*Annuaire de l'Institut de droit international*, 1911 (Paris), vol. 24, pp. 365–367). See also Griffin, *loc. cit.*, pp. 78–79.

<sup>150</sup> See footnotes 81 and 83 above.

<sup>151</sup> Inter-American Bar Association, *Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957* (Buenos Aires, 1958), p. 82. (The text of the resolution is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.) See also Inter-American Bar Association, *Principles of Law Governing the Uses of International Rivers and Lakes* (Washington, D.C., U.S. Government Printing Office, 1958), pp. 4–5.

2. Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.

3. Co-riparian States are under a duty to respect the legal rights of each co-riparian State in the drainage basin.<sup>152</sup>

78. An important precedent for the ILA Committee members was the Declaration adopted by the Seventh International Conference of American States at Montevideo in 1933 on the industrial and agricultural uses of international rivers, which emphasizes affirmative co-operation and reads in part:

1. In case that, in order to exploit the hydraulic power of international waters for industrial or agricultural purposes, it may be necessary to make studies with a view to their utilization, the States on whose territories the studies are to be carried on, if not willing to make them directly, shall facilitate by all means the making of such studies on their territories by the other interested State and for its account.

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 over the margin under its jurisdiction.<sup>153</sup>

79. A number of international organs have in recent years taken clear stands in favour of strengthened co-operation among system States in view of the perceived need for more rational utilization of the world's shared water resources. Thus the Committee on Natural Resources of the United Nations Economic and Social Council received a report from the Secretary-General which emphasized that a shift had taken place from the early period of minimal international co-ordination to a more active approach in light of "the rapid expansion of increasingly complex societies in most parts of the world . . . Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers".<sup>154</sup> International water resources, defined as water in a natural hydrological system shared by two or more countries, offer a unique kind of opportunity for the promotion of international amity.

The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action. Water is a vital resource, the benefits from which can be multiplied through joint efforts and the harmful effects of which may be prevented or removed through joint efforts. . . . A characteristic trend in more recent international arrangements for water resources development has been the broadening of the scope and diversity of the parties' international water development activities . . .<sup>155</sup>

<sup>152</sup> ILA, *Report of the Forty-eighth Conference, New York, 1958* (London, 1959), pp. viii–ix. For the discussion on the topic "uses of the waters of international rivers" at the Conference and in the report of the ILA Committee, *ibid.*, pp. 28–102. (The text of the "agreed principles" is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 204, document A/5409, para. 1082).

<sup>153</sup> Carnegie Foundation for International Peace, *The International Conferences of American States, First Supplement, 1933–1940* (Washington, D.C., 1940), p. 88. (The text is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I, A.)

<sup>154</sup> E/C.7/2/Add.6, p. 1, para. 1.

<sup>155</sup> *Ibid.*, p. 2, para. 3.

In response, the Committee on Natural Resources included a section on objectives and priorities in the field of water resources in its "Guidelines for action in the development of natural resources",<sup>156</sup> examined the economic and technical aspects of international river basin development<sup>157</sup> and recommended the holding of a United Nations water conference.<sup>158</sup> Meanwhile, ECE had adopted, as part of its declaration of policy on water pollution control, a series of principles recommended by a meeting of governmental experts, including these points:

1. Water pollution control constitutes a fundamental governmental responsibility and calls for close international collaboration . . . All problems concerning the rational utilization of water resources should be viewed in relation to the special features of each drainage area.

. . .

9. States bordering on the same surface water should reach an understanding to the effect that such water represents for them a common asset, the use of which should be based on the desire to reconcile their respective interests to the greatest possible extent . . .<sup>159</sup>

In 1971, the ECE Committee on Water Problems approved recommendations concerning river basin management, citing

. . . growing demands, including more stringent needs for high quality water, in conjunction with the natural fluctuations and the growing pollution of the water resources, [which] have caused water shortages to occur in more and more regions . . . only careful planning and rational management of the allocation, utilization and conservation of water resources as well as a disciplined use of water for the various legitimate purposes can assure that requirements will be met in the future and that the natural environment will be improved and preserved . . .<sup>160</sup>

80. The Asian-African Legal Consultative Committee devoted several years of study to these problems, creating an Inter-Sessional Sub-Committee on International Rivers in 1967. Several drafts were considered—all embracing the equitable utilization principle. In 1971, a new Sub-Committee was appointed which brought forth a report containing a series of revised draft "propositions". The most relevant for present consideration is proposition III, paragraph 1: "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."<sup>161</sup>

<sup>156</sup>See *Official Records of the Economic and Social Council, Fifty-second Session, Supplement No. 5* (E/5097 and Corr. 1), p. 10, para. 20.

<sup>157</sup>*Ibid.*, *Fifty-fourth Session, Supplement No. 4* (E/5247), pp. 27-29, paras. 129-137.

<sup>158</sup>*Ibid.*, p. 25, para. 114.

<sup>159</sup>*Ibid.*, *Forty-first Session, Supplement No. 3* (E/4177), part III. The ECE Committee on Water Problems made recommendations in 1970, focusing on pollution by oil and oil products, that broadened the concern to include ground waters (E/ECE/WATER/7, annex I).

<sup>160</sup>E/ECE/WATER/9, annex II (preamble). See also United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), Especially pp. 5-6 and 174-184, paras. 14-20 and 553-586.

<sup>161</sup>Asian-African Legal Consultative Committee, *Report of the Fourteenth Session* (New Delhi, 10-18 January 1973), (New Delhi, 1974), p. 100. For the text of the draft propositions and the Rapporteur's commentary, *ibid.*, p. 9 *et seq.* After extended discussion, the final draft version parallels much of the Helsinki Rules. (The text of the revised draft propositions is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.)

81. The Council of Europe, whose joint Working Party on Fresh Water Pollution Control in 1965 had noted "the existence of the principle that a State must not allow international water passing through its territory to be used without proper regard for the legitimate interests of neighbouring States",<sup>162</sup> promulgated its European Water Charter two years later.<sup>163</sup> The European Water Charter declares: "Water knows no frontiers; as a common resource it demands international co-operation."<sup>164</sup> And: "Within a drainage basin, all uses of surface and underground waters are interdependent and should be managed bearing in mind their interrelationship."<sup>165</sup> The Committee of Ministers of the Council of Europe established an *Ad Hoc* Committee of Experts in 1970 to prepare a draft European convention on the protection of international fresh waters against pollution. The Committee produced its final draft—"European Convention for the Protection of International Watercourses against Pollution"—in 1974, the preamble of which contained this clause:

*Convinced* of the urgent need for general and simultaneous action on the part of States and for co-operation between them with a view to protecting all water resources against pollution, especially watercourses forming part of an international hydrographic basin,<sup>166</sup>

It affirmed the growing awareness of the requirement of an active collaborative approach to meeting contemporary concerns affecting shared water resources.

82. Another regional intergovernmental organization, the Inter-American Economic and Social Council, declared in its resolution on control and economic utilization of hydrographic basins and streams in Latin America that:

. . . Control and better utilization of hydrographic basins and streams that . . . make up a part of the common patrimony of the member countries . . . will help speed up the integration and multiply the potential capacity for development of those countries.<sup>167</sup>

<sup>162</sup>Council of Europe, Consultative Assembly, "Report on fresh water pollution control in Europe" (Strasbourg, 1965); see also the "Guiding principles applicable to fresh water pollution control" contained in part III of the report, adopted by the Consultative Assembly in its recommendation 436 (1965) (see *Yearbook* . . . 1974, vol. II (Part Two), pp. 340-342, document A/CN.4/274, paras. 368-372).

<sup>163</sup>Recommendation 493 of the Consultative Assembly of 28 April 1967 and resolution 67 (10) of the Committee of Ministers of 26 May 1967 (*ibid.*, pp. 342-343, para. 373).

<sup>164</sup>Principle XII.

<sup>165</sup>Principle XI, second para.

<sup>166</sup>See *Yearbook* . . . 1974, vol. II (Part Two), p. 346, document A/CN.4/274, para. 377. For the several collaborative activities proposed, see the text of the draft (*ibid.*, pp. 346-348). In the Consultative Assembly's recommendation 629 (1971) on the pollution of the Rhine valley water-table, emphasis was again placed on "the urgent need for such co-operation, which is a proof of both the solidarity existing between frontier regions and the practical nature of the problems calling for common action" (*ibid.*, p. 349, para. 378). Attention may also be drawn to the urgent tone of the directive of 17 December 1979 of the Council of the European Communities on the protection of groundwater against pollution caused by certain dangerous substances (80/68/EEC) (*Official Journal of the European Communities* (Luxembourg), 23rd year, 26 Jan. 1980, No. L20, p. 43).

<sup>167</sup>Resolution 24-M/66 (Pan American Union, *Final Report of the Fourth Annual Meeting of the Inter-American Economic and Social Council* (Washington, D.C., 1966), vol. I, p. 48). (The text of the resolution is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380.) The 1965 revised draft Inter-American convention on the industrial and agricultural use of international rivers and lakes contained in its preamble an analogous statement: "The utilization of waters in accordance with modern



The Council then recommended that the countries

... begin or continue joint studies looking towards the control and economic utilization of the hydrographic basins and streams of the region of which they are a part, for the purpose of promoting, through multinational projects, their utilization for the common good, in transportation, the production of electric power, irrigation works, and other uses, and particularly in order to control and prevent damage such as periodically occurs as the result of rises in the level of their waters and consequent floods.<sup>168</sup>

83. Finally, the United Nations Water Conference, held in Mar del Plata, Argentina, in 1977, reaffirmed the principle of equitable utilization and cast its recommendations in terms of co-operative management:

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation ... 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.

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.

92. A concerted and sustained effort is required to strengthen international water law as a means of placing co-operation among States on a firmer basis. The need for progressive development and codification of the rules of international law regulating the development and use of shared water resources has been the growing concern of many Governments.<sup>169</sup>

84. The International Law Association, continuing its work in the field on the recommendations of its Committee on International Water Resources Law, has adopted, *inter alia*, articles on flood control, in which the positive dimension of system States' relationships is emphasized: "Basin States shall co-operate in measures of flood control in a spirit of good neighbourliness, having due regard to their interests and well-being as co-basin States."<sup>170</sup> In 1974, the Association approved articles on maintenance and improvement of naturally navigable waterways separating or traversing several States,<sup>171</sup> and in 1976, at the Madrid Conference, it adopted articles on the protection of water resources and water installations in times of armed conflict<sup>172</sup> and, in addition, articles on international water resources

technological methods contributes decisively to the economic development of their peoples" (Pan American Union, *Report of the Inter-American Juridical Committee on the Work accomplished during its 1965 Meeting* (Washington, D.C., 1966), p. 7). (See also *Yearbook* ... 1974, vol. II (Part Two), p. 350, document A/CN.4/274, para. 379.)

<sup>168</sup> Pan American Union, *Final Report* ... (op. cit.). (The recommendation is reproduced in *Yearbook* ... 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380.)

<sup>169</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), p. 53.

<sup>170</sup> Art. 2 (ILA, *Report of the Fifty-fifth Conference, New York, 1972* (London, 1974), p. xvi). For the report of the Committee on flood control (Rapporteur: F. Berber), including a detailed review of State practice, *ibid.*, pp. 43-97.

<sup>171</sup> ILA, *Report of the Fifty-sixth Conference, New Delhi, 1974* (London, 1976), p. xiii. For the report of the Committee on the topic (Rapporteur: H. Zurbrugg), *ibid.*, pp. 117-128.

<sup>172</sup> ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (London, 1978), pp. xxxiv-xxxvi. For the report of the Committee on the topic (Rapporteur: F. Berber), *ibid.*, pp. 234-248, and ILA, *Report of the Fifty-sixth Conference* ... , pp. 129-145 (intermediate report).

administration.<sup>173</sup> In 1980, the Association approved articles on regulation of the flow of water of international watercourses;<sup>174</sup> work continues on other topics.

#### 4. THE PROPOSED ARTICLE

85. It is submitted that the right of each State to share equitably in the uses of the waters of an international watercourse system is indisputable and undisputed. Moreover, contemporary conditions and expectations have tended to move the international community to a position of affirmative promotion of co-operation and collaboration with respect to shared water resources. Thus the Commission may wish to consider a draft article that not only articulates the settled principle of equitable utilization, but also embraces the progressive concept of "equitable participation". States sharing an international watercourse system not only may stand on their rights to reasonable and equitable sharing of the uses of the waters but, arguably, also have a right to the co-operation of their co-system States in, for example, flood control measures, pollution abatement programmes, drought mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works or environmental protection—or some combination of these—as appropriate for the particular time and circumstances. The details of such joint co-operative efforts on the part of system States should be reflected in one or more system agreements. None the less, it may be maintained that there now exists a duty under general international law to participate affirmatively in effectuating the more rational development, use and protection of shared water resources. To the extent that State practice does not establish that duty, it is believed that the progressive development of international law should establish it.

86. The following formulation is accordingly proposed for the consideration of a successor Special Rapporteur and of the Commission.

#### *Article 6. Equitable participation*

1. The waters of an international watercourse system shall be developed and used by system States on an equitable basis with a view to attaining optimum utilization of those waters, consistent with adequate protection and control of the components of the system.

2. Without its consent, a State may not be denied its equitable participation in the utilization of the waters of an international watercourse system of which it is a system State.

3. An equitable participation includes the right to use water resources of the system on an equitable basis and the duty to contribute on an equitable basis to the protection and control of the system as particular conditions warrant or require.

87. While the emphasis in this suggested formulation is on the sharing, reasonably and equitably, of uses (paragraph 1), the regional or community goal of maximizing the resource is expressly stated. Moreover,

<sup>173</sup> ILA, *Report of the Fifty-seventh Conference* ... , pp. xxxvii-xli, including "Guidelines for the establishment of an international water resources administration". For the report of the Committee on the topic (Rapporteur: D. Caponera), *ibid.*, pp. 239-266.

<sup>174</sup> ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982) (Chairman and Rapporteur on the topic: E. Manner), pp. 359-393.

the States' right to use the waters, in the technical sense of the term, is qualified by protection and control of the system (for example, recognition of the importance of the appropriate regulation of flow and of water quality). River regulation and control (training works and associated measures) often serve, it may be said, some of the traditional uses of waters, such as electrical power generation, irrigation, fishing, recreational uses and navigation, and also serve other highly important ends such as flood control, drought mitigation, saline intrusion control and pollution mitigation of direct or indirect concern to all system States.<sup>175</sup> Similarly, the element of "protection", defined to cover, above all, water quality, the environment, security, water-related disease and conservation, calls for measures or works that may limit to some degree the uses that otherwise might be made of the waters by one or more system States. The well-being of the peoples dependent upon the waters of the system, or the socio-economic development of the area, not to mention protection of the marine environment, may give certain measures of protection overriding priority.<sup>176</sup> To be sure, terms as "pollution", "measures of protection", "measures of control" and many others will ultimately require precise definition, probably in a special article on definitions. Suffice it to say at this juncture that the terms employed have precedents and are generally understood and widely employed by water resources specialists.

88. Paragraph 2 of the proposed article simply restates the rule that a system State is *entitled* to its equitable "share", yet broadened to embrace the full scope of a system State's involvement in matters affecting the international watercourse system—its "equitable participation".

89. The third and final paragraph of this article attempts a straightforward delineation of the two "aspects" of the compound principle of equitable participation: the right to use and the duty to contribute, in an equitable manner. The equities are couched in the larger perspective so widely sought: the integrated approach to the development, use and protection of shared international water resources.<sup>177</sup>

<sup>175</sup> See the review of State practice, definitions and examples and draft articles on "Regulation of the flow of international watercourses" in the report of the Committee on International Water Resources Law (ILA, *Report of the Fifty-eighth Conference, Manila, 1978* (London, 1980), pp. 219–237), and the discussion at the Working Session at Manila (*ibid.*, pp. 238–247). For the final version of these articles, with commentary, as approved by the Association in Belgrade in 1980, see the report of the Committee on International Water Resources Law (ILA, *Report of the Fifty-ninth Conference* . . . , p. 359).

<sup>176</sup> The elaboration of control and protection principles obviously calls for separate, specific consideration. At this juncture references are given, for purposes of illustration only, concerning flood control (see footnote 170 above) and security measures (see footnote 172 above), since works on these topics are less widely known than, for example, works on pollution and environmental protection.

<sup>177</sup> See, as a recent expression of this action-oriented framework, the conclusions of the United Nations Interregional Meeting of International River Organizations (Dakar, Senegal, 5–14 May 1981), e.g.:

"1. Some co-operating States need to provide their international river and lake organizations with both competence and capability to deal effectively with the existing and impending demands for improved water resources development, use and protection . . .

"3. Where benefits and costs are to be shared, international river and lake organizations could be empowered to recommend to their

90. At the level of general, or residual, rules, it would be difficult to leave "participation" in the protection and control aspects of shared water resources unqualified. Here, the system State's affirmative involvement is considered as much of a "right" as it is a "duty", since the welfare and other vital interests of the system State are often intimately linked to the wise husbanding of the system's water resources and the careful avoidance of water's so-called "harmful effects". What precautionary measures, hydraulic works, warning systems or abatement programmes, among other things, may be required in a particular international watercourse during certain seasons, or longer time periods, can be and are being determined in consonance with the physical and chemical circumstances, the capabilities and needs of the system States and the availability of applicable technology. Effectively to avert the threat of flooding for the indefinite future (for example) would probably necessitate major hydraulic works and land-use measures requiring in all likelihood quite elaborate systems agreements; this residual rule should not pretend too much. For that reason, the final phrase, "as particular conditions warrant or require", has been used to qualify the expectation (or, conversely, the duty) in relation to need and to justification.

91. This suggested advance to the principle of "equitable participation" is in no way a retreat from the accepted principle of equitable utilization or apportionment. On the contrary, equitable participation assumes, includes and articulates equitable utilization as the fundamental rule, but places it in the larger context of the system States' need and willingness to give attention to critical matters of common interest respecting shared water resources which may be ancillary to uses or at best only indirectly related to uses. This larger approach—the integrated approach, scientifically so essential to the water-related aspects of the welfare of system States—was not covered conceptually by the traditional terminology addressed to uses and to "dividing" quantities of water, despite efforts of governmental and non-governmental bodies to make the terms embrace quality, hazard and conservation concerns. In the suggested text, the principle of equitable sharing of the uses of the waters is preserved, and the

respective Governments the general or specific formulas and rules for such sharing . . .

"4. Water quality, water-related disease and environmental protection considerations have to date received inadequate attention in most cases . . .

"5. The prevention and mitigation of floods, droughts and other hazards, natural and man-made, are increasingly of concern to the co-operating States because of the numerous changes that are taking place at accelerating rates within the watersheds; therefore, new or strengthened activities must be undertaken to deal effectively with the detrimental effects of water-related hazards and conditions . . .

"6. Those co-operating States that have not yet included groundwater as a part of the shared water resources system need to recognize this part of the hydrologic cycle as intimately linked to the quantity and quality of their shared surface waters . . .

"15. A manual on each of the numerous technical and managerial aspects of the development, use and protection of shared water resources systems would be a highly useful product . . ."

(United Nations, *Experience in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.II.A.17), pp. 14–15, para. 49. See also the note on the meeting prepared by L. Johnson, of the secretariat of the International Law Commission, and circulated to the Commission at the request of the Chairman (ILC (XXXIII)/Conf. Room Doc. 11, para. 11), and chap. III, D, 4, of the present report.



developing principle, heretofore not succinctly articulated, that reflects the States' recognition of the need to act affirmatively in the protection and control of shared water resources, is proffered.<sup>178</sup>

### C. Clarifying the ascertainment of equitable use

92. Although the international community of States has accepted the principle of equitable utilization, the difficulty of the application of that principle is readily recognized. That problem arose from the very beginning, and has not been ameliorated by the fact that sovereign States sharing an international watercourse system, in contrast with States of a federal system, have rarely bound themselves to the compulsory jurisdiction of an arbitral or adjudicatory tribunal with competence to make legally binding determinations in this field.

#### 1. THE LAKE LANOUX ARBITRATION

93. In the *Lake Lanoux* arbitration between France and Spain in 1957, the Tribunal observed:

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>179</sup>

The Tribunal considered 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.<sup>180</sup>

In short:

France may use its rights; it may not disregard Spanish interests;

Spain may demand respect for its rights and consideration of its interests.<sup>181</sup>

#### 2. PROPOSALS SUBMITTED TO THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

94. In 1973, the Sub-Committee on International Rivers of the Asian-African Legal Consultative Committee submitted to the Committee its revised draft

<sup>178</sup> See in this connection the background papers for the 1981 Dakar Interregional Meeting, addressed to "countries which share water resources but yet have no established basin-wide institutional framework" (as stated in resolution VII of the United Nations Water Conference, held at Mar del Plata in 1977), as well as to existing international river commissions and their States members, in particular the following: "Institutional and legal arrangements" (Rapporteur: G. J. Cano) (United Nations, *Experiences in the Development and Management* . . . , p. 44; "Progress in co-operative arrangements" (Rapporteur: R. D. Hayton) (*ibid.*, p. 65); "Economic and other considerations for co-operation in the development of shared water resources" (Rapporteurs: K. E. Hansson and R. Revesz) (*ibid.*, p. 82); "River basin planning: observations from international and Canada-United States experience" (Rapporteur: M. Cohen) (*ibid.*, p. 107); "Role of environmental factors in internationally shared water resources", by V. R. Pantulu, Mekong Secretariat (mimeo.).

<sup>179</sup> *Yearbook* . . . 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068. The Tribunal, in an examination of the "complaints" mentioned in art. 11 of the Additional Act to the Treaty of Bayonne of 26 May 1866 between France and Spain, was assaying "how 'all the interests involved on one side and the other' should be safeguarded" (*ibid.*). For the full text of the award, see United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 285 (in French).

<sup>180</sup> *Yearbook* . . . 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068.

<sup>181</sup> *Ibid.*

propositions, including, as paragraph 3 of proposition III, its conclusions on the question of relevant factors:

3. Relevant factors which are to be considered include in particular:

(a) the economic and social needs of each basin State, and the comparative costs of alternative means of satisfying such needs;

(b) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State;

(c) the past and existing utilization of the waters;

(d) the population dependent on the waters of the basin in each basin State;

(e) the availability of other water resources;

(f) the avoidance of unnecessary waste in the utilization of waters of the basin;

(g) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among users;

(h) the geography of the basin;

(i) the hydrology of the basin;

(j) the climate affecting the basin.<sup>182</sup>

#### 3. RESOLUTIONS OF THE INTERNATIONAL LAW ASSOCIATION

95. The Sub-Committee on International Rivers of the Asian-African Legal Consultative Committee may have taken into account the earlier work of the International Law Association in this sphere. At its Dubrovnik Conference in 1956, the International Law Association adopted a statement of principles, principle V of which identified the following factors, among others, that should be taken into consideration by system States in reaching agreements or in settling disputes, directly by negotiation, or through decisions of tribunals:

(a) the right of each to a reasonable use of the water;

(b) the extent of the dependence of each State upon the waters of that river;

(c) the comparative social and economic gains accruing to each and to the entire river community;

(d) pre-existent agreements among the States concerned;

(e) pre-existent appropriation of water by one State.<sup>183</sup>

Principle VIII adopted at Dubrovnik provided that:

So far as possible, riparian States should join with each other to make full utilization of the waters of a river both from the viewpoint of the river basin as an integrated whole, and from the viewpoint of the widest variety of uses of the water so as to assure the greatest benefit to all.<sup>184</sup>

At its New York Conference, in 1958, the International Law Association reviewed the next report of its Committee on the Uses of the Waters of International Rivers and adopted its four proposed "Agreed principles of international law". The second principle affirmed the "reasonable and equitable share in the beneficial uses" rule, adding: "What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case".<sup>185</sup> No list of factors, however, was set forth at New York.

<sup>182</sup> For the text of the draft propositions and the Rapporteur's commentary, see footnote 161 above. The text of proposition III is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 339, document A/CN.4/274, para. 367.

<sup>183</sup> ILA, *Report of the Forty-seventh Conference, Dubrovnik, 1956* (London, 1957), pp. 241-243. (The text is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 203, document A/5409, para. 1080.)

<sup>184</sup> *Ibid.*

<sup>185</sup> ILA, *Report of the Forty-eighth Conference* . . . , p. 100. The

(Continued on next page.)

96. Finally, in 1966, the ILA Committee made its final report, proposing articles which, approved by the Conference, became the "Helsinki Rules on the Uses of the Waters of International Rivers". Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains five articles. The first, article IV, has been considered in the immediately preceding section on equitable participation; the second, article V, deals squarely with the question of factors:

*Article V*

(1) What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

(2) Relevant factors which are to be considered include, but are not limited to:

(a) the geography of the basin, including in particular the extent of the drainage basin in the territory of each basin State;

(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

(c) the climate affecting the basin;

(d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin State;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.<sup>186</sup>

(Footnote 185 continued.)

comment to the first principle, recommending treatment of a system of rivers and lakes in a drainage basin "as an integrated whole (and not piecemeal)", pointed out: "Until now international law has for the most part been concerned with surface waters, although there are some precedents having to do with underground waters. It may be necessary to consider the interdependence of all hydrological and demographic features of a drainage basin" (*ibid.*). (The text is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 204, document A/5409, para. 1082.)

<sup>186</sup> ILA, *Report of the Fifty-second Conference* . . . , p. 488. (The text of the Helsinki Rules is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 357-358, document A/CN.4/274, para. 405.) Lipper, reflecting on the practice of the United States Supreme Court in determining an equitable utilization, "the balancing process", observes that

"it may be relevant to consider the nature of the land along the banks of the river, the extent of the dependence of the riparians on the river's flow, the volume of diversion, the size of the river's watershed or drainage area and the possibility of maintaining a sustained flow through the controlled use of flood waters. Of course, an emergency may require special consideration and extraordinary measures for its duration. There are numerous other factors which come to mind: *inter alia*, the quality of the waters after use by the upper riparian, the seasonal variations in diversions, the contribution of water by each riparian, the availability of storage facilities or the ability to construct them, the availability of other resources, the extent to which water is or could be returned to the river after use (return flow) and the suitability of the water for the purpose desired" (Lipper, *loc. cit.*, p. 49). Smith regarded necessity, justification, motive and material injury as relevant in "The Chicago diversion", *The British Year Book of International Law*, 1929 (London), vol. 10, p. 155.

97. Only limited guidance is offered even in the unofficial commentary to article V regarding the weight to be accorded to any of the factors named.<sup>187</sup> What is intended is "flexible guidelines essential to ensuring the protection of the 'equal right' of all basin States to share the waters"; particular cases might call into consideration other factors.<sup>188</sup> Each relevant factor is to be "given such weight as it merits relative to all the other factors. And no factor occupies a position of pre-eminence *per se* . . ." <sup>189</sup> Article VI expressly provides, moreover, that a use or category of uses "is not entitled to any inherent preference over any other use or category of uses".<sup>190</sup> Nonetheless, the commentary explains that if a use (using domestic use as the example) "is indispensable—since it is, in fact, the basis of life—it would not have difficulty in prevailing on the merits against other uses . . ." <sup>191</sup>

98. Article VII of the Helsinki Rules makes an express limitation to the process of weighing of factors: "A basin State may not be denied the *present*\* reasonable use of the waters . . . to reserve for a co-basin State a *future*\* use of such waters."<sup>192</sup> Aimed at allowing the optimum utilization at any given time, the article implies that "future readjustment" could take place when the co-basin State's "future use" becomes, or is in the process of becoming, a reality. This flexibility over time is inherent in the concept of equitable utilization in the Helsinki Rules, permitting accommodation to changes of use as the system States' patterns of development and activity change. But the uses of other system States may not be curtailed so long as implementation of a planned use by a system State still lies in the future.<sup>193</sup> "When the latter is ready to use the waters or to increase an existing use, then the entire question of equitable utilization of the waters is opened up for review . . . and the rights and needs of the various States will be considered."<sup>194</sup> Clarification of this potential jeopardy to existing uses is contained in paragraph 1 of article VIII:

1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.<sup>195</sup>

Finally, paragraph 3 of article VIII contains the rule that a use "will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use".<sup>196</sup>

#### 4. IMPLICATIONS OF INTERNATIONAL AGREEMENTS

99. International agreements between system States may, in many cases, be regarded as the parties' *de facto* determination of equitable utilization or equitable apportionment, even though neither phrase had come

<sup>187</sup> In the commentary, however, hypothetical examples are discussed at some length (ILA, *Report of the Fifty-second Conference* . . . , pp. 488-491).

<sup>188</sup> *Ibid.*, p. 488.

<sup>189</sup> *Ibid.*, p. 489.

<sup>190</sup> *Ibid.*, p. 491.

<sup>191</sup> *Ibid.*, pp. 491-492.

<sup>192</sup> *Ibid.*, p. 492.

<sup>193</sup> See the commentary to art. VII (*ibid.*, pp. 492-493).

<sup>194</sup> *Ibid.*, p. 493.

<sup>195</sup> *Ibid.*

<sup>196</sup> *Ibid.* Para. 2 deals with the timing of the coming into existence of a use and use abandonment.

into common usage by the time most such treaties were drafted.<sup>197</sup> Direct negotiations led to those determinations, and direct negotiations will undoubtedly in the future play a similarly dominant role.<sup>198</sup> The "balancing process" may also become the task of an international tribunal or conciliation commission, or be entrusted to the parties' international river commission. In any event, those charged with working out an ascertainment of the sharing of uses on an equitable basis need, as points of departure, the firmest foundations that international law can provide. Even though, in the absence of a controlling agreement between the parties, international judicial or arbitral decisions *directly* to the point are not to be found,<sup>199</sup> the interest of States in the codification and progressive development of legal principles and rules in this complex and seemingly imponderable area clearly persists.<sup>200</sup>

100. At one juncture, in connection with discussions with Canada concerning proposed diversions by Canada from the Kootenay River into the Columbia and from the Columbia into the Fraser River, the United States Department of State prepared a memor-

<sup>197</sup> See the review of treaties on the sharing of the waters of international watercourses in sect. B above.

<sup>198</sup> There apparently is broad accord, moreover, that some *mutual* rights and responsibilities exist, as aptly stated by S. Cardona: "The internationality of river basins presupposes a combination of rights and duties that are common to the neighbouring States . . . It follows that the legal order that governs this combination of rights and duties affects the exercise of the territorial sovereignty of each State over its own territory" ("El régimen jurídico de los ríos internacionales", *Revista de derecho internacional* (Havana), vol. LVI, 1949, p. 26). In the Act of Santiago concerning hydrologic basins ("utilization of the waters common to the two countries") signed by Argentina and Chile in 1971, a number of rules are set forth, the first, basic one of which reads: "The waters of rivers and lakes shall always be utilized in a fair and reasonable manner." (The text of the Act is reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.) A similar declaration on water resources by Argentina and Uruguay (Buenos Aires, 1971), seeks "to ensure a reasonable and fair participation by the States in the use and benefits of the waters of international rivers and their tributaries", confirms *inter alia*, the principles outlined in the 1933 Montevideo Declaration, and records the "common will of their two peoples to develop new and effective forms of co-operation and rapprochement . . ." (*ibid.*, pp. 324-325, para. 328). The provisions of the Act of Buenos Aires on hydrographic basins, signed by Bolivia and Argentina in 1971, are broadly similar (*ibid.*, p. 325, para. 329).

<sup>199</sup> The federal country experience can, however, be instructive to the negotiator, arbiter, judge or conciliator. One such example identifying and weighing factors is *New Jersey v. New York* (1931) (*United States Reports*, 1931, vol. 283, p. 336), where New York proposed to divert Delaware River waters for drinking purposes and New Jersey objected. The diversion was found reasonable by the Court: it would have little effect on the water supply, agricultural output and sanitary conditions of New Jersey. On the other hand, oyster fisheries and recreational uses would receive substantial injury. The Court applied the formula of maximum benefit/minimum detriment to reconcile the parties' interests and reduced the diversion sought by New York substantially (averting the injury to the oyster fisheries), directed New York to construct a sewer plant (rendering the water's quality safe for recreational uses), and ordered New York to maintain a specified minimum flow. The "factors" and their disposition obviously are always related to the particular case.

<sup>200</sup> The application of the equitable utilization doctrine has not only occupied the Asian-African Legal Consultative Committee over a period of years, as noted above, but, at the 1981 Dakar Interregional Meeting, including States interested in forming or strengthening river basin commissions, participants repeatedly called for progress in this area. See United Nations, *Experiences in the Development and Management* . . . , pp. 8, 14, 15, 16, 17, 19, paras. 27, 49 (3) and (15), 51-57, 67. See also the note prepared by a member of the secretariat of the International Law Commission and circulated to members of the Commission (ILC (XXXIII/Conf. Room Doc. 11), paras. 10, 12-13.

andum. In the conclusions to that document, which stated that riparians "possess equal rights on either side . . . and these rights reciprocally restrict the freedom of action of the others", the following appears on this matter of factors:

(a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

(b) In determining what is just and reasonable account is to be taken of rights arising out of—

(1) Agreements,

(2) Judgments and awards, and

(3) Established lawful and beneficial uses;

and of other considerations such as—

(4) The development of the system that has already taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian;

(5) The extent of the dependence of each riparian upon the waters in question; and

(6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question.<sup>201</sup>

101. The cumulative achievements to date in delineating what is, and what is not, equitable use clearly leave room for improvement. They suggest the desirability of an authoritative rule, be it only minimal, for the guidance of system States and of the various forums within which equitable calculations may be undertaken. At the same time no automatically applicable fixed sets of factors, or a given formula for ranking or weighing the factors, can be devised that would fit all situations.

102. Ideally, system States should create, where they have not already done so, the necessary machinery for authoritative ascertainment of equitable utilization whenever the need arises. And this machinery for ascertainment of equitable use, as well as for working out the technical and compensatory adjustments that often are required, should not in the first place be considered "dispute settlement". Rather, such determinations, including where necessary their attendant, often complex, shaping of the package of modifications of use and of measures for avoidance of harm, need to be an integral part of the system States' affirmative co-operation in their international watercourse system. In the past, such machinery has been lacking in most international watercourse systems, and the defensive, one might say "adversary", context within which use conflicts were taken up all too often gave rise to acrid and protracted disputes.

103. It was not without reason, grounded in experience, that the Inter-American Juridical Committee set

<sup>201</sup> United States of America, Memorandum of the Department of State, "Legal aspects of the use of systems of international waters . . ." (*op. cit.*), p. 90, quoted in Whiteman, *op. cit.*, p. 940. The comment following the quoted passage reads:

"The foregoing is an attempt to formulate the factors which would be considered in applying the doctrine of 'equitable apportionment' because whatever the situation—whether in negotiation or before a tribunal—more guidance is needed than is contained in the words 'equitable apportionment'. Other factors should doubtless be included.

"Perhaps an additional factor would be that the order of priority of uses of a particular system would be the relative importance of the possible different uses to the international area served by the system. It is doubtful that a statement of priority among uses of water for all systems could be made as a matter of existing law. On some systems the navigational use [would be] of paramount importance; on the others irrigation would surely come next after drinking and domestic uses."

forth the view "that if it is desired to take a truly effective step in this difficult field, a careful and rigid procedure must be established—one that will not permit of evasion or undue delay in the settlement of controversies".<sup>202</sup> While one may question the choice of the term "rigid", the Committee's rationale, and its preoccupation with avoidance of delay in matters affecting the utilization of international watercourse systems, strike responsive chords among international water resources specialists.<sup>203</sup>

104. The widely emphasized development goals, dependent as their realization is upon increasingly critical water supply and water quality conditions found in international watercourses, in many cases tend to drive system States towards active collaboration in (if not integrated management of) their shared water resources. The frequently urgent need for protection of the resource, and of populations served by the resource, from harmful effects created or enhanced by particular uses and by natural hazards, is stimulating such collaboration in more and more instances.<sup>204</sup>

105. Clearly there is ample justification for a recommendation that system States institutionalize their arrangements for ascertainties about equitable utilization. As a matter of duty under international law, as it may be progressively developed, the Commission may be able to recognize the modern attitude of many States and facilitate, if only in a residual way, the knotty process of arriving at just determinations about the equitableness of a particular use by a particular system State under the prevailing circumstances. The factors already articulated and set forth above are, or may be, substantively relevant in this regard. Except for resort to dispute settlement procedures, however, prior conceptualizations of the problem have not provided a mechanism for triggering the required balancing task. This task should be discharged in a co-operative atmosphere, initiated by the exercise of a right by the system State or States concerned.

#### 5. THE PROPOSED ARTICLE

106. The following draft article is accordingly proposed for the consideration of a successor Special Rapporteur and the Commission:

##### *Article 7. Determination of equitable use*

**1. The right of a system State to a particular use of the water resources of the international watercourse system depends, when questioned by another system State, upon objective evaluation of:**

- (a) that system State's**
  - (i) contribution of water to the system, in comparison with that of other system States,**
  - (ii) development and conservation of the water resources of the system,**
  - (iii) degree of interference, by such use, with uses or**

**protection and control measures of other system States,**

- (iv) other uses of system water, in comparison with uses by other system States,**
- (v) social and economic need for the particular use, taking into account available alternative water supplies (in terms of quantity and quality), alternative modes of transport or alternative energy sources, and their cost and reliability, as pertinent,**
- (vi) efficiency of use of water resources of the system,**
- (vii) pollution of system water resources generally and as a consequence of the particular use, if any,**
- (viii) co-operation with other system States in projects or programmes to attain more optimum utilization and protection and control of the system, and**
- (ix) stage of economic development;**

**(b) the total adverse affect, if any, of such use on the economy and population of other system States, including the economic value of and dependence upon existing uses of the waters of the system, and the impact upon the protection and control measures of the system States;**

**(c) the efficiency of use by other system States;**

**(d) availability to other system States of alternative sources of water supply, energy or means of transport, and their cost and reliability, as pertinent;**

**(e) co-operation of other system States with the system State whose use is questioned in projects or programmes to attain optimum utilization and protection and control of the system;**

**2. The determination, in accordance with paragraph 1 of this article, of the equitableness of a use as part of a system State's equitable participation shall be undertaken through good faith consultations among the system States concerned at the request of any system State.**

**3. Failure to reach agreement on such a requested determination within a reasonable time entitles any system State participating in the consultations to invoke the means provided in these articles for the pacific settlement of disputes.**

107. In part, the proposed article represents a consolidation and reworking of the "factors" developed previously and set forth earlier in this section. In addition, however, it represents an amplification of the pertinent considerations to include the aspects—of actual and growing importance—of protection and control embraced in section B above and by the proposed article on equitable participation. If the principle of equitable participation finds favour with a successor Special Rapporteur and the Commission, it then follows that ascertainment of the equitableness of a utilization should take relevant aspects of system State co-operation into account.<sup>205</sup>

<sup>202</sup> Pan American Union, *Industrial and Agricultural Use of International Rivers and Lakes* (Washington, D.C., 1963), quoted in Whiteman, *op. cit.*, p. 939.

<sup>203</sup> See e.g. United Nations, *Management of International Water Resources* . . . , pp. 144–153, 179–180, paras. 457–484 and 576–580.

<sup>204</sup> For a review of instances of this affirmative stance, see sect. B above.

<sup>205</sup> In 1967, in preambular para. 3 of its resolution requesting the Permanent Committee on Use of International Rivers and Lakes to pursue its studies, the Inter-American Bar Association declared:

"International waters have for America unique importance to the extent that it is difficult to imagine a social and economic development and integration of the continent without an equitable

108. Probably no specific mechanism or method could be required to accomplish the "objective evaluation" called for in paragraph 1 of the article.<sup>206</sup> Many substantial suggestions for, or employment of, conciliation, technical commissions of inquiry, joint fact-finding task forces, etc., have been made by various bodies and by States.<sup>207</sup> Since it is here presumed that the system States are not, at least at this initial stage, in a posture of formal dispute, the choice of means is left to the participating Governments, except that they must enter into consultations in good faith.<sup>208</sup> If such

and adequate usage of such waters, in achieving which the law has a substantial function" (Inter-American Bar Association, *Resolutions, Recommendations and Declarations approved by the XV Conference* (San José, Costa Rica, 10-15 April 1967, pp. 1-2).

See also the Association's resolution on the legal aspects of the problem of contamination of waters of international rivers and lakes (Inter-American Bar Association, *Resolutions, Recommendations and Declarations approved by the XVI Conference* (Caracas, Venezuela, 1-8 November 1969). (The text of the resolutions is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 356-357, document A/CN.4/274, paras. 401 and 402.)

<sup>206</sup> Although understandably dispute-oriented, the Tribunal in the *Lake Lanoux* arbitration had this to say with respect to evaluation:

"It is for each State to evaluate in a reasonable manner and in good faith the situations and the rules which will involve it in controversies; its evaluation may be in contradiction with that of another State; in that case, should a dispute arise the Parties normally seek to resolve it by negotiation or, alternatively, by submitting to the authority of a third party" (*International Law Reports*, 1957, p. 132) (see also United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , pp. 310-311 (in French)).

<sup>207</sup> See *inter alia* the provisions on conciliation in paras. 7-10 of the Montevideo Declaration adopted by the Seventh International Conference of American States (Carnegie Foundation for International Peace, *The International Conferences of American States . . .* (op. cit.), p. 89); the provisions for a permanent technical committee in the 1963 draft convention of the Inter-American Juridical Committee (Pan American Union, *Industrial and Agricultural Use of International Rivers and Lakes* (op. cit.), p. 24), quoted in Whiteman, op. cit., p. 939, and art. 9 (II) of the Committee's revised draft (1965), concerning the establishment of a joint commission (Pan American Union, *Report of the Inter-American Juridical Committee on the Work accomplished during its 1965 Meeting* (op. cit.), pp. 7-10); the provisions for permanent joint commissions in the "Madrid resolution" of the Institute of International Law (*Annuaire de l'Institut de droit international*, 1911, p. 367); the provisions for an *ad hoc* commission of the International Law Association (ILA, *Report of the Forty-ninth Conference, Hamburg, 1960* (London, 1961), pp. xvi-xviii); the provisions in articles XXXI-XXXIII of the Helsinki Rules for referral to a joint agency, then to good offices or mediation, a commission of inquiry or an *ad hoc* conciliation commission (ILA, *Report of the Fifty-second Conference . . .*, pp. 524-528); the provision in the 1960 Indus Waters Treaty between India and Pakistan, annex F, for referral to a "neutral expert." (United Nations, *Treaty Series*, vol. 419, p. 202); the provision in art. 9 (4) of the 1954 Treaty between Switzerland and Austria on the regulation of the Rhine for referral to "an independent and impartial specialist" (United Nations, *Legislative Texts . . .*, p. 506); and the provision in art. 94 of the 1929 Agreement concerning the frontier between Germany and Belgium for a joint administrative commission of foreign office and sectoral ministry representatives (League of Nations, *Treaty Series*, vol. CXXI, p. 379).

<sup>208</sup> The *Lake Lanoux* Tribunal, interpreting article 16 of the Additional Act under consideration, held that the provision raised "a duty of consultation and of bringing into harmony the respective actions of the two States when general interests are involved in matters concerning waters" (*International Law Reports*, 1957, p. 133).

"Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed" (*ibid.*, p. 134). (See also United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , pp. 310-311 (in French)).

consultations, or more formal negotiations, do not yield acceptable results, the parties may of course agree to any other means of peaceful settlement; in the absence of such agreement, the article allows any participant system State to call into play the provisions for settlement or avoidance of disputes, including those respecting equitable participation determinations, which it is contemplated that the Commission (or, failing that, a diplomatic conference) will in due course include among the articles of a convention on this topic. A proviso for avoiding the application of this final, third paragraph by agreement among the participants to resort to other means of settlement of their own choosing might have been included here; however, it seemed preferable to leave the paragraph as a straightforward procedural step and to incorporate recognition of the parties' freedom of choice, by agreement, in the specialized article or articles on settlement of disputes.

109. It is believed that every practical effort should be made to foster resolution of differences among system States by means short of international arbitration or adjudication. In matters affecting the development, use, protection or control of vital water resources, few countries now or in the future may be able to afford the delays and disruptions often entailed in protracted dispute settlement procedures even if the States concerned are otherwise prepared to resort to such procedures. To be sure, recourse to third-party settlement must be preserved and nurtured, but as a last resort.

110. The present article focuses on only one kind of likely difference between system States: the ascertainment of rights to use water on an equitable basis. Perhaps other aspects of international water resources system management involve potential conflict as consequential as does equitable utilization. History teaches us that at least to this area special attention should be devoted. Problems involving environmental protection, and claims of appreciable harm or failure to control (when under a duty to do so) a water-related hazard, should also be resolvable fairly and with dispatch.

#### D. Responsibility for appreciable harm

111. It is difficult today to find dissent from the general proposition that a State may not use, or allow persons under its jurisdiction or control to use, its territory in such a way that harm is caused to the territory or interests of another State.<sup>209</sup> The United

The article here proposed to the Commission does not attempt to codify the presumably amicable consultation process; procedural rules, however, may be required under articles on accommodation of differences and settlement of disputes.

<sup>209</sup> In support of the proposition, see, *inter alia*, Andrassy, "Les relations internationales de voisinage", *Recueil des cours . . . 1951-II* (Paris, Sirey, 1952), t. 79, especially pp. 169-176 ("aménagement des eaux communes"), pp. 102-129, 177-178 and bibliography, pp. 179-180; also, by the same author, "L'utilisation des cours des bassins fluviaux internationaux", *loc. cit.*, pp. 23-40, and "Nachbarrecht und Wassernutzung", *Völkerrecht und rechtliches Weltbild—Festschrift für Alfred Verdross* (Vienna, Springer, 1960), pp. 55-56; Bourne, "International law and pollution of international rivers and lakes", *University of British Columbia Law Review* (Vancouver), vol. 6, 1971, p. 126, and by the same author, "Procedure in the development of international drainage basins: the duty to consult and to negotiate", *The Canadian Yearbook of International Law* (Vancouver), vol. X, 1972, p. 212; J. J. A. Salmon, "La pollution des fleuves et des lacs et le droit international", reports and draft resolutions submitted at the Athens session of the Institute of International Law (*Annuaire de l'Institut de droit international*, 1979

(Continued on next page.)

States described its view of international law on the point in the following terms to the General Assembly in 1962:

... In the absence of specific treaty provisions to the contrary, the trend of [customary international] law was that no State might claim to use the waters of an international river in such a way as to cause material prejudice to the interests of other States, and that no State might oppose the use of river waters by other States unless that use caused material prejudice to its own interests.<sup>210</sup>

112. The Secretary-General of the United Nations as early as 1949 had expressed the view that "there has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States".<sup>211</sup> The arbitral tribunal in the *Trail Smelter* case held that, "under the principles of international law, . . . 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 . . . , when the case is of serious consequence and the injury is established by clear and convincing evidence".<sup>212</sup>

(Footnote 209 continued)

(Basel), vol. 58, Part One, p. 193); L. Oppenheim, *International Law: a Treatise*, 8th edition, H. Lauterpacht ed. (London, Longmans, Green, 1955), vol. I, pp. 345-347 and 474-476; A.-Ch. Kiss, *L'abus de droit en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1953); F. A. von der Heydte, "Das Prinzip der guten Nachbarschaft im Völkerrecht", *Völkerrecht und rechtliches Weltbild* . . . (op. cit.), pp. 133-145, and by the same author, "Le principe du bon voisinage en droit international", *Revista da Faculdade de Direito da Universidade de Lisboa* (Lisbon), vol. XV, 1962, pp. 279-292; E. Suy, "Réflexions sur la distinction entre la souveraineté et la compétence territoriale", *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* (Munich, Fink, 1971), pp. 493 et seq.; R. W. Ianni, "International and private actions in transboundary pollution", *The Canadian Yearbook of International Law*, (Vancouver), vol. XI, 1973, p. 258; Barberis, *Los recursos* . . . , op. cit., especially pp. 28-30 and 150-154, and works and practice there cited; J. Ballenegger, *La pollution en droit international: la responsabilité pour les dommages causés par la pollution transfrontière* (Geneva, Droz, 1975), especially pp. 21 and 72. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), p. 130; Lederle, "Die Donauversinkung", *Annalen des Deutschen Reichs* (Munich, 1917), p. 693; M. Decleva, *L'utilizzazione delle acque nel diritto internazionale* (Trieste University, 1939, 1st year, ser. 2, fasc. 3-4), p. 85; H. Jaeger, "Das Recht der wirtschaftlichen Nutzung mehrstaatlicher Gewässer", *Berichte des Wirtschafts- u. Verkehrsministeriums, Nordrhein-Westfalen* (Düsseldorf, 1952), No. 16, p. 39; J. F. Hostie, "Problems of international law concerning irrigation of arid lands", *International Affairs* (London), vol. XXXI, No. 1, 1955, p. 61; Jiménez de Aréchaga, loc. cit., p. 320; M. Wolfrom, *L'utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux* (Paris, Pedone, 1964), p. 143; Ch. Bédard, *Le régime juridique des Grands lacs de l'Amérique du Nord et du Saint Laurent* (Quebec, Laval University Press, 1966), pp. 129-130; G. Herczegh, "Some legal questions of the utilization of the waters of international rivers", *Questions of International Law* (Budapest, Hungarian Branch of I.L.A., 1968), p. 117; C. A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *Recueil des cours* . . . , 1968-III (Leyden, Sijthoff, 1970), vol. 125, p. 336; G. Reitzenstein, *Das Recht der Staaten an gemeinsamen Flüssen* (Borna-Leipzig, Noske, 1911), pp. 31-58.

<sup>210</sup> Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 764th meeting, para. 20. Twenty years earlier the Legal Adviser of the Department of State had concluded: "No one of [the agreements he had reviewed relating to] 'the use of rivers and lakes having an international aspect' 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" (cited in Whiteman, op. cit., p. 950).

<sup>211</sup> United Nations, *Survey of International Law*, (Sales No. 1948.V.1 (1)), p. 34, para. 57.

<sup>212</sup> United Nations, *Reports of International Arbitral Awards*, vol. III, p. 1965. (See also *Yearbook* . . . 1974, vol. II (Part Two), p. 194, documents A/5409, para. 1054.) Although the case was one of air

## 1. THE UNDERLYING PRINCIPLE

113. The most common expression of this proposition at this general level is the Latin maxim, *sic utere tuo ut alienum non laedas*.<sup>213</sup> The maxim has had application in one form or another at the purely municipal, at the federal (inter-provincial)<sup>214</sup> and international levels.<sup>215</sup> In precise terms the maxim has, at the inter-provincial and national levels, chiefly been applied by common law courts.<sup>216</sup> At the international level, implicit ap-

pollution, the tribunal relied on analogous precedents involving water. In its judgment of 9 April 1949 on the *Corfu Channel* case (merits), the International Court of Justice sustained "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*I.C.J. Reports* 1949, p. 22).

<sup>213</sup> In the Helsinki Rules, this maxim underlies chap. 3, "Pollution". See especially the commentary under art. X (ILA, *Report of the Fifty-second Conference* . . . , pp. 497-501, and works there cited). The Helsinki Rules contain no separate general article on responsibility for appreciable harm. In para. 3 of the preamble to its resolution of 1957, adopted in Buenos Aires, the Inter-American Bar Association asserted: "States having under their jurisdiction part of a system of international waters are under a duty to refrain from making changes in the existing regime that might affect adversely the advantageous use by one or more other States having a part of the system under their jurisdiction . . ." (Inter-American Bar Association, *Proceedings of the Tenth Conference* . . . (op. cit.), p. 82). (The text of the resolution is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092.)

<sup>214</sup> Relevant interstate practice has been partially reviewed in sect. B above, on equitable participation. For more detailed studies, see W. Van Alstyne, "International law and interstate river disputes", *California Law Review* (Berkeley, Calif.), vol. XLVIII, 1960, p. 596; J. Friedrich, "The settlement of disputes between States concerning rights to the waters of interstate streams", *Iowa Law Review* (Iowa City), vol. 32, 1946-1947, p. 244; Berber, *Rivers in International Law*, op. cit., pp. 179-184; D. Schindler, "The administration of justice in the Swiss Federal Court in intercantonal disputes", *The American Journal of International Law*, vol. 15, 1921, p. 155. On the applicability of such precedent at the international level, see e.g. "Convenzione con la Francia per l'utilizzazione delle acque del fiume Roja e suoi affluenti", annotated by D. Anzilotti, *Rivista di Diritto Internazionale* (Rome), series II, vol. IV, 1915; M. Huber, "Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen", *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (Breslau), vol. 1, 1907, pp. 34-35; W. B. Cowles, "International law as applied between subdivisions of federations", *Recueil des cours* . . . , 1949-I (Paris, Sirey 1949), vol. 74, pp. 659-670; Centro de Economía, Legislación y Administración del Agua, *Seminario de administración de cuencas interjurisdiccionales* (Mendoza, Argentina, 7-12 July 1975) (Mendoza, Instituto Nacional de Ciencia y Técnica Hídricas, 1975).

<sup>215</sup> Besides the *sic utere tuo* formulation, there are several other variations or similar maxims: *prohibetur ne quis faciat in suo quod nocere possit alieno* ("it is forbidden for any one to do or make on his own [land] what may injure another's") and *sic enim debere quem meliorem agrum suum facere ne vicini deteriore faciat* ("everyone ought so to improve his land as not to injure his neighbour's")—said to be a "rule of the Roman law" (*Black's Law Dictionary*, 5th ed. (St. Paul, Minn., West Publishing Co., 1979), pp. 1091 and 1237-1238). E. C. Clark, in his *History of Roman Private Law* (Cambridge, University Press, 1914, part 2, vol. 2, p. 587), insists that "*sic utere tuo ut non laedas alienum*" was the original phrasing, i.e. that of a medieval hexameter, and finds that it was one of only two restrictions on private property rights, the other being eminent domain.

<sup>216</sup> For judicial discussion, application and criticism, see, *inter alia*, *Rylands and Horrocks v. Fletcher* (1868) (United Kingdom. *The Law Reports, English and Irish Appeals*, vol. III, 1868, p. 330); *Thurston v. Hancock et al.* (1815) (*Massachusetts Reports*, vol. 12, 1820, p. 224);

*Fleming v. Lockwood* (1908) (*Pacific Reporter*, vol. 92, 1908, p. 962), where the Montana Supreme Court ruled:

"The maxim '*sic utere tuo* . . . ' furnishes, in a general sense, the rule by which every member of society possesses and enjoys his property, but it is not an ironclad rule, without limitations. If applied literally in every case it would largely defeat the very purpose of its existence, for in many instances it would deprive individuals of the legitimate use of their property . . . . The doctrine of the maxim is not inconsistent with the rule of law that a man may use his property as he pleases, for all purposes for which it is



plication of the principle embodied in the maxim can be found in numerous treaties, for example in the arrangements between Canada and the United States, including but not limited to the 1972 and 1978 Agreements on Great Lakes water quality and implementation of the anti-pollution provision (art. IV) of their basic 1909 Boundary Waters Treaty in spite of other provisions of that Treaty.<sup>217</sup> A restatement of the principle can also be found in principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration), proclaiming that States have 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."<sup>218</sup> Similarly, the report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States, convened under UNEP auspices, contains draft principles of conduct in the field of the environment that implicitly assume the applicability of the principle to the subject matter:

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.<sup>219</sup>

adaptable, without being answerable for the consequences, if he is not an active agent in causing injury, if he does not create a nuisance, and if he exercises due care and caution to prevent injury to others";

*Davoren v. Kansas City* (1925) (*South Western Reporter*, vol. 273, 1925, p. 401), where the Missouri Supreme Court's ruling included the words: "... as it is sometimes stated, as not unreasonably to injure others";

*Town of Jackson v. Mounger Motors* (1957) (*Southern Reporter*, vol. 98, 1958, p. 698), where the Louisiana Court of Appeal ruled: "This principle is of course a qualification of the general rule that ... the proprietor of land may do whatsoever he wishes with or on it, providing such use does not unreasonably disturb or curtail his neighbour's use of the latter's own property";

*Chapman v. Barnett* (1961) (*Indiana Appellate Court Reports*, vol. 131, 1962, p. 30);

*Barger v. Barringer* (1909) (*North Carolina Reports*, vol. 151, 1918 (reprint), p. 419);

*Lasala et al. v. Holbrook* (1833) (*Paige's Reports*, vol. 4, 1834, pp. 171-173);

the *Auburn and Cato Plank Road Co. v. Douglas* (1853) (*New York Reports*, vol. V, 1857, p. 444);

*Mahan v. Brown* (1835) (*Wendell's Reports*, vol. 13, 1836, p. 264).

See also W. Blackstone, *Commentaries on the Laws of England* (New York, Garland, 1978 (reprint)), vol. I, p. 306, and, for inferred general rules and excerpts from numerous additional cases, *American Jurisprudence*, 1st ed., vol. 38 ("Negligence", sect. 15); *ibid.*, 2nd ed., vol. 1, 1962, sect. 2, "Adjoining landowners", pp. 692-693, and vol. 16 A, 1979, sect. 367, "Constitutional law"; H. T. Tiffany, *A Treatise on the Modern Law of Property and other Interests in Land*, C. Zollmann, ed. (Chicago, Ill., Callaghan, 1940), especially sects. 508 and 509.

<sup>217</sup> See Cohen, *loc. cit.*, pp. 107 *et seq.*

<sup>218</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). See L. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal* (Cambridge, Mass.), vol. 14, 1973, p. 423.

<sup>219</sup> Principle 3, para. 1 (UNEP/IG.12/2, annexed to UNEP/GC.6/17). Although in the explanatory note to the Principles the Group took the position that the formulation did not "intend to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect existing rules of general international law—should be incorporated in the body of general international law", the quoted language, by its terms, would seem to be declaratory of existing international law.

114. The *sic utere tuo* principle is clearly reflected, in addition, in article 3 of the Charter of Economic Rights and Duties of States, as adopted by the United Nations General Assembly in its resolution 3281 (XXIX) of 12 December 1974:

In the exploitation of natural resources shares by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.

115. In the field of broadcasting, where various kinds of transmissions can cause interference in the territory of other States, the principle has wide acceptance, for example in the early international agreements such as the International Radiotelegraph Convention of 1927,<sup>220</sup> the International Telecommunication Convention of 1932,<sup>221</sup> and the International Convention on the Use of Broadcasting in the Cause of Peace of 1936.<sup>222</sup>

116. It has been maintained that the maxim in question had its origin in the Roman law;<sup>223</sup> however, regardless of origin it now occupies a firm place among

<sup>220</sup> Art. 10, sect. 2 (League of Nations, *Treaty Series*, vol. LXXXIV, p. 97).

<sup>221</sup> Art. 35, sect. 1 (*ibid.*, vol. CLI, p. 5).

<sup>222</sup> Art. I (*ibid.*, vol. CLXXXVI, p. 301).

<sup>223</sup> From what we know of the "Twelve Tables", table VIII contained a law VIII, which has some bearing on the point: "When rain falls upon the land of one person in such a quantity as to cause water to rise and injure the property of another, the Praetor shall appoint three arbiters for the purpose of containing the water, and providing against damage to the other party" (*The Civil Law*, S. P. Scott trans., ed. (Cincinnati, Ohio, Central Trust Co., 1932), vol. 1, p. 72). Number LXXI of the New Constitutions of Emperor Leo dealt with the question how close to the crops of another one may build structures upon tillable land or vineyards (*ibid.*, vol. 17, pp. 267-268). See also the Justinian Digest, book XXXIX, title III, concerning the right to compel a neighbour to take care of water and rain water (*ibid.*, vol. 9, pp. 3-17), and the Justinian Code, book III, title XXXIV, concerning servitudes and water, etc. (*ibid.*, vol. 12, pp. 323-326). In the Digest, book VII, title III, section 17, citing Papirius Justus, on Constitutions, book I, it is related that a rescript of the emperors Antoninus and Verus stated that "where water is taken from a public river for the purpose of irrigating fields, it should be divided in proportion to the size of the same, unless someone can prove that, by virtue of a special privilege, he is entitled to more", and that "a party should only be permitted to conduct water where this can be done without injury to another" (*ibid.*, vol. 3, p. 295). As is well known, the ancient maxims and rulings were often contradictory, as well as overlapping. Compare *neminem laedit qui jure suo utitur* (he who stands on his own rights injures no one) with *nemo damnum facit nisi qui id fecit quod facere jus non habet* (no one is considered as doing damage unless he is doing what he has no right to do). In a well documented, specialized study of the ancient origins of water law, Scott concludes:

"Roman law ... respected ancient rights and customs. It also concerned itself with practical needs. In dealing with one water case, Ulpian says (D.43.13.1.7) 'we ought to look at the usefulness of things and the safety of him who does the work, provided that those who dwell along the river are not injured'. Finally, Roman jurists followed the maxim 'equity suggests this, although we may be deficient in the law' in water problems; though the rules of the law might not provide relief, the jurist felt that it should be possible to act to protect a man who was benefiting himself and not harming others (D.39.3.2.5). The creation of a system of water law which protected ancient rights, adjusted to practical needs, and was informed by the principle of equity, was no small achievement." See also B. E. Dobkins, *The Spanish Element in Texas Water Law* (Austin, Texas University Press, 1959), p. 57; K. Neumeyer, "Ein Beitrag zum internationalen Wasserrecht", *Festschrift für George Cohn* (Zürich, Staatswissenschaftliche Fakultät, 1915), p. 143; C. G. Vernesco, *Des fleuves en droit international* (Paris, Rousseau, 1888), pp. iv-xvi, 1-42, 83-99, 123-146 (first part: "De la condition des fleuves en droit romain"), also pp. 144-150, 155-165, 172-193, 280-286.

the doctrinal bases for the obligation of States to avoid appreciable harm to other States, perhaps even more particularly with respect to harm transmitted via international watercourses. Numerous publicists have inferred the principle from State practice.<sup>224</sup>

117. One author concluded that there was one important qualification on the absolute independence of States, to wit:

... 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.<sup>225</sup>

The "connection" with "abuse of rights" is not unusual, at least by treatise writers grounded in the common law.<sup>226</sup> The civil law jurist, on the other hand, is most likely to address himself to the "abus de droit" principle.<sup>227</sup> If the principle, as couched, has in the past stirred disputation among jurists and judges,<sup>228</sup> at least

<sup>224</sup>See, *inter alia*, Smith, *op. cit.*, p. 71; Lederle, *Das Recht der internationalen Gewässer* . . . , *op. cit.*, p. 60; C. Eagleton, "The use of the waters of international rivers", *Canadian Bar Review* (Ottawa), vol. XXXIII, No. 8, 1955, p. 1023; Johnson, "Effect of existing uses on equitable apportionment of international rivers: an American view", *University of British Columbia Law Review* (Vancouver), vol. 1, 1959, p. 392; J. E. Manner, "Water pollution in international law" (WHO, *Aspects of Water Pollution Control*, Public Health Papers No. 13 (Geneva, 1962), p. 68); Van Alstyne, "The justiciability of international river disputes: a study in the case method", *Duke Law Journal* (Durham, N.C.), 1964, p. 316; Gönnerwein, *op. cit.*, p. 65; F. von der Heydte, *Völkerrecht* (Cologne, Verlag für Politik und Wirtschaft), 1958, vol. I, p. 241.

<sup>225</sup>J. G. Starke, *An Introduction to International Law*, 5th ed. (London, Butterworths, 1963), p. 101, under the rubric "Rules of neighbourly intercourse between States". See also Oppenheim, *op. cit.*, pp. 345-346 and 474-476, and works there cited; A. E. Upton, "International water quality law", *Natural Resources Journal*, vol. 13, 1973, pp. 286-294. Additional illustrations of State practice and doctrine will be utilized in the development of the elements of the topic.

<sup>226</sup>See A. Lester, "River pollution in international law", *The American Journal of International Law*, vol. 57, 1963. Lester concluded:

"It can be stated confidently, *de lege lata*, that the Harmon doctrine is not a generally recognized principle of international law, and that there is liability for action incompatible with the general principle *sic utere tuo*. The doctrines of neighborhood, abuse of rights, servitudes, and equitable apportionment stress elements which should be taken into account in the elaboration of river law, but they themselves do not provide specific legal norms" (*ibid.*, p. 847);

for precedents and works cited in support of the conclusion, *ibid.*, pp. 831-847.

<sup>227</sup>See its employment and discussion, in connection with the related (if not overlapping) principles, in *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, as follows: report by J. J. A. Salmon, "La pollution des fleuves et des lacs et le droit international" (pp. 193 *et seq.*, especially pp. 201-203) and works there cited, and the observations in response to para. 3 of J. J. A. Salmon's questionnaire (p. 294) of C.-A. Colliard (p. 296), R. Y. Jennings (pp. 298-299), E. McWhinney (p. 303), C. Rousseau (p. 304), I. Seidl-Hohenveldern (pp. 305-306), J. Sette Câmara (p. 308), H. Valladao (p. 310), J. H. W. Verzijl (p. 311), K. Zemanek (p. 313) and J. Zourek (p. 315) as well as of E. McWhinney (p. 366) and J. Zourek (p. 378). See also the fourth preambular paragraph of resolution II adopted by the Institute at its Athens session: "Recalling the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the obligation to avoid any use of its own territory that causes injury in the territory of another State" (*ibid.*, Part Two, p. 197), and the discussion endorsing the principle set out in that paragraph (*ibid.*, pp. 107-108).

<sup>228</sup>An excursion into the substance and semantics of this venerable debate is not required. However, the basic positions can be consulted in e.g. H. Gutteridge, "Abuse of right", *The Cambridge Law Journal*, vol. V, 1933, p. 22; A. de Cupis, *Il danno, teoria generale della responsabilità civile* (Milan, Giuffrè, 1955), pp. 20-21, and works there cited; A. Spota, *Tratado de derecho civil* (Buenos Aires,

at the international level its repeated espousal, in one formulation or another, can rightly be said, as with *sic utere tuo*, to constitute a general principle recognized as binding upon all members of the international community.<sup>229</sup> In this report, then, attention will be focused on refinement of the principle as it functions within the law of the non-navigational uses of international watercourse systems.<sup>230</sup> The principle is, in addition, registered in express terms in the general provisions of the Convention on the Law of the Sea:

Depalma, 1947), t. 1, vol. 1, pp. 304-305, and t. 2, vol. 1, pp. 3-13; M. Rotondi, "L'abuso di diritto", *Rivista di diritto civile* (Padua), 1923, pp. 113-114; E. Salas Aceel, "Las relaciones de vecindad y el abuso del derecho", *Jurisprudencia argentina* (Buenos Aires), vol. 71, p. 678; M. Markovitch, *La théorie de l'abus des droits en droit comparé* (Paris, Librairie générale de droit et de jurisprudence, 1936); R. Mugaburu, *Esquemas sobre la sistemática del derecho* (Buenos Aires, 1952), pp. 272-312 and 393-399, and works there cited; H. Capitant, "Des obligations de voisinage et spécialement de l'obligation qui pèse sur le propriétaire de ne causer aucun dommage au voisin", *Revue critique de législation et de jurisprudence* (Paris), vol. XXIX (1900), p. 156.

See "aemulatio" (abuse or misuse of right) in A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia, Pa., 1953), where it is maintained that the term is not of Roman origin but was developed in the Middle Ages when Justinian's laws came under the influence of Christian ethics; de Villiers, "Nuisances in Roman law", *The Law Quarterly Review* (London), vol. 13, 1897, p. 387; A. Provincial *Manual of Later Roman Law, the Calabrian Procheiron on Servitudes and Bye-Laws incidental to the Tenure of Real Property*, E. H. Freshfield, (Cambridge, University Press, 1931). Contention among the Civil Code specialists centred on the logic of the existence of a right that could not be exercised to the full; analytically, it was argued, the initial statement of the right was inaccurate or incomplete in that restrictions or limitations would, strictly speaking, be part of any full description of the right. See in that connection M. Planiol, "Fondement de la responsabilité", *Revue critique de législation et de jurisprudence* (Paris), 1905, especially p. 290, and *ibid.*, 1906, p. 80, and by the same author, *Traité élémentaire de droit civil*, 9th ed., vol. II (Paris, Librairie générale de droit et de jurisprudence, 1923), pp. 287-292; G. Morin, "Quelques observations critiques sur le concept d'abus du droit", *Introduction à l'étude du droit comparé* (Paris, Sirey, 1938), vol. II, third part, p. 467. Provisions in civil codes concerning abuse of rights are surveyed in Berber, *Rivers in International Law*, *op. cit.*, pp. 198-205.

<sup>229</sup>See especially Kiss, *op. cit.*; N.-S. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux", *Recueil des cours* . . . 1925-1 (Paris, Hachette), vol. 6, 1926, p. 5, and works there cited; Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), chap. 14; M. Scerni, *L'abuso di diritto nei rapporti internazionali* (Rome, Anonima romana editoriale, 1930); Cheng, *op. cit.*, chap. 4; S. Trifu, *La notion de l'abus de droit dans le droit international* (Paris, Domat Montchrestien, 1940); A. Hauriou, "Les dommages indirects dans les arbitrages internationaux", *Revue générale de droit international public* (Paris), 2nd series, vol. VI, 1924, p. 203; I. C. MacGibbon, "Customary international law and acquiescence", *The British Year Book of International Law*, 1957, vol. 33, p. 115; Schwarzenberger, "Uses and abuses of the abuse of rights in international law", *The Grotius Society, Transactions for the Year 1956* (London), 1957, vol. 42, p. 147; J.-D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Neuchâtel, Editions de la Baconnière, 1958); Sauser-Hall, *loc. cit.*, p. 5, and works there cited; E. R. C. van Bogaert, *Het rechtsmisbruik in het volkenrecht* (Antwerp, De Sikkel, 1948); H.-J. Schlochauer, "Die Theorie des abus de droit im Völkerrecht", *Zeitschrift für Völkerrecht* (Breslau), vol. XVII, No. 3, 1933; W. Friedmann, "The uses of 'general principles' in the development of international law", *The American Journal of International Law*, vol. 57, 1963, especially pp. 288-290; L. Siorat, *Le problème des lacunes en droit international* (Paris, Librairie générale de droit et de jurisprudence, 1958), p. 395; Bourne, "The right to utilize the waters of international rivers", *The Canadian Yearbook of International Law*, 1965 (Vancouver), vol. III, 1965, p. 187; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1958), vol. I, pp. 541-542.

<sup>230</sup>Consideration of the consequences of the principle has been eschewed, since that subject belongs more properly to the field of State responsibility, a topic under extended and active consideration by the Commission.



## Article 300. Good faith and abuse of rights

The States parties to this Convention undertake to discharge in good faith the obligations entered into in conformity with this Convention, and to exercise the rights, jurisdictions and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.<sup>231</sup>

118. There is one more related principle that merits at least some exposition at this point: the principle of "good-neighbourship" ("voisinage"). Conceptualized in that manner, the limitation upon the complete freedom of action of the State seems to have been taken up chiefly on the European continent, and the position is seen as "very similar to that in connection with the principle of the abuse of rights . . ."<sup>232</sup> There is a considerable literature which examines the proposition.<sup>233</sup> The principle has been stated authoritatively in, for example, the German Civil Code of 1884:

. . . that a person's right to dispose of his property is limited by the similar right of disposal possessed by the neighbour, and the latter is not compelled to put up with installations having a detrimental effect to his land which exceed the proportions arising from the normal social relations of daily life.<sup>234</sup>

While the related principles of *sic utere tuo* and "abus de droit" stress the restrictive aspect of the property owner's use rights, and good-neighbourship doctrine makes plain that the neighbour is also under duty to tolerate inconsequential or minor "interferences".<sup>235</sup> Interferences are not lawful where they could have, with due consideration, been avoided.<sup>236</sup> And some authorities regard the principle as limited "to the requirement that States shall not, in areas adjacent to an international boundary, engage in activities that may have injurious consequences for a neighbouring country".<sup>237</sup> Although in earlier times, and even often

<sup>231</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII, document A/Conf. 62/122.

<sup>232</sup> Berber, *Rivers in International Law* (op. cit.), p. 211.

<sup>233</sup> See *inter alia* von der Heydt, "Das Prinzip der guten Nachbarschaft . . .", loc. cit., pp. 133-145; H. Thalmann, *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (Zurich, Juris-Verlag, 1951); Andrassy, "Les relations internationales de voisinage", loc. cit., p. 77; Capitant, "Des obligations de voisinage et spécialement de l'obligation qui pèse sur le propriétaire de ne causer aucun dommage au voisin", loc. cit.; R. von Jhering, "Des restrictions imposées aux propriétaires fonciers dans l'intérêt des voisins", *Oeuvres choisies*, O. de Meulenaere, trans. (Paris, Marescq, 1893), vol. 2, p. 101; H. de Page, *Traité élémentaire de droit civil belge*, (Brussels, Bruylant, 1938), vol. 4, p. 801; L. Barassi, *La proprietà nel nuovo Codice civile*, 2nd rev. (Milan, Giuffrè, 1943), p. 300; Ch. de Visscher, *Problèmes de confins en droit international public* (Paris, Pedone, 1969).

<sup>234</sup> *Entscheidungen des Reichsgerichts in Zivilsachen* (Leipzig, Verlag von Weitz, 1884), vol. 11, p. 345, as quoted in Berber, *Rivers in International Law*, op. cit., p. 215. The Civil Code (sect. 903) provides, however: "A person may deal at will with his property in so far as he does not come into conflict with the law or the rights of a third person" (quoted in Berber).

<sup>235</sup> It should not escape mention that the first-mentioned "end" recited in the Preamble to the Charter of the United Nations is "to practise tolerance and live together in peace with one another as good neighbours".

<sup>236</sup> *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin, de Gruyter, 1939), vol. 159, p. 139. Note, too, "the responsibility which today devolves upon all countries, great and small, to establish an atmosphere of co-operation and security throughout the world, and . . . the role that the existence and development of bilateral good neighbourly relations and understanding among States can play in achieving that goal" (General Assembly resolution 2129 (XX) of 21 December 1965).

<sup>237</sup> Barberis, *Los recursos* . . ., op. cit., p. 149. But see G. Handl, "Territorial sovereignty and the problem of transnational pollution", *American Journal of International Law*, vol. 69, 1975, especially p. 56.

today, the restriction to border regions may have sufficed, the general principle underlying responsibility for appreciable harm today is not so limited.

119. This general proposition, lacking in precise definition certainly, is also reflected in other legal systems and apparently is of truly ancient origin. The earliest known code of laws, the Code of Hammurabi, contains many provisions concerning irrigation. From these provisions it appears that each farmer along an irrigation canal was obligated not to use the water in such a way as to damage his neighbours' lands.<sup>238</sup> The principle of Islamic law to the effect that one must not harm the property of another in a way that one would not have his own damaged has a counterpart in Jewish law: "a landowner in using his land was under a duty not to harm his neighbour and not to deprive him of his customary rights by committing nuisances and so forth".<sup>239</sup>

120. Admittedly a balancing of interests is called for, as was reported in the *Spanish Zone of Morocco* case:

It is admitted that all law has the object of assuring the co-existence of interests worthy of legal protection. This is undoubtedly also true of international law . . .<sup>240</sup>

Indeed, the tribunal found several principles "not even open to discussion", the first one of which was stated as follows:

Responsibility is the necessary corollary of right. All rights of an international character consequently involve international responsibility . . .<sup>241</sup>

121. A well-known decision by the Staatsgerichtshof (Constitutional Law Court) of Germany went even further in applying the rule as between federal States, but involving rights in the flow of the waters of the Danube. In holding that Baden must desist from injuring its neighbour at Immendingen Dam, the Court relied on the "generally recognized principles of water law . . . [to the effect that] no useless consumption of water, injurious to other interested parties, may be connected with a dam" and that, while a State "is not obliged to interfere, in the interests of another State, with the natural processes affecting an international river", Baden's actions amounted to "the neglect of any orderly work of maintenance" along this part of the river. Further, that "only considerable interference with the natural flow of international rivers can form the basis for claims under international law"; however, "legal principles which have been developed for the common utilization of international watercourses flowing above ground require . . . application to water flowing underground", and therefore Würtemberg was under a duty "to refrain from such interference with the natural distribution of water as damages the interests of Baden to any considerable extent".<sup>242</sup>

<sup>238</sup> *The Babylonian Laws*, G. R. Driver and J. C. Miles eds., 2nd edition (Oxford, Clarendon Press, 1956), vol. 1, p. 153.

<sup>239</sup> G. Horowitz, *The Spirit of Jewish Law: a Brief Account of Biblical and Rabbinical Jurisprudence* (New York, Central Book Co., 1953), p. 328. See also M. Fathi, *La doctrine musulmane de l'abus des droits* (Lyon University, Séminaire oriental d'études juridiques et sociales, 1913); FAO, *Water Laws in Moslem Countries*, Irrigation and Drainage Paper 20/1, by D. Caponera (Rome, 1973), vol. I, especially pp. 21-22 and 38-42, and works there cited.

<sup>240</sup> British claims in the Spanish zone of Morocco, *Spain v. United Kingdom* (1925) (United Nations, *Reports of International Arbitral Awards*, vol. II . . ., p. 640).

<sup>241</sup> *Ibid.*, p. 641.

<sup>242</sup> *Würtemberg and Prussia v. Baden* (the Donauversinkung case) (Continued on next page.)

122. The Additional Act to the 1866 Treaty of Bayonne, which was central to the judgment in the *Lake Lanoux* arbitration between France and Spain, contains a provision, article 9, with respect to requirements concerning existing uses. The Tribunal said in that connection:

The recognition of the legality of such use is subject to the following conditions:

(b) The legality of each enjoyment is recognized only to the extent that the water used is necessary to satisfy actual needs.

(c) The recognition of the legality of an enjoyment is to cease in case of abuses, including abuses other than employment of water in excess of what is necessary to satisfy actual needs.<sup>243</sup>

Among other more recent treaty practice, the 1963 Act regarding navigation and economic co-operation between the States of the Niger Basin provided for utilization of the river, its tributaries and subtributaries by the parties consistent with their duty not to engage in activities injurious to other treaty partners.<sup>244</sup> The 1971 Convention between Ecuador and Peru, covering two basins, Puyango-Tumbes and Catamayo-Chira, 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".<sup>245</sup>

The 1972 Convention on the status of the River Senegal required, in article 4, consultations and approval by the contracting parties on any project susceptible of modifying the characteristics of the river's regime, etc., "d'une manière sensible"; the joint agency provided for in article 11 of the Convention would be competent to evaluate whether the modification was "sensible".<sup>246</sup>

123. The 1964 Convention and Statute for the Chad Basin requires notification to the Lake Chad Basin Commission of all projects under study; the Commission must be consulted concerning all measures that might produce an "influence sensible" on: water losses, the annual hydrograph, the conditions of use by the other riparian States, water quality and the biological characteristics of the flora and fauna.<sup>247</sup> Acting under the Treaty of Brasilia of 1969, covering the Plata Basin, the Foreign Ministers of the five system States adopted in 1971 the Act of Asunción on the use of international rivers, which requires that, with respect to successive rivers, each basin State may utilize the waters for its needs, "provided that it causes no appreciable damage to any other State of the basin".<sup>248</sup>

(Footnote 242 continued.)

(1927) (*Entscheidungen des Reichsgerichts* (op. cit.), vol. 116, pp. 1, 22, 30 and 31–42, quoted in Hackworth, op. cit., vol. 1, pp. 597–599).

<sup>243</sup> *International Law Reports*, 1957, p. 122. "It could have been argued that the works would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which would injure Spanish interests. Spain could then have claimed that her rights had been impaired in violation of the Additional Act . . . It has not been clearly affirmed that the proposed works would entail an abnormal risk in neighbourly relations or in the utilization of the waters" (ibid., p. 123).

<sup>244</sup> United Nations, *Treaty Series*, vol. 587, p. 9.

<sup>245</sup> Ecuador, *Registro Oficial* (Quito), 2nd year, No. 385, 4 Jan. 1972, p. 1.

<sup>246</sup> The text of the Convention is reproduced in "Economic co-operation among developing countries: compilation of the principal legal instruments" (TD/B/609/Add.1 (vol. IV)), p. 11).

<sup>247</sup> See footnote 139 above.

<sup>248</sup> Resolution No. 25, para. 2. See *Yearbook . . . 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326.

124. The 1975 Statute for the Uruguay River, adopted by Uruguay and Argentina, provides that 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 regime of the river or the quality of its waters.<sup>249</sup>

The parties are also to submit to the Administrative Commission, created under chapter XIII of the Statute, every six months,

a detailed report on all development activities undertaken or authorized by them in the areas of the river under their respective jurisdictions, in order that the Commission may determine whether, in the aggregate, such activities are causing appreciable harm.<sup>250</sup>

125. By a tripartite declaration in 1960, Argentina, Brazil and Uruguay agreed *inter alia*, with respect to the Salto Grande works, that Brazil had a right to indemnization for the damages that might be caused by the flooding of its territory by the reservoir behind the dam; moreover, Brazil's right to be heard, should the two parties decide to modify the approved plans, for example to raise the height of the dam, was acknowledged, and Brazil was to consult in advance with the other two Governments about any works it might plan in its portion of the Uruguay River that might injure the latter.<sup>251</sup> In the 1944 Treaty between Mexico and the United States of America, each party declares its intention to operate its facilities in such manner, consistent with the normal operations of its hydraulic systems, so as not to harm the other.<sup>252</sup> The 1977 Agreement on the Kagera Basin defines a project as inter-State and subject to the approval of the basin organization when, *inter alia*, it could produce "substantial effects", beneficial or prejudicial, in another signatory State.<sup>253</sup> The Indus Waters Treaty (Pakistan–India, 1960) provides:

If either party plans to construct any engineering works which would cause interference with the waters of any of the rivers and which, in its opinion, would affect the other party materially, it shall notify the other party of its plans and shall supply such data relating to the work as may be available as would enable the other party to inform itself of the nature, magnitude and effect of the work . . .<sup>254</sup>

<sup>249</sup> Art. 35 (chap. IX: "Conservation, utilization and exploitation of other natural resources") (*Actos internacionales Uruguay-Argentina 1830–1980* (Montevideo, 1981), p. 600); art. 36: "The parties shall, through the Commission, co-ordinate appropriate measures to prevent alteration of the ecological balance, and to control impurities and other harmful elements in the river and its catchment area".

<sup>250</sup> Art. 28 (ibid., p. 599).

<sup>251</sup> Hayton, "The Plata Basin", *The Law of International Drainage Basins* (op. cit.), p. 379.

<sup>252</sup> Art. 17 (United Nations, *Treaty Series*, vol. 3, p. 350). See also Meyers, loc. cit., pp. 567–568.

<sup>253</sup> Art. 2, para. 2, of the Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin (Burundi, Rwanda, United Republic of Tanzania), 24 August 1977.

<sup>254</sup> Art. VII, para. 2 (United Nations, *Treaty Series*, vol. 419, p. 146). The paragraph provides further that, if a work causes interference, but not materially, in the opinion of the party that plans its construction, that party will nonetheless supply to the other party at its request the available information on the nature, magnitude and effect of the work. See also Baxter, loc. cit., p. 471. Among numerous other examples, see the 1968 Agreement between Bulgaria and Turkey concerning co-operation in the use of the waters of rivers flowing through the territory of both countries, art. 2 of which provides that " . . . they shall avoid causing any substantial damage to each other in the construction and use of installations on rivers flowing through their territory" (United Nations, *Treaty Series*, vol. 10).

126. As early as 1911, at its Madrid session, the Institute of International Law concluded, in its "Reglementation internationale des cours d'eau internationaux", that:

When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc., to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc., thereof.<sup>255</sup>

The regulations further stated, in rule II, paragraph 3, with respect to successive streams:

No establishment . . . may take so much water that the constitution, otherwise called the utilizable or essential character, of the stream shall, when it reaches the territory downstream, be seriously modified . . .<sup>256</sup>

127. The American States, at their Seventh International Conference, held in Montevideo in 1933, approved a Declaration which stated *inter alia*:

. . . 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.<sup>257</sup>

128. By 1961, the Institute of International Law was ready with a broader pronouncement on utilization of non-maritime international waters (except for navigation), which came to be known as the "Salzburg resolution".<sup>258</sup> After establishing in article 2 that the right to utilize was "subject to the limits imposed by international law and, in particular, those resulting

from the provisions [of the resolution] which follow", and postulating utilization "on the basis of equity" in article 3, the provision most relevant here, article 4, reads:

No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

Recently, at its 1979 Athens session, the Institute adopted a resolution on the pollution of rivers and lakes and international law which states:

. . . States shall be under a duty to ensure that their activities or those conducted within their jurisdiction or under their control cause no pollution in the waters of international rivers and lakes beyond their boundaries.<sup>259</sup>

The International Law Association at its 1980 Belgrade Conference adopted two articles on "relationship between water, other natural resources and the environment", article 1 of which reads:

Consistent with article IV of the Helsinki Rules, States shall ensure that:

(a) The development and use of water resources within their jurisdiction do not cause substantial damage to the environment of other States or of areas beyond the limits of national jurisdiction; and

(b) The management of their natural resources (other than water) and other environmental elements located within their own boundaries does not cause substantial damage to the natural condition of the waters of other States.<sup>260</sup>

At the same Conference, the Association adopted nine articles on "regulation of the flow of water of international watercourses", defined 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 . . ." The pertinent provisions of these rules read as follows:

#### Article 6

A basin State shall not undertake regulation that will cause other basin States substantial injury unless those States are assured the enjoyment of the beneficial uses to which they are entitled under the principle of equitable utilization.

#### Article 7

1. A basin State is under a duty to give the notice and information and to follow the procedure set forth in article XXIX of the Helsinki Rules.

2. When appropriate, the basin State should invite other basin States concerned to participate in the regulation.

#### Article 8

In the event of objection to the proposed regulation, the States concerned shall use their best endeavours with a view to reaching an agreement. If they fail to reach an agreement within a reasonable time, the States should seek a solution in accordance with chapter 6 of the Helsinki Rules.<sup>261</sup>

807, p. 124); the 1971 Agreement between Finland and Sweden concerning frontier rivers (*ibid.*, vol. 825, p. 272), especially, chap. 3 ("Hydraulic construction works"), in which it is provided as follows:

"where the construction would result in a substantial deterioration in the living conditions of the population or cause a permanent change in natural conditions such as might entail substantially diminished comfort for people living in the vicinity or a significant nature conservancy loss or where significant public interests would be otherwise prejudiced, the construction shall be permitted only if it is of particular importance for the economy or for the locality or from some other public standpoint" (art. 3, second para.);

"Where hydraulic construction works . . . may have a harmful effect on fishing, the person carrying out the construction shall take or pay for such measures as are reasonably called for in order to protect the fish stock or maintain fishing of an equal standard" (art. 7);

"Persons carrying out construction works shall . . . be bound to take or pay for the measures required in order to prevent any significant inconvenience to timber floating . . ." (art. 8, second para.);

" . . . care shall be taken to ensure that, apart from occasional, temporary turbidity, no pollution occurs that causes any significant inconvenience" (art. 9).

<sup>255</sup> *Annuaire de l'Institut de droit international*, 1911, vol. 24, pp. 365-366 (rule 1). The text of the regulations is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 200, document A/5409, para. 1072.)

<sup>256</sup> *Ibid.* The same regulations went so far as to declare: "All alterations injurious to the water, the emptying therein of injurious matter . . . is forbidden" (rule II, para. 2).

<sup>257</sup> Para. 2, second para. (Pan American Union, *Seventh International Conference . . . (op. cit.)*, p. 114). (The Declaration is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I, A.) Para. 3 declares: ". . . 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 . . .".

<sup>258</sup> *Annuaire de l'Institut de droit international*, 1961, pp. 381-384. (The text of the resolution is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.)

<sup>259</sup> Art. II (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 199). The French text reads ". . . ne causent pas . . . de pollution . . ." (*ibid.*, p. 198).

<sup>260</sup> For the articles, with annotated comments, see I.L.A., *Report of the Fifty-ninth Conference . . .*, report of the Committee on International Water Resources Law, part II (Rapporteurs: G. Cano, J. Barberis and L. Teclaff).

<sup>261</sup> For the text of the articles, with introduction and commentary (Chairman: E. Manner), *ibid.*, pp. 367-369.

129. Previously, in 1972, the Association, also upon the recommendation of its Committee on International Water Resources Law, had approved special articles on marine pollution of continental origin, which covered, *inter alia*, the "discharge or introduction of substances . . . indirectly through rivers or other watercourses whether natural or artificial".<sup>262</sup> The relevant substantive article reads:

Taking into account all relevant factors referred to in article III, a State

(a) shall prevent any new form of continental seawater pollution or any increase in the degree of existing continental seawater pollution which would cause substantial injury in the territory of another State or to any of its rights under international law or to the marine environment, and

(b) shall take all reasonable measures to abate existing continental seawater pollution to such an extent that no substantial injury of the kind referred to in paragraph (a) is caused.<sup>263</sup>

For our purposes, two more articles in this ILA text merit quotation:

#### Article IV

When it is contended that the conduct of a State is not in accordance with its obligations under these articles, that State shall promptly enter into negotiations with the complainant with a view to reaching a solution that is equitable under the circumstances.

#### Article V

In the case of violation of the rules in article II, the State responsible shall cease the wrongful conduct and shall compensate the injured State for the injury that has been caused to it.<sup>264</sup>

### 2. THE MATTER OF "APPRECIABLE"

130. Although a few doctrinal statements and even treaties have expressed the principle in absolute terms,<sup>265</sup> that is, apparently proscribing activities of a system State that cause any harm whatsoever to another system State, the usual formulations are careful to contain a qualification. Harm of some significance is required before the legal interests of the affected State would be infringed. Also, thus far, most of the applications have dealt with pollution. The qualifying terms obviously vary, although it is not as readily ascertainable whether the same, or essentially the same, degree of harm is intended to be imparted. "Substantial", "significant", "sensible" (in French and Spanish) and "appreciable" (especially in French) are the adjectives most frequently employed to modify "harm".

<sup>262</sup> Art. I (ILA, *Report of the Fifty-fifth Conference* . . . (p. xvii).

<sup>263</sup> Art. II (*ibid.*, pp. xvii-xviii). See also art. III, on "relevant factors" following a list of "international standards" that should be established "as soon as possible" (*ibid.*, p. xviii), which shows departures from as well as resemblances with the factors for equitable utilization set out in art. V of the Helsinki Rules.

<sup>264</sup> *Ibid.* For the discussion of the topic at the Conference and the relevant portion of the Committee's report, *ibid.*, pp. 26-37 and 97-106 respectively. For the articles on flood control, adopted at the same Conference, and the discussion and report, *ibid.*, pp. xvi-xvii, 22-26, 43-97.

<sup>265</sup> See e.g. para. 2 of the 1971 Argentine-Uruguayan Declaration on water resources: "States shall refrain from polluting international rivers and tributaries in any manner and shall conserve the ecological resources in the areas within their respective jurisdictions" (see *Yearbook* . . . 1974, vol. II (Part Two), p. 325, document A/CN.4/274, para. 328). Czechoslovakia and the USSR, in art. 14, para. 1, of their 1956 Agreement concerning the frontier, contracted to "ensure that the frontier waters are kept clean and are not artificially polluted or fouled in any way. They shall also take measures to prevent damage to the banks of the frontier river Uzh" (United Nations, *Treaty Series*, vol. 266, p. 312).

131. These variations in terminology may in considerable part be the result of choices made by translators. For example, a leading student of the topic, whose native language is Spanish and who is an accomplished linguist, appears more or less to equate *perjuicio sensible*, the phrase he uses and defines as "injury of a certain importance", with "serious magnitude", "serious detriment" and "substantial", in English, with *erheblich beeinträchtigen* (to prejudice in a manner that is important, considerable, of consequence), *wesentlich benachteiligen* (to injure substantially, or in a real manner), or *wichtige Interessen* . . . *beeinträchtigen* (to injure important, weighty, serious interests), in German, and with *nuire gravement, sensiblement modifier, entraves sensibles, changement sensible and influence sensible*, in French.<sup>266</sup>

132. Examples from treaty practice include the Agreement of 26 February 1975 between Argentina and Uruguay,<sup>267</sup> the Act of Santiago of 26 June 1971 between Argentina and Chile,<sup>268</sup> and the Act of Asunción (Argentina, Bolivia, Brazil, Paraguay and Uruguay) of 3 June 1971,<sup>269</sup> all of which use *perjuicio sensible*; Brazil and Uruguay, on the other hand, agreed in 1933 on the use of *modificación sensible y durable*.<sup>270</sup> The 1879 Treaty between Baden and Switzerland refers to an *erhebliche Einwirkung* (considerable influence);<sup>271</sup> the 1891 Treaty between the United Kingdom and Italy deals with *ouvrage qui pourrait sensiblement modifier*;<sup>272</sup> the 1905 Treaty between Norway and Sweden speaks of *entraves sensibles*;<sup>273</sup> in 1931, Romania and Yugoslavia employed *changement sensible du régime des eaux*.<sup>274</sup> In the Belgium-United Kingdom Treaty of 1934, the word "substantial" appears,<sup>275</sup> while the more recent Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany speaks of *Massnahmen* . . . *die den Nachbarstaat wesentlich benachteiligen* ("measures . . . causing substantial prejudice to the neighbouring State").<sup>276</sup> The tripartite agreement of 30

<sup>266</sup> Barberis, *Los recursos* . . . , *op. cit.*, p. 29.

<sup>267</sup> Arts. 7 and 11 (*Actos internacionales Uruguay-Argentina, 1830-1980* (Montevideo, 1981) pp. 594-596).

<sup>268</sup> Art. 4. (The text of the Act is reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327).

<sup>269</sup> Resolution No. 25, para. 2 (*ibid.*, p. 324, para. 326).

<sup>270</sup> Art. XX (League of Nations, *Treaty Series*, vol. CLXXXI, p. 77).

<sup>271</sup> Art. 5 (G.Fr. de Martens, ed., *Nouveau Recueil général de Traité*s, 2nd series, (Göttingen, Dieterich, 1884), vol. IX, p. 595).

<sup>272</sup> Art. III (*ibid.*, vol. XVIII, p. 738).

<sup>273</sup> Art. 2 (*ibid.*, vol. XXXIV, p. 711).

<sup>274</sup> Art. 3 (League of Nations, *Treaty Series*, vol. CXXXV, p. 31).

<sup>275</sup> Art. 1 (*ibid.*, vol. CXC, p. 103).

<sup>276</sup> Art. 58, para. 1 (United Nations, *Treaty Series*, vol. 508, p. 190). See also e.g. the 1973 Treaty of the Plata River and its maritime limits (Argentina-Uruguay), arts. 21 and 71 (*sensible* translated as "substantial" in *International Legal Materials*, vol. XIII, 1974, pp. 255 and 263); the 1891 Protocol of Rome between the United Kingdom and Italy (*sensiblement modifier*) (*British and Foreign State Papers, 1890-1891* (London, 1897), vol. LXXXIII, p. 21). On the other hand, avoidance of works entailing "any prejudice" to the interests of Egypt appeared in both the 1929 and the 1952-1953 exchanges of notes between the United Kingdom and Egypt (League of Nations, *Treaty Series*, vol. XCIII, p. 44, and United Nations, *Treaty Series*, vol. 207, p. 278). See the discussion and illustrations relating to the proper "quantity" term and the problem of precision in *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, "La pollution des fleuves et des lacs et le droit international", pp. 218, *et passim*.

April 1966b between Austria, the Federal Republic of Germany and Switzerland addresses itself to situations that *wichtige Interessen anderer Anliegerstaaten beeinträchtigen* ("adversely affect important interests of other riparian States").<sup>277</sup>

133. Among modern system-wide conventions, the pertinent language in the 1972 Convention on the status of the Senegal River was *projet susceptible de modifier d'une manière sensible*,<sup>278</sup> and the Lake Chad Basin Statute of 1964 refers to *mesures susceptibles d'exercer une influence sensible*.<sup>279</sup>

134. Thus, starting in the last century and persisting into very contemporary treaty practice, the States concerned have, while heeding the *sic utere tuo* maxim, almost always limited it by one of the terms discussed above.<sup>280</sup>

135. In the Helsinki Rules, "substantial" is employed in relation to pollution:

#### Article X

1. Consistent with the principle of equitable utilization of the water of an international drainage basin, a State

(a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause *substantial injury*\* in the territory of a co-basin State, and

(b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no *substantial damage*\* is caused in the territory of a co-basin State.<sup>281</sup>

The commentary to article X explains "substantial injury" in the following terms:

Pollution as that term is used in this chapter may be the result of reasonable and otherwise lawful use of the waters of an international basin. For example, the normal process of irrigation for the reclamation of arid or semi-arid land usually causes an increase in the salinity of the downstream waters. Modern industrial processes of a very valuable and useful nature may result in the discharge of deleterious wastes that pollute the water. Frequently rivers are the most efficient means of sewage disposal, thereby causing pollution of waters. Thus, as pollution may be a by-product of an otherwise beneficial use of the waters of an international drainage basin, the rule of international law stated in this article does not prohibit pollution *per se* . . .

However, where the effect of the pollution is such that it is not consistent with the equitable utilization of the drainage basin and causes "substantial injury" in the territory of another State, the conduct causing the pollution gives rise to a duty, as stated in this article, on the part of the State responsible for the pollution.

Not every injury is substantial. Generally, an injury is considered "substantial" if it materially interferes with or prevents a reasonable use of the water. On the other hand, to be "substantial" an injury in the territory of a State need not be connected with that State's use of the waters. For example, the pollution of water could result in

"substantial injury" in the territory of another State by the transmission . . . of organisms that cause disease.<sup>282</sup>

136. The 1969 draft European convention on the protection of fresh water against pollution, of the Council of Europe, expressly recognized in the preamble "that it is a general principle of international law that no country is entitled to exploit its natural resources in a way that may cause substantial damage in a neighbouring country".<sup>283</sup> Previously, in 1965, the Consultative Assembly had approved a list of "guiding principles on fresh water pollution control" that included, in the preamble, the declarative statement that control of water pollution "constitutes a fundamental governmental responsibility and requires systematic international collaboration".<sup>284</sup> This approved list of principles resulted from a report to the Consultative Assembly prepared by an inter-committee working group. A section of the report covered the legal basis for pollution control at the international level. The most pertinent paragraphs of that section, drafted 16 years ago, are still valid and read as follows:

Most specialists who have studied the problem of the responsibility of a State in regard to the damage caused outside its territory conclude that international law does not allow any State to use its waters in such a way as to cause substantial damage to a neighbouring country. Amongst the theories and principles most frequently quoted in support of this conclusion are the Roman law maxim *sic utere tuo ut alienum non laedas* (a principle which has been widely recognized in the parallel field of radio broadcasting . . .); the theory of the abuse of rights; and principle of neighbourship. Recently two other theories have been put forward: the "principle of coherence" according to which a drainage basin constitutes an indivisible unit from both the physical and the legal points of view, and the principle of peaceful coexistence.

. . . since 1860 . . . about forty conventions have been concluded in Europe with the direct or indirect aim of protecting international watercourses from pollution.

. . . it would clearly be dangerous to assert that there are in international law any precise and concrete rules as to the rights and obligations of States in regard to international water pollution. The most one can do is to note the existence of the principle that a State must not allow international water passing through its territory to be used without proper regard for the legitimate interests of neighbouring States.<sup>285</sup>

<sup>282</sup> *Ibid.*, p. 500.

<sup>283</sup> Council of Europe, Consultative Assembly, recommendation 555 (1969) (doc. 2561), p. 3. (The text of the draft convention is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 344-345, document A/CN.4/274, para. 374.) Art. 2 of the draft gave operative form to the principle of "substantial" damage stated in its para. 1. The draft did not find favour with the Council's Committee of Ministers on several grounds, including the finding that it went beyond even the Helsinki Rules with respect to State responsibility. Because concerted action in the field of water pollution was judged indispensable, a new draft was "commissioned" to reflect the aims established by the Consultative Assembly in its recommendation 555. The resulting substitute draft (1974) (doc. 3417) was couched in terms more of affirmative and close co-operation; the earlier draft's attention to general international law was omitted, but the provisions concerning institutional arrangements, data and notice were strengthened (*ibid.*, pp. 346-349, para. 377).

<sup>284</sup> Council of Europe, Consultative Assembly, recommendation 436 (1965) (doc. 1965), para. 1(c). The problem of responsibility for "substantial injuries" is taken up in para. 11(c), under the heading "International aspects". (The text of the recommendation is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 341-342, document A/CN.4/274, para. 372.)

<sup>285</sup> Council of Europe, Consultative Assembly, report on fresh water pollution control in Europe (doc. 1965), pp. 95, 97, 98. (The

<sup>277</sup> Art. 3, para. 1 (United Nations, *Treaty Series*, vol. 620, p. 200).

<sup>278</sup> Art. 4 (TD/B/609/Add.1 (vol. IV), p. 12).

<sup>279</sup> Art. 5 (*Journal officiel de la République fédérale du Cameroun* . . . , 4th year, No. 18, p. 1003). Art. II of the 1974 Stockholm Convention on the Protection of the Environment (Denmark, Finland, Norway, Sweden) deals with "the permissibility of environmentally harmful activities which entail or may entail *considerable nuisance*\* in another Contracting State" (*International Legal Materials*, vol. XIII, 1974, p. 595).

<sup>280</sup> See Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours* . . . , 1978-I (Aalphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, pp. 194-195.

<sup>281</sup> ILA, *Report of the Fifty-second Conference* . . . , pp. 496-497. Para. 2 of art. X provides:

"The rule stated in paragraph 1 of this article applies to water pollution originating:

(a) within a territory of the State, or  
(b) outside the territory of the State, if it is caused by the State's conduct."

From this intensive preparatory work the notable European Water Charter developed. Approved by the Consultative Assembly and the Committee of Ministers in 1967, it was proclaimed in Strasbourg on 6 May 1968.<sup>286</sup> The matter of State responsibility is not taken up in so many words in the Charter, but the "international" character of this "indispensable" "treasure", that is, water, is roundly declared in article III, third para.: "Any *important*\* reduction of quantity and deterioration of quality of water, whether running or still, may do *harm*\* to man and other living creatures." Article XI provides that the management of water resources "should be based on their natural basins rather than on political and administrative boundaries" and that "all uses of surface and underground waters are interdependent and should be managed bearing in mind their interrelationships". Article XII states: "Water knows no frontiers; as a common resource it demands international co-operation."

137. While for some commentators distinguishing between the terms "serious", "substantial", *sensible*, etc. may turn on insubstantial differences, the Special Rapporteur has concluded that "appreciable" is the correct and preferred term. This choice has already met with at least tentative approval within the Commission. Article 3, paragraph 2, of the articles reported to the Sixth Committee of the General Assembly in 1980 permits "system agreements" with respect to something less than an entire international watercourse system, "provided that the use by one or more other system States of the waters . . . is not, to an appreciable extent, affected adversely".<sup>287</sup> And article 4, paragraph 2, of the same articles further provides that a system State is entitled to participate in the negotiation of a system agreement (to the extent that its use is thereby affected) if its use of the waters of an international watercourse system "may be affected to an appreciable extent" by a proposed system agreement applicable to something less than the system as a whole.<sup>288</sup>

138. Simply put, "appreciable" stands for more in quantity than is denoted by "perceptible", which could be construed to mean only barely detectable. "Appreciable" means less in quantity than terms such as "serious" or "substantial". With any such qualifying term out of ordinary language there is always the difficulty of determining, as in this case, just what quantity of harm satisfies "appreciable". As the Commission has reported in paragraph (10) of its commentary to the tentatively approved article 4, as set forth in chapter V of its 1980 report to the General Assembly:

In the absence of any mathematical formula for fixing the extent to which use or enjoyment of system water should be affected in order to support participation in a negotiation, effect on a system State to

an "appreciable extent" is proposed as the criterion. This extent is one which can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use.<sup>289</sup>

139. It is perhaps worth noting again that the "draft principles of conduct in the field of environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States" employ "significantly affect", which signifies, according to the single definition accompanying the draft principles, "any appreciable effects on a shared natural resource and excludes *de minimis* effects".<sup>290</sup>

140. In any event, measuring the quantity of such a qualifying term is not a new task for the law. Such descriptive terms denoting a certain standard are frequently unavoidable, and not only in customary law. The problem presented itself long ago with such verbal standards as "reasonable care", "probable cause", "reasonable time", "reasonable use", *rebus sic stantibus*, "substantial capacity", "substantial compliance" (or "performance"), "minimum standard of justice", *force majeure*, "excessive force", and even *de minimis* itself.<sup>291</sup>

141. Since what is intended in this new article on responsibility for harm is the same quantity already expressed in articles 3 and 4, adopted at the Commission's thirty-second session, in 1980, it is imperative that the same term "appreciable" be used. In its use of "appreciable", the Commission desires to convey as clearly as possible that the effect or harm must have at least an impact of some consequence, for example on public health, industry, agriculture or environment in the affected system State, but not necessarily a momentous or grave effect, in order to constitute transgression of an interest protected by international law.<sup>292</sup>

### 3. MAKING THE RULE MORE DEFINITE AND CERTAIN

142. The Special Rapporteur is persuaded that the time has come to cast the *sic utere tuo* principle, appropriately qualified, as a clear rule with respect to international watercourse systems. The classical case, as previously noted, is the Canada-United States *Trail Smelter* arbitration.<sup>293</sup> Moreover, in the *Lake Lanoux* arbitration between France and Spain, decided in 1957, the tribunal inferred that, if the waters returned to the lake in France after use had had a harmful chemical composition, temperature or other condition, the claim of Spain would have been sustained.<sup>294</sup>

143. But, in addition to pollution, direct conflicts between or among uses are also capable of resulting in harm to a system State. The Institute of International Law, in article 2 of its 1961 resolution on the utilization

(Footnote 285 continued.)

text of the relevant paragraphs is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 340-341, document A/CN.4/274, para. 370.)

<sup>286</sup>For the text of the European Water Charter, *ibid.*, pp. 342-343, para. 373.

<sup>287</sup>*Yearbook* . . . 1980, vol. II (Part Two), p. 112, para. 98 (see also para. 8 above).

<sup>288</sup>*Ibid.*, p. 118.

<sup>289</sup>*Ibid.*, p. 119. The commentary supports its position with, *inter alia*, the *Lake Lanoux* arbitration, the Statute annexed to the 1964 Convention on the development of the Chad Basin, the 1929 Convention on certain questions relating to the law on watercourses between Norway and Sweden, the 1933 Convention regarding the determination of the legal status of the frontier between Brazil and Uruguay, and the Helsinki Rules.

<sup>290</sup>UNEP/IG.12/2, annexed to document UNEP/GC.6/17.

<sup>291</sup>See *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, observations of M. S. McDougal (pp. 300-301) in response to J. J. A. Salmon's questionnaire (pp. 294-295).

<sup>292</sup>One legal definition of "appreciable" is: "Capable of being estimated, weighed, judged of, or recognized by the mind. Capable of being perceived or recognized by the senses. Perceptible but not a synonym of substantial." See *Black's Law Dictionary* (op. cit.).

The inflicting of appreciable harm of a particular kind may, considering the total circumstances, become permissible within the context of a system State's equitable participation. See sect. B of this chapter.

<sup>293</sup>United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1964.

<sup>294</sup>*Ibid.*, vol. XII . . . , p. 285.



of non-maritime international waters except for navigation, implicitly recognized this possibility by qualifying every State's right to utilize waters which traverse or border its territory by making the right "subject to the limits imposed by international law" and by specifying that such right "is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin".<sup>295</sup> The preamble of the resolution includes the statement that "the obligation not to cause unlawful harm to others is one of the basic general principles governing neighbourly relations".<sup>296</sup>

144. As even a cursory study of the subject of natural and man-made hazards reveals, a wide variety of "incidents" could, and on occasion do, occur that might involve a system State's responsibility, either for negligence or for failure to exercise the ordinary standard of care in the management of its portions of the international watercourse and the hydraulic works and installations associated therewith.<sup>297</sup>

145. Dams in rare instances give way; spills of highly toxic chemicals may amount to more than a "pollution problem to be studied". Damage may be catastrophic and involve, among other irreversible effects, the loss of thousands of lives. The filling of a reservoir may obliterate inland wetlands of unusual value to the ecology of a particular region as well as deprive downstream irrigators, industry and municipalities of their vital supply; a valuable fishery may be destroyed for all parties. The diversion of a stream, or the withholding of much of its flow, may deprive important groundwaters of their natural recharge; river regulation or "training" may deprive deltas and estuaries of floods or scouring flows that have sustained agriculture, navigation and coastal fisheries. The point need not be

belaboured that harm can proceed from a variety of sources other than pollution.

146. It is frequently said, however, that the upper riparian is at a disadvantage as concerns this matter of State responsibility, since it is presumed that most, if not all, harm proceeds from upstream to downstream. A standard consequence is that floods and contamination originating in an upstream system State may have their most harmful effects in downstream system States. Since water flow is governed by gravity (where it is not being pumped to a higher elevation), that belief seems logical, but it is only partly true. Insufficient attention has been given in connection with State responsibility to the works and conditions *downstream* that may adversely affect upstream system States. A number of illustrations are well known concerning rivers subject to more than one jurisdiction. For example, pollution of the lower reaches of a watercourse has often proved sufficient to discourage or inhibit entirely anadromous and catadromous fish migration, adversely affecting commercial and recreational fishing upstream.

147. Dams, barrages or weirs downstream are obviously capable of preventing or limiting not only navigation but also fish migration and timber floating. Incidentally, locks, where provided, to some extent retard traffic along the watercourse and do not accommodate ships in excess of a certain breadth and draft.<sup>298</sup> In cold climates, the reservoir and locks may not remain free of thick ice as once did the open channel. These conditions may make water transportation more expensive and time-consuming, matters of critical importance to upstream States. Ordinary fish ladders, moreover, have not been found to be successfully adapted to by the fish in some cases and circumstances.

148. Dams downstream create artificial lakes behind them that may change the ecology of the surrounding region, including the territory of an upstream system State. The same artificial lake may flood upper riparian land continuously from the time of the initial filling or during the times when the operators of the dam are accumulating the maximum amount of water for later power generation or supply uses; also, silt may be deposited further upstream as a result of such changes in the regime of the river downstream. In rather flat regions, in particular, the presence of a large new lake may so raise the subterranean water table as to cause drainage problems, for example on agricultural lands, in mines and in the basements of homes and factories. If the flooding is serious, relocation of road and rail routes, of communication lines and even of whole towns may be required.

149. A lower riparian may also overfish a fishery in the river or lake, reducing the catch by the upper riparians: this result is not limited to migratory species. Failure to let down high season waters downstream (by opening dam floodgates or the installation of

<sup>295</sup> *Annuaire de l'Institut de droit international*, 1961, p. 382. (The text of the resolution is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.)

<sup>296</sup> Moreover, art. 4 refers to the right of other States to enjoyment of the advantages to which they are entitled under art. 3 (i.e. "on the basis of equity"), as well as to adequate compensation for any loss or damage.

<sup>297</sup> Under certain circumstances, affirmative precautionary actions may be the duty of a system State, including action with respect to the treatment of a dangerous condition arising in its own territory; the duty appears to include timely communication of appropriate warnings to States that may be affected if an incident in fact occurs. Although in the article here proposed the legal obligation is in the usual proscriptive form, that is, appreciable harm is *not* permitted, contemporary, not to mention future, conditions may be deemed to exact a more affirmative duty to undertake measures—to be the good neighbour in the positive sense. See, in this connection, the remarks on the *Württemberg and Prussia v. Baden* case (1927) in para. 121 above. The Netherlands and the Federal Republic of Germany, in their 1960 Treaty on boundary waters and other frontier questions, agreed "to take or to support all measures required to establish and to maintain . . . such orderly conditions as will mutually safeguard their interests", and neither to take nor to "tolerate any measures causing substantial prejudice to the neighbouring State" (art. 58, para. 1); specified five areas of "positive" action to prevent harm (art. 58, para. 2); and agreed to "endeavour, within the limits of their financial resources, to effect such improvements in the use and management of the boundary waters within their respective territories as will serve their mutual interests, and to participate financially, where such participation is equitable, in measures taken in respect of the boundary waters within the territory of the neighbouring State" (art. 58, para. 3) (United Nations, *Treaty Series*, vol. 508, pp. 190-192). In the Indus Waters Treaty (India and Pakistan, 1960), "Each party will use its best endeavours to maintain the natural channels of the rivers, . . . in such condition as will avoid, as far as practicable, any obstruction to the flow in these channels likely to cause material damage to the other party" (art. IV, para. 6) (*ibid.*, vol. 49, p. 138).

<sup>298</sup> It should not go without mention that low bridges and causeways across watercourses can impose comparable burdens upon water transport; trans-river "tunnel" structures may be laid so shallowly as to restrict or endanger navigation during low flow periods. On the other hand, damming may significantly improve if not extend navigation upstream (as is the case of the upper Mississippi and Uruguay rivers), but this section of the report concerns harm and not possible benefit, which would be weighed in the balance of the system States' equitable participation (see sect. B above).

inadequate gates) may result in the flooding of the territory of upper riparians.

150. Inadequate navigational aids, including reporting to upper riparians of new or shifted sandbars or channels, as well as poor channel maintenance, can cause accidents and delays to shipping to and from the upper riparians; a lower riparian's sudden restriction of piloting within its territory to its nationals raises the cost of navigation to upper riparians and deprives the upper riparians' pilots of part of their livelihood. A reduction in flow from a major downstream tributary (for example, because of diversion for irrigation) may result in the silting up of channels of the mainstream and delta, diminishing if not obstructing navigation and floating for upper riparians. Failure to maintain channel depth (by dredging or weirs) downstream diminishes the size of vessels that can successfully navigate to and from upper parts of the international watercourse. Failure to remove ice, log jams or other obstacles downstream blocks timber floating and navigation for the upper riparians. Imposition of unreasonable or discriminatory fees or regulations by a lower riparian may result in delays and increases the cost of shipping and floating to and from upper riparians; avoidable congestion of the lower riparian's navigable channels and ports delays shipping. The closing of a river by the lower riparian (for example, for "naval exercises" or for public safety reasons) in fact deprives upper riparians of the use of the river for transport.

151. Thus a highly beneficial use or a combination of uses downstream—generation of electricity, shunting of water into a mill, storage for irrigation or industrial use, regulation (including flood control), blockage of saltwater intrusion and recreational uses, for example—may result in appreciable harm to one or more upstream system States.

152. Moreover, the refusal of a lower riparian, for example, to pay compensation, make contribution, or share power (as indicated or appropriate under the circumstances), may be judged to deprive an upper riparian of its equitable participation. The creation of, or failure to eliminate, vector breeding grounds, especially in irrigation works, dam spillways and marshy areas, may result in the spread of insects or other transmitters of disease, and thus the disease, to neighbouring territories, including upstream.<sup>299</sup>

153. Just as important as the test of "appreciable" is the construction of a just balance in the procedural aspects of determining and then quashing the charge or imposing, or excusing, a finding of appreciable harm.<sup>300</sup> Every effort has been made to heed the clear insistence that that no system State be entitled to brandish a veto over the head of a State proposing a modification of the régime of the international watercourse system, consist-

ent with affording each possibly adversely affected State access to the facts and respectable opportunities to evaluate the situation and to propose or to consider adjustments to resolve the question, and even to have its findings challenged. The tribunal in the 1957 *Lake Lanoux* arbitration, addressing the issue of the requirement of agreement with Spain prior to France's implementation in its own territory of the hydraulic works, said:

Undoubtedly international practice discloses some specific cases in which this assumption is proved; . . . But these cases are exceptional and international case law does not readily recognize their existence, especially when they infringe upon the territorial sovereignty of a State, which would be true in the present case.

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, . . . a State which ordinarily is competent has lost the right to act alone . . . This is to admit a "right of consent", a "right of veto", which at the discretion of one State paralyzes another State's exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. . . . but the reality of the obligations thus assumed cannot be questioned, and they may be enforced, for example, in the case of an unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith.<sup>301</sup>

154. The procedural steps and safeguards here proposed are not regarded as stringent, except with respect to the duty to comply with them in good faith. The Special Rapporteur believes that, just as proposing States in practice do not tolerate paralysation of their enterprises, potentially affected States in practice do not countenance a State's complete freedom of action, at least with respect to activities affecting shared water resources, where objectively the activity will or may set into motion significantly detrimental, perhaps irreversible, changes. The duty to inform and to consult, and then to work out a solution that obviates the expected appreciable harm, is now cardinal in the field of shared water resources. To proceed unmindful of the sovereign interest of other system States may often constitute culpable behaviour, contrary to existing international law.

155. Finally, not so much "right" is given the system State claiming that it may be affected that it is permitted to convert its legitimate interest and that of the international community into harassment of the proposing State. Concern on this point has been voiced in

<sup>299</sup> Other examples could be cited, such as allowing the spread of the water hyacinth or other plant pests; downstream canalization or bed stabilization works, which alter the normal régime of the river, including the grading of the bed upstream; artificial islands downstream causing adverse changes in the flow régime upstream, including bank erosion; and artificial recharge of aquifers (by flood protection programmes or injection, for example), that inhibit surface drainage in an upstream State.

<sup>300</sup> Of course, in some cases there may be damage without compensation being justified. See Bourne, "The right to utilize the waters of international rivers", *loc. cit.*, pp. 230 and 259.

<sup>301</sup> *Yearbook . . . 1974*, vol. II (Part Two), p. 197, document A/5409, para. 1065. For the full text of the award, see United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 285 (in French). See also the following statements in a report by the OECD Environment Committee entitled "Application of information and consultation practices for preventing transfrontier pollution":

" . . . information and consultation should respect the *sovereignty* and legitimate interests of the countries between which they take place . . . Consequently they would miss their purpose completely if their effect were to make a decision by one country to undertake an activity or measure likely to create a significant risk of transfrontier pollution entirely dependent on the prior consent of the exposed country(ies)" (OECD, *Transfrontier Pollution and the Role of States* (Paris, 1981), p. 11. On absence of a veto, see OECD, *Legal Aspects of Transfrontier Pollution* (Paris, 1977), p. 47, footnote 2.



the Sixth Committee. The Special Rapporteur has tried to fashion a workable and tentative balance, respecting both sets of interests and apprehensions.

#### 4. THE PROPOSED ARTICLE

156. The following draft article is proposed for the consideration of a successor Special Rapporteur and the Commission on the matter of responsibility:

##### *Article 8. Responsibility for appreciable harm*

1. The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.

2. Each system State is under a duty to refrain from, and to restrain all persons under its jurisdiction or control from engaging in, any activity that may cause appreciable harm to the interests of another system State, except as may be allowable under paragraph 1 of this article.

3. Before a system State undertakes, authorizes or permits a project or programme that may cause appreciable harm to the interests of another system State, as determined on the basis of objective scientific data, notice accompanied by technical information and data shall be made available by the former State (the proposing State) to the system State that may be affected. The technical data and information provided must be sufficient to enable the other system State to determine accurately and to evaluate the potential for harm of the intended project or programme.

4. The proposing State under paragraph 3 of this article shall allow the other system State, unless otherwise agreed, a period of not less than six months to study and evaluate the potential for harm of the project or programme and to communicate its determination to the proposing State. The proposing State shall co-operate with the other system State should additional data or information be deemed to be needed for a proper evaluation. During the said or agreed upon evaluation period the project or programme may not be initiated without the consent of the other system State.

5. If the other system State under paragraphs 3 and 4 of this article determines that the intended project or programme would, or is likely to, cause appreciable harm to its interests and such harm is deemed by the other system State not allowable under the proposing State's equitable participation, and makes timely communication thereof to the proposing State, the proposing State and the other system State are under a duty, promptly after communication of such determinations to the proposing State, to consult with the objective of verifying or adjusting the other system State's determinations, and of arriving at such modifications of the intended project or programme by negotiation as will eliminate any remaining cause of appreciable harm not allowable under the proposing State's equitable participation, except that compensation acceptable to the other system State may be substituted for project or programme modification.

6. If the other system State under paragraph 4 of this article fails to communicate to the proposing State its determination that a project or programme would, or

is likely to, cause appreciable harm within the period provided under paragraph 4 of this article, the proposing State may proceed to execute the project or programme in the form and to the specifications communicated to the other system State without responsibility for subsequent harm to the other system State from that project or programme, provided that the proposing State is in full compliance with paragraphs 3 and 4 of this article.

7. In the event that the other system State under paragraphs 3, 4 and 5 of this article communicates its determination that the intended project or programme would, or is likely to, cause appreciable harm to its interests and the proposing State formally declares and demonstrates to the other system State that the project or programme in question is of the utmost urgency, the proposing State may proceed without further delay with the project or programme, provided that the proposing State is in full compliance with paragraphs 3, 4 and 5 of this article and provided that the proposing State demonstrates willingness and financial capability to compensate the other system State in full measure, by way of guaranty or otherwise, for all appreciable harm caused thereby. In such event, the proposing State shall be liable for all appreciable harm caused by the project or programme to the other system State. No provision of this paragraph shall relieve the proposing State from its duty to consult and to negotiate in accordance with paragraph 5 of this article.

8. Irreconcilable differences between the proposing State and the other system State, with respect to the adequacy of compliance with this article or concerning the evaluation of the potential for harm of the intended project or programme or regarding modifications of the project or programme in question or with respect to either system State's equitable participation, shall be resolved by the most expeditious procedures of pacific settlement available to and binding upon the parties, or in accordance with the dispute settlement provisions of these articles.

9. If a proposing State fails to comply with the provisions of this article, it shall incur liability for the harm caused to the interests of other system States as a result of the project or programme in question.

157. Paragraph 1 of the proposed article affirmatively states the basic rule under general international law, being careful to take into account the possibility of permissible harm even of an appreciable amount or quality provided it falls within the context of equitable participation (see section B above). Respect for the basic rule is reflected in paragraph 2 in the form of a duty to refrain from causing appreciable harm, and to prevent others (persons both natural and legal) from causing such harm; the same exception in the context of equitable participation is also here included.

158. Paragraph 3 sets forth the indispensable minimal procedural steps for the tolerable coexistence of system States where significant development projects or programmes are planned for the international watercourse system. A duty to refrain from causing appreciable harm, cautiously observed, might otherwise result in a slowing down, if not paralysis, of works and activities affecting the water resources. Doubts, divergences of criteria or convictions, or impasses cannot be resolved if the system States are not in communication with one another, particularly at the technical level of project

and programme data and information, at least where these works and activities may have significant transnational impact. Thus a requirement to give notice and to provide the necessary and relevant information and data should not be omitted from the Commission's article on responsibility for appreciable harm.<sup>302</sup> To be sure, system States should be encouraged in appropriate cases to strengthen this residual duty by more detailed procedures and more specific scope for their data and information exchange in system agreements. The proposed article serves to foster the minimal co-operation essential to their beneficial use of their shared water resources. The objective here is to avoid costly and unnecessary disputes by promoting, through minimal duties, essential co-operation between the States concerned.

159. The system State likely to be affected must, after being put on notice, have a reasonable period to study the works or actions proposed by its co-system State.<sup>303</sup> During this fixed period of evaluation, the proposing system State is barred from implementing its plan, an element of the principle of good neighbourship, of "voisinage".<sup>304</sup> On the other hand, the system State receiving notice and necessary and relevant information and data must not delay its response beyond a reasonable time; otherwise it would be able to delay, or block, the development of the proposing State. Paragraph 4 of the proposed article addresses this troublesome point. Although the system States concerned are free to agree upon a shorter or longer period for the evaluation of the project or programme, a certain period is called for and justified in this procedural rule in order to avoid disputes over what is a "reasonable" time. The Special Rapporteur submits six months as reasonable, in the absence of agreement specifying a different period or a different procedure.

160. The amount and kinds of information or data provided by the proposing State may be deemed insufficient by the system State upon which notice has been served. Although determination by the notified State of insufficiency, or sufficiency, should not be part of a rule of international law, it is not excessive to require the

proposing State to co-operate with its co-system State should additional information or data be requested. Again, communication between the system States concerned is essential, including the proffering of justification by the State requesting more information and compliance or explanation by the proposing State. Paragraph 4 anticipates such situations. Finally, paragraph 4 allows implementation of the proposed works or programme during the time allotted to the other system State to carry out its evaluation, if the latter agrees to the implementation.

161. Paragraph 5 of the proposed article carries co-operation one step further, to the stage of discussions about the scope or specifications of the proposed project or programme in the event that the system State notified ascertains that indeed the impact on its interests would be such as to amount to appreciable harm, or that such harm is likely. The system State likely to be affected is required to give notice of its determination to the proposing State, after which both States are obliged without delay to enter into consultations. Failure of either party to initiate, or to respond to the initiative of the other promptly, would constitute a breach. Although this step could be styled "negotiations", "consultations" is preferred because of the technical nature of the discussions and the assumption of affirmative disposition on both sides to find an accommodation that preserves as much as possible the outcome of the original proposal while removing or diminishing the aspects that would be, or might be, harmful to the other system State.<sup>305</sup>

162. The rule in paragraph 5 does not require modification to the extent of removing all harm to the other system State, but only such changes as will avoid impermissible *appreciable* harm. The possibility that, under the proposing State's equitable participation, the appreciable harm in this case must be accepted by the other system State, is acknowledged. Modern multipurpose projects and programmes contemplate, under appropriate and agreed circumstances, the yielding of a use or benefit by one system State in order that the greater total benefits of the integral project or programme, or of a set of works and programmes, may be achieved. The system State restricting or even forgoing its particular use or benefit would normally be compensated for the value of its sacrifice; such compensation might be financial, or it might be in the form of electricity supplies, flood control measures, enlargement of another use, or other good. Compensation would have to be for agreed amounts and kinds, a possibility that should be anticipated by the Commission's articles.<sup>306</sup>

<sup>302</sup> Art. XXIX, para. 2, of the Helsinki Rules provides that a State "should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the régime of the basin in a way which might give rise to a dispute . . . The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration" (ILA, *Report of the Fifty-second Conference* . . . , p. 518). In art. 5 of the resolution adopted at its Salzburg session in September 1961, the Institute of International Law recognized as a rule of international law that "works or utilizations [of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States] may not be undertaken except after previous notice to interested States" [*Annuaire de l'Institut de droit international*, 1961, p. 383].

<sup>303</sup> The corresponding provision (art. XXIX, para. 3) in the Helsinki Rules states: "A State providing the notice . . . should afford to the recipient a reasonable period of time to make an assessment of the probable effect of the proposed construction or installation and to submit its views to the State furnishing the notice" (ILA, *Report of the Fifty-second Conference* . . . , p. 519).

<sup>304</sup> The Institute of International Law, in art. 7 of its "Salzburg resolution", recognized as a rule of law that: "During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult" (*Annuaire de l'Institut de droit international*, 1961, p. 383).

<sup>305</sup> In art. 6 of its "Salzburg resolution", the Institute approved the following formulation:

"In case objection is made, the States will enter into negotiations with a view to reaching an agreement within a reasonable time.

"For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned".

<sup>306</sup> Art. 4 of the "Salzburg resolution" provides:

"No State can undertake works or utilizations of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under Article 3 [on the basis of equity, taking particular account of their respective needs, as well as other pertinent

163. In order to achieve the necessary balance between the rights of the system State likely to be affected and those of the proposing State, paragraph 6 frees the proposing State from the restraint imposed under paragraph 4 if notice is not given to the proposing State by the expiration date of the period—either the period unilaterally specified by the proposing State, which may not be less than six months, or the shorter or longer period agreed upon. Failure to deliver to the proposing State its determination of definite or likely appreciable harm within the allowed period authorizes implementation of the project or programme, as communicated to the co-system State. This proviso clearly eliminates any undue delay where the other system State cannot show that the project or programme involves appreciable harm or is withholding its response for whatever reason. However, it would be improper to allow the proposing State to implement a different project or an altered programme, since the transnational impact might very well be significantly at variance with the original design and size notified to the other system State. Paragraph 6 describes such deviation and also requires that the proposing State shall have lived up to its obligations to give notice, to provide sufficient information and data and to abstain from implementation prior to the expiration of the evaluation period (paras. 3 and 4 of this article) in order to be free to carry out its proposal in default of timely notification by the other system State.

164. Under this article addressed to responsibility for appreciable harm, it is more likely that the system State given notice by a proposing system State will in fact respond within the prescribed time period, given the clarity of the procedural requirements and the potential penalty attached to failing or refusing to answer. Thus paragraph 5 covers the situation of notice to the proposing State that the project or programme could cause the co-system State appreciable harm; paragraph 6 releases the proposing State in the event of no timely response by the other system State.

165. Paragraph 7 deals with the proposing State's right to proceed under certain extraordinary circumstances.<sup>307</sup> It is possible that immediate execution of a particular project or programme is clearly necessary in order to avoid disastrous consequences. Under such circumstances the proposing State may, under this article, choose to make formal declaration as to urgency and proceed with the project in the face of notice that appreciable harm to its interests is predicted by a co-system State. The declaration of "utmost urgency" may not be a hollow statement, however. The proposing State must demonstrate the urgency. Moreover, it must give its co-system State the notice, information and data, and time for evaluation (paras. 3 and 4), and it must go forward with its obligation to

consult (para. 5), or it is not free to execute the project or programme. A final sentence is added, emphasizing the continuing duty to consult and to negotiate even where urgency allows immediate implementation. Modifications avoiding some of or all the anticipated appreciable harm may possibly be engineered during the implementation phase; further examination of the project or programme on a joint basis may lead to the conclusion that the harm feared by the co-system State will not in fact be appreciable; compensation for any appreciable harm may be negotiated. Other system States may realize, or be made to realize, the danger and urgency, resulting in system State collaboration in appropriate circumstances.

166. If the proposing State executes the required measures unilaterally, the system State likely to be adversely affected has a right to certain assurances from the proposing State, also under paragraph 7. The proposing State's ability and willingness fully to compensate its co-system State must be demonstrated, and the paragraph makes the proposing State liable for the appreciable harm.

167. The following provision, paragraph 8, anticipates that system States may not be able to agree upon questions of harm, compensation, or project or programme modification. Because the proposing State has a right to prompt resolution of these issues, because of the critical nature of water resources works and programmes generally, and because the other system State can have no legal basis for avoiding peaceful resolution, this clause requires recourse to the swiftest means of pacific settlement which the system States concerned have accepted, or, in the alternative, recourse to the provision in these articles concerning settlement of disputes. A separate article on settlement or avoidance of disputes is anticipated by this article. The Commission may, in that connection, choose to provide for recourse to the International Court of Justice or to a chamber of the Court for arbitration or for some other settlement procedure, such as conciliation.

168. The final paragraph of article 8 sets forth unequivocally the liability of a proposed State that fails to meet the obligations of the article, both procedural and substantive. It will be noted that liability under this paragraph is not restricted to the *appreciable* harm caused.<sup>308</sup>

169. A number of illustrations in State practice have already been set out that point the way to the provisions of the suggested article. A few additional passages follow which are pertinent to consideration of the proposed requirements and language of this suggested draft article.

170. With respect to the question of notification and consultation between the system State intending to modify the régime of the international watercourse and the possibly affected system State, the Inter-American Juridical Committee, responding to the observations and recommendations of the Inter-American Council

circumstances], as well as adequate compensation for any loss or damage".

<sup>307</sup> Some system States have covered emergency situations in their agreements. An example is the final para. of art. 29 of the 1922 Convention relating to watercourses and dikes on the Danish-German frontier:

"Protective measures taken in cases of necessity when danger is threatening require no authorization. If, however, they become permanent, authorization [from the Frontier Water Commission] shall be obtained when the immediate danger has been averted" (League of Nations, *Treaty Series*, vol. X, p. 217).

<sup>308</sup> According to art. XXIX, para. 4, of the Helsinki Rules: "If a State has failed to give the notice . . . , the alteration by the State in the régime of the drainage basin shall not be given the weight normally accorded to temporal priority in use in the event of a determination of what is a reasonable and equitable share of the waters of the basin" (ILA, *Report of the Fifty-second Session* . . . , p. 519).

of Jurists<sup>309</sup> and of members of the Organization of American states, prepared a revised report and draft convention on industrial and agricultural use of international rivers and lakes in 1965.<sup>310</sup> In the section of the report entitled "Notificación y procedimiento", the following is set forth:

Paragraph (e) of the scheme drawn up by the Council of Jurists states:

"It is desirable to establish an appropriate procedure to ensure notification or consultation between riparian States if one of them wishes to carry out works for the utilization of the waters of international lakes or rivers for agricultural or industrial purposes."

The Convention would clearly be incomplete without this section. It is obviously not sufficient to enunciate general principles if, when a case arises, the parties are not required to establish contact in order to compare views and try to reconcile their interests.

It should therefore be made mandatory for interested States to be notified of the intention of another State to carry out such works. In this way, potentially serious conflicts are eliminated and, instead, understanding among States will be facilitated, to the benefit of the works themselves, because, once agreement among the interested States has been confirmed, they will be able to proceed more rapidly and free of material or legal obstacles.<sup>311</sup>

171. Based on these and related considerations, the pertinent articles of the revised draft convention of the Inter-American Juridical Committee read:

#### Article 5

The utilization of the waters of an international river or lake for industrial or agricultural purposes must not prejudice the free navigation thereof in accordance with the applicable legal rules, or cause substantial injury, according to international law, to the riparian States or alterations to their boundaries.

#### Article 6

In cases in which the utilization of an international river or lake results or may result in damage or injury to another interested State, the consent of that interested State shall be required, as well as the payment or indemnification for any damage or harm done, when such is claimed.

#### Article 8

A State that plans to build works for utilization of an international river or lake must first notify the other interested States. The notification shall be in writing and shall be accompanied by the necessary technical documents in order that the other interested States may have sufficient basis for determining and judging the scope of the works. Along with the notification, the names of the technical expert or experts who are to have charge of the first international phase of the matter should also be supplied.

#### Article 9

The reply to the notification must be given within six months and no postponements of any kind may be allowed, unless the requested State asks for supplementary information in addition to the documents that were originally provided, which request may be made only within thirty days following the date of the said notification and must set forth in specific terms the background information that is desired. In such case, the term of six months shall be counted from the date on which the aforesaid supplementary information is provided.

#### I

If no reply is received within the aforesaid period, it shall be understood that the State or States that were notified have no

objections to the work that is being planned and that, consequently, the notifying State may proceed to execute its plans in accordance with the project that was presented. No later claim by the notified State shall be valid.

#### II

If observations of a technical nature or relating to foreseeable damage or injury are made in the reply to the notification, this document should indicate the nature and estimate of these and the name of the technical expert or experts who together with those mentioned in the notification will form a Joint Commission that will proceed to study the matter. The reply should also include an indication of the place and date for the meeting of the Joint Commission thus formed.

If the reply does not meet the foregoing requirements, it shall be considered that this procedure has not been executed.

The Joint Commission shall carry out its mandate of seeking a solution, both with respect to the best way of executing and taking advantage of the works that are planned in common benefit, and, when appropriate, with respect to indemnification for the damage and injury caused, all within the period of six months from the date of the reply to the notification.<sup>312</sup>

172. An important precedent for the Inter-American Juridical Committee was the 1933 Declaration of Montevideo, a resolution of the Seventh International Conference of American States.<sup>313</sup> The awareness in that relatively early resolution of the importance of the procedural aspects of notification and consultation, and of expeditious resolution of differences, is patent:

2. . . . 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.

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 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 judgement on the case. The Commission shall act within a period of six months, and if within this period no agreement has been

<sup>312</sup> *Ibid.*, pp. 132-134. The Inter-American Council of Jurists had instructed the Committee to consider, among several "basic points": "In case of lack of agreement between the riparian States, provision should be made for procedures to facilitate an understanding, to guarantee the exercise of the rights of the parties and to promote settlement of the dispute, in the spirit of equity and co-operation which inter-American good-neighbourliness and solidarity require" (*ibid.*, p. 120).

<sup>313</sup> Resolution LXXII (*ibid.*, pp. 111-113). (The text of the Declaration is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A.) For a discussion of the background of the resolution see Organization of American States, *Rios y lagos internacionales* . . . , pp. 1-2. In its first report, in 1963, the Committee concluded, *inter alia*, that the Declaration of Montevideo was a satisfactory statement of principles for present needs (Pan American Union, *Industrial and Agricultural Use* . . . (op. cit.), p. v).

<sup>309</sup> Resolution I, adopted at the fifth meeting of the Inter-American Council of Jurists (Organization of American States, *Rios y lagos internacionales* . . . (op. cit.) p. 117).

<sup>310</sup> *Ibid.* (The text of the revised draft convention is reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), pp. 350-351, document A/CN.4/274, para. 379.)

<sup>311</sup> Organization of American States, *Rios y lagos internacionales* . . . , p. 128.

reached, the members shall set forth their respective opinions, informing the Governments thereof.

9. In such cases, and if it is not possible to reach an agreement through diplomatic channels, recourse shall be had to such procedure of conciliation as may have been adopted by the parties beforehand or, in the absence thereof, to the procedure of any of the multilateral treaties or conventions in effect in America. The Tribunal shall act within a period of three months, which may be extended, and shall take into account, in the award, the proceedings of the Mixed Technical Commission.<sup>314</sup>

173. Although the requirements in the article suggested for the consideration of a successor Special Rapporteur and the Commission are less exacting and detailed than those projected historically within the Inter-American system, the element of urgency is preserved. Similarly concerned with the price of delay, the Council of OECD adopted in 1974 a recommendation on principles concerning transfrontier pollution, which, among specific principles annexed, sets forth a "principle of information and consultation":

6. Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the transmission of which is not prohibited by legislative provisions or prescriptions or applicable international conventions, and should invite their comments.

7. Countries should enter into consultation on an existing or foreseeable transfrontier pollution problem at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.

8. Countries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected and, except in cases of extreme urgency, providing a reasonable amount of time in the light of circumstances for diligent consultation. Such consultations held in the best spirit of co-operation and good neighbourliness should not enable a country to unreasonably delay or to impede the activities or projects on which consultations are taking place.<sup>315</sup>

174. In an analogous field, Canada and the United States of America recently entered into an Agreement relating to the exchange of information on weather modifications activities, which illustrates contemporaneous recognition of the importance of proceeding as good neighbours. The preamble takes "into particular consideration the special traditions of prior notification and consultation and the close co-operation that have historically characterized their relations".<sup>316</sup> The operative articles contain commitments by each party "to notify and to fully inform the other . . . prior to the commencement of such activities" and "to provide such notice as far in advance . . . as may be possible" (art. IV).<sup>317</sup> Also, the parties "agree to consult, at the

request of either party, regarding particular weather modification activities of mutual interest. Such consultations shall be initiated promptly on the request of a party, and in cases of urgency may be undertaken through telephonic or other rapid means of communications . . ." (art. V). Extreme emergencies "may require immediate commencement . . . of weather modification activities of mutual interest . . . In such cases, the party commencing such activities shall notify and fully inform the other party as soon as practicable, and shall promptly enter into consultations at the request of the other party" (art. VI).

175. The Sub-Committee of the Asian-African Legal Consultative Committee proposed to put the matter simply, but also would make consultation mandatory:

A State which proposes a change of the previously existing use of the waters of an international drainage basin that might seriously affect utilization of the waters by another co-basin State must first consult with the other interested co-basin States . . .<sup>318</sup>

And the United Nations Conference on the Human Environment recommended, in its Action Plan for the Human Environment, that the following principle be considered by the States concerned when appropriate:

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.<sup>319</sup>

The General Assembly, as it acted to implement principles 21 and 22 of the Stockholm Declaration, recognized, in paragraph 2 of its resolution 2995 (XXVII) of 15 December 1972, that co-operation among States

will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area.

176. Austria and Yugoslavia concluded a Convention concerning water economy questions relating to the Drava in 1954 which provided that the upper riparian State, Austria, if it seriously contemplated new works which would divert more water from the Drava, or which would affect the river to the detriment of Yugoslavia, undertook to discuss such plans with Yugoslavia "prior to legal negotiations concerning rights in the water".<sup>320</sup>

177. The requirements embraced within "notification" were spelled out in considerable detail by Denmark and Germany in their 1922 Agreement:

#### Article 31

##### Contents of notifications

Notifications shall state where the drawings and explanations which have been submitted may be inspected, and shall mention the authorities to which objections to the authorization and also applications for the erection and upkeep of installations for the prevention of damage, or applications for compensation shall be addressed in writing or be made orally in official form. A time limit shall also be fixed for lodging objections or making applications. The period

<sup>314</sup> Organization of American States, *Rios y lagos internacionales* . . . , pp. 111-112. However, it appears that arts. 2 and 3 were intended primarily for contiguous rivers, art. 4 providing: "The same principles shall be applied to successive rivers . . ." (*ibid.*, p. 112). Art. 10 carries the message of urgency further, allowing the parties one month to accept or reject the conciliation finding before proceeding to arbitration "at the request of the interested parties", in accordance with the procedure provided by the Second Hague Convention (*ibid.*, p. 113).

<sup>315</sup> Recommendation C(74)224 of 14 November 1974 (OECD, *OECD and the Environment* (Paris, 1979), pp. 110-111, annex, title E).

<sup>316</sup> *International Legal Materials*, vol. XIV, No. 3, 1975, p. 589. The Agreement entered into force on 26 March 1975.

<sup>317</sup> This is in addition to the exchange of information pursuant to art. II.

<sup>318</sup> Proposition X (Asian-African Legal Consultative Committee, *Report of the Fourteenth Session* (op. cit.), p. 107).

<sup>319</sup> Recommendation 51 (b) (i) (*Report of the United Nations Conference on the Human Environment* . . . , p. 17).

<sup>320</sup> Art. 4 (United Nations, *Treaty Series*, vol. 227, p. 132). The article provided further that, if no agreed settlement could be reached from direct discussions or within the Joint Drava Commission set up by the Conference, the matter was to be referred to the court of arbitration (also provided for) for decision.

allowed shall be not less than two, and not more than six weeks. It shall begin to run from the day following that upon which the gazette containing the final notification is published.

It shall be stated in the notification that all persons who have not lodged any objection or made any application within the time limit fixed shall lose their rights in that connection, but that applications for the erection and upkeep of installations or for compensation may be made at a later date if they are based upon damage which could not be foreseen during the period covered by the time limit.

Even after the expiration of the appointed time, a person who has suffered damage shall not be debarred from submitting a claim provided he can show that he was prevented by circumstances over which he had no control from submitting such claim within the time limit.

The right establishing claims after the expiration of the appointed time is subject to prescription three years after the date on which the person who suffered damage learned of the existence of such damage.

A suitable additional period may be allowed for the production of evidence.<sup>321</sup>

178. In the General Convention for the development of hydraulic power affecting more than one State, which came out of the Second General Conference on Communications and Transit, held in Geneva in 1923, article 4 provides another early precedent:

If a contracting State desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed.<sup>322</sup>

179. The former chairman of the International Joint Commission, Canadian Section, reviewing the lessons "of considerable importance" from the Canada-United States experience, heads his list with this statement:

First, it is quite impossible to have satisfactory co-riparian relationships without the concerned parties being obliged by custom or practice to consult with the others before any plans are undertaken in the private or public sector which may have transboundary water quality or water quantity, or general environmental, effects on other members of the river basin family. Prior consultation is, therefore, of the essence and due notice and consultation becomes a prerequisite for sound relations.<sup>323</sup>

180. The 1975 Statute of the Uruguay River, adopted by Uruguay and Argentina, contains six articles on these procedural aspects of the topic that are worthy of study, even though in this case, as in many others, the parties formed a joint commission to administer their pertinent relations:

#### 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.

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 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>324</sup>

181. The ECE Committee on Electric Power adopted, in 1954, a revised version of its earlier "recommendation No. 3", addressed to the matter at hand:

*Recommends* that a State proposing to embark within its own territory on projects likely to have serious repercussions on the territory of other States, whether upstream or downstream, should first communicate to the States concerned such information as would enlighten them as to the nature of those repercussions;

*Recommends* that, in the event of objections being raised by the States concerned following such prior notification, the State proposing to embark on the projects should endeavour, by negotiations with

<sup>321</sup> League of Nations, *Treaty Series*, vol. X, pp. 217-219. This Agreement created a Frontier Water Commission (with appeal provided to a Supreme Frontier Water Commission) and contemplated applications, and objections, from individual users of the international watercourse.

<sup>322</sup> *Ibid.*, vol. XXXVI, p. 81.

<sup>323</sup> Cohen, *loc. cit.*, p. 126.

<sup>324</sup> *Actos internacionales Uruguay-Argentina, 1830-1980 (op. cit.)*, pp. 594-596. Chap. XV of the 1975 Agreement (art. 60) treats of "Judicial settlement of disputes"; chap. XIV (arts. 58 and 59) provides for a conciliation procedure (*ibid.*, pp. 606-607). The same system States had adopted similar prior notification and consultation obligations (arts. 17-22, in chap. II, on navigation and facilities) in their 1973 Treaty concerning the La Plata River (*International Legal Materials*, vol. XIII, No. 2, 1974, pp. 254-255). In addition, art. 50 provided for a pledge by the parties "to inform each other as to any norms they anticipate may be adopted with reference to water pollution"; art. 51 provided: "Each party shall be liable to the other for detriment suffered as a consequence of pollution caused by their operations, or by those of physical or corporate persons domiciled on their soil" (*ibid.*, p. 260). Chap. XIII of the 1973 Treaty set up a procedure for conciliation whereby, at the request of either party, "the Administrative Commission shall take cognizance over any dispute arising between the parties with reference to the La Plata River" (art. 68) (*ibid.*, p. 262). See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 298-300, document A/CN.4/274, paras. 115-130.



those States, to reach an agreement such as will ensure the most economic development of the river system.<sup>325</sup>

182. The final report (1978) of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States contains several pertinent draft principles:

*Principle 5*

States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

*Principle 6*

1. It is necessary for every State sharing a natural resource with one or more other States:

(a) to notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment of the other State or States; and

(b) upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and

(c) to provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and

(d) if there has been no advance notification as envisaged in sub-paragraph (a) above, to enter into consultations about such plans upon request of the other State or States.

2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

*Principle 7*

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

...

*Principle 11*

1. The relevant provisions of the Charter of the United Nations and of the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations apply to the settlement of environmental disputes arising out of the conservation or utilization of shared natural resources.

2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

3. It is necessary for the States parties to such a dispute to refrain from any action which may aggravate the situation with respect to the environment to the extent of creating an obstacle to the amicable settlement of the dispute.<sup>326</sup>

183. It may be noted that the Brazil-Paraguay Treaty for hydro-electric development of the water resources of the Paraná River, concluded in 1973, provides in

article XXII that any disagreement over the interpretation or implementation of the Treaty and its annexes shall be settled "with no resultant delay or interruption in the construction and/or operation of the hydroelectric utilization scheme and of its auxiliary works and facilities".<sup>327</sup>

184. Incidents of damage, inequitable advantage and deprivation of benefits should of course be avoided. Active co-operation and collaboration between or among system States not only may forestall breach by any one of them of their duties under general and conventional international law but also are most conducive to the policy objectives of rational and optimum development, use and protection of an international watercourse system. Ample agreement accompanied by an integrated approach to management of shared water resources has been found to be the best combination of arrangements for development of critical or intensively used watercourse systems. Twenty years ago, in 1961, at its Salzburg session, the Institute of International Law clearly appreciated the by then heightened significance of interstate collaboration in this field. The preamble to its resolution, "Utilization of non-maritime international waters (except for navigation)" reads as follows:

The Institute of International Law,

Considering that the economic importance of the use of waters is transformed by modern technology and that the application of modern technology to the waters of a hydrographic basin which includes the territory of several States affects in general all these States, and renders necessary its restatement in juridical terms,

Considering that the maximum utilization of available natural resources is a matter of common interest,

Considering that the obligation not to cause unlawful harm to others is one of the basic general principles governing neighbourly relations,

Considering that this principle is also applicable to relations arising from different utilizations of waters,

Considering that in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource,

Recognizes the existence in international law of the following rules, and formulates the following recommendations:<sup>328</sup>

185. Pakistan and India, in their 1960 Indus Waters Treaty, recognized "that they have a common interest in the optimum development of the rivers," and to that end they declared "their intention to co-operate, by mutual agreement, to the fullest possible extent".<sup>329</sup>

186. Ideal arrangements, however, often cannot be realized, at least initially. It is necessary, therefore, to engender essential respect for the interests of other States by establishing minimum standards of behaviour. This is, it may be said, the function of general rules of international law at large; the field of shared water resources is no exception. Consequently it is submitted that it becomes necessary to include provisions in the Commission's draft articles on this topic

<sup>325</sup> E/ECE/EP/147. The earlier (1953) recommendation No. 3 had two clauses that were replaced by the second paragraph quoted above; those clauses read as follows: "Recognizes that such notification would be calculated to permit the opening of negotiations between the parties"; and "Recognizes, further, that this prior notification would be in keeping with accepted standards of international courtesy and in the interests of the harmonious hydro-electric development of successive rivers in Europe" (E/ECE/EP/135).

<sup>326</sup> UNEP/IG.12/2, annexed to document UNEP/GC.16/17.

<sup>327</sup> United Nations *Treaty Series*, vol. 923, p. 96.

<sup>328</sup> *Annuaire de l'Institut de droit international*, 1961, vol. 49, Part Two, pp. 381-382. See also United Nations, *Management of International Water Resources* . . . , pp. 174-181, paras. 553-585.

<sup>329</sup> Art. VII, para. (1) (United Nations, *Treaty Series*, vol. 419, p. 144). The paragraph proceeds to detail particular areas of co-operation. See also *Yearbook* . . . 1974, vol. II (Part Two), p. 102, document A/5409, para. 361 (p).

that prescribe clearly a system State's appropriate behaviour and yet respond to situations where the conduct of a system State is or may become inappropriate under residual principles and rules of international law, fixing State responsibility and specifying procedures that permit system States to avert imposition of such responsibility. To meet these objectives, an article assigning responsibility, under certain circumstances, for appreciable harm, is believed central to the Commission's work. In the light of these considerations, the foregoing article has been proposed for the consideration of a successor Special Rapporteur and of the Commission.

### E. Information and data

187. In addition to the technical information and data pertaining to any specific project or programme that may cause appreciable harm to another system State, there is a recognized need for exchange of broader information and data on a regular basis in order that the system States may continually analyse the conditions in the international watercourse system, formulate their plans and adjust their activities in light of the performance of the system and their knowledge of the needs of their peoples and of their economies.

#### 1. PRIOR CONSIDERATION OF THE SUBTOPIC

188. In the Special Rapporteur's first report, an entire chapter was devoted to "Regulation of data collection and exchange".<sup>330</sup> The obligations under the three somewhat exacting articles, submitted for purposes of preliminary discussion only, may have responded to the technical need but have now been put aside as apparently exceeding at this time the necessary degree of acceptance within the Commission and the Sixth Committee of the General Assembly.<sup>331</sup> Yet the relative scarcity of comment in the Sixth Committee, particularly in light of the detailed treatment and considerable emphasis placed upon the matter in the report of the Special Rapporteur, allows the inference that there is recognition at least of the basic principle that information and data collection and exchange are essential to rational use of shared water resources, and thus should find expression in some form in the Commission's articles.<sup>332</sup>

189. The single article on "Collection and exchange of information" offered in the Special Rapporteur's second report<sup>333</sup> was couched in most general terms in the light of the criticisms received during the thirty-first session of the Commission.<sup>334</sup> Although an article dealing with information and data collection and exchange was predominantly accepted within the Commission, discussion at the thirty-second session centred on other aspects of the report, depriving this particular draft

article of close scrutiny.<sup>335</sup> In turn, the Commission's Drafting Committee felt that adequate consideration could not be given by it to the matter in the time then available. Consequently the article on information and data was left aside at the Commission's thirty-second session.<sup>336</sup>

190. Reflecting on the importance placed on the matter by all water resources specialists, and bearing in mind the possible burdens and sensitivities involved for some States, the Special Rapporteur has made a third effort to devise a meaningful article on information and data. Undoubtedly there are still some minor international watercourse systems that are so little used as to preclude a present need for data or information from other system States; yet the time may well come when one or more system States will include those increasingly precious water resources in their development planning, or when new uses or flooding, for example, have become significant. Moreover, system States cannot soundly ascertain the value of such undeveloped shared water resources unless and until they have in hand at least preliminary survey studies, which in turn cannot be prepared properly without basic data, much of which need to be system-wide.

191. The Commission's article should anticipate such changed circumstances and provide for the initiation of information and data exchange as and when needed. To be sure, information and data may, at least for the time being, be required on some aspects of the uses of water resources or behaviour relating thereto, but not on others. Failing express agreement, a system State should not be put to the expense and trouble of providing information or data that are not in fact going to be useful to the receiving system States. On the other hand, a system State should not be denied information about a shared water resource, necessary or useful to its assessments and planning, simply because it can be obtainable only from a co-system State or by joint effort. Real problems of cost and capability, as well, at times, even of national security, need to be faced in this area of international interrelationship and co-operation.

192. The situation is not uncommon that one system State requires, requests and expects information or data from a co-system State that does not stand in need of information or data from the requesting system State. The frustrations and dissatisfactions inherent in situations where perceived need is not reciprocal can readily be imagined.<sup>337</sup> Thus the Commission's article must endeavour to respond to the needs of all countries and facilitate the requisite co-operation between and among system States in the interest of each individual country's economic and social development. And this must be done without imposing onerous burdens on others.

<sup>330</sup> *Yearbook . . . 1979*, vol. II (Part One), pp. 171-177, document A/CN.4/320, paras. 111-136, and examples and studies there cited.

<sup>331</sup> See the Special Rapporteur's appraisal of comment on that first effort in his second report (*Yearbook . . . 1980*, vol. II (Part One), pp. 178-179, document A/CN.4/332 and Add.1, paras. 126-130).

<sup>332</sup> *Ibid.*, p. 179, para. 129; see also *Yearbook . . . 1980*, vol. I, p. 151, 1612th meeting, para. 13.

<sup>333</sup> *Yearbook . . . 1980*, vol. II (Part One), p. 179, document A/CN.4/332 and Add.1, para. 130.

<sup>334</sup> See *Yearbook . . . 1979*, vol. II (Part Two), p. 168, para. 142.

<sup>335</sup> But see *Yearbook . . . 1980*, vol. I, p. 130, 1608th meeting, para. 7 (Mr. Sucharitkul), and p. 144, 1610th meeting, para. 36 (Mr. Jagota).

<sup>336</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 87. For the Special Rapporteur's submission to the Commission on that point in paras. 124-139 of his second report, (*Yearbook . . . 1980*, vol. II (Part One), pp. 178-180, document A/CN.4/332 and Add.1).

<sup>337</sup> This problem received considerable attention at the 1981 Dakar Interregional Meeting of international river organizations (United Nations, *Experiences in the Development and Management . . .*, p. 13, para. 45).



## 2. RECENT EXPERT TESTIMONY, OFFICIAL AND UNOFFICIAL

193. A "significant finding" of the United Nations Interregional Seminar on River Basin and Interbasin Development, held in Budapest in 1975, was that

... often the process of national or international river basin and interbasin development is greatly facilitated if the technical facts are established in an objective manner prior to discussions at the political and policy levels between countries ... The facts speak for themselves and provide persuasive evidence of the possible benefits and lines of development. The seminar attached highest importance to the establishment of suitable organizational entities to gather, analyse and interpret data. In some cases, the *ad hoc* arrangements of establishing fact-finding committees has been followed. A series of task forces may be organized, or technical centres or institutes supported by co-basin partners may be considered.<sup>338</sup>

194. One contributor at that Seminar postulates:

An efficient system of hydrological data collection is the basic criterion for water management to meet its responsibilities ...

Accordingly, the process of data collection and processing is extended through the data transmission system to the decision, of which it forms the objective basis. In the absence of reliable records, water management decisions may become biased by personal influences and misjudgment may lead to unfounded decisions ...<sup>339</sup>

The same author drew these pertinent conclusions:

1. Optimal water management decisions can be made only on the basis of observation data from the optimal hydrological network.

3. No optimal network can be developed unless the data from the so-called "minimal network" are available, which present a picture about the time and space variability of hydrological phenomena.

7. In the observation systems on international catchments, hydrological information may be required for water management decisions from the territory of the neighbouring countries ...<sup>340</sup>

195. In "A review of some hydrological studies required in the design of water management projects", WMO made the following statements relevant to this matter:

1. Hydrological and related meteorological data are collected, in the main, to provide information for development and managing the water resources of a country. They are also used for operating purposes: forecasting flood discharges or stages, low flows, monthly and, in some cases, yearly discharges, for operation of reservoirs and hydro-electric plants, etc. Finally, they also serve research.

It is important to establish the various networks on an integrated basis ... For international basins, good co-operation is necessary not only between the agencies in one country but also between such agencies of the countries sharing the basin.

2. Common hydrologic data usually required for various hydrological purposes are listed below:

- Annual and seasonal volume of streamflow
- Mean daily discharge distribution
- Low-flow frequency
- Frequency of high discharges
- Frequency of large-volume floods

<sup>338</sup> Recommendation 2 of the Seminar held from 16 to 26 September 1975 in Budapest, in co-operation with UNDP and the National Water Authority of Hungary (*River Basin Development: Policies and Planning: Proceedings of the United Nations Interregional Seminar on "River Basin and Interbasin Development"*, United Nations publication, Sales No. E.77.II.A.4), vol. I, p. 20.

<sup>339</sup> O. Starosolszky, "Hydrometrical tasks establishing the decision-making on river basin development" (*ibid.*, p. 174).

<sup>340</sup> *Ibid.*, p. 179.

- Shape of flood hydrograph
- Ice cover distribution
- Sediment transportation
- Chemical quality of the water
- Precipitation distribution
- Evaporation distribution<sup>341</sup>

196. The water resources development objectives of Bangladesh, which forms part of three international watercourse systems, provide representative illustrations of the purposes to which such data and information are put, especially by developing countries:

(a) to confine river flows to stable and fixed beds at all stages of discharge through embankments and river training;

(b) to control water flows from river to land;

(c) to ensure drainage of water from the land into the river;

(d) to provide irrigation by the co-ordinated use of surface and groundwater to the maximum extent;

(e) to prevent flooding from the sea through coastal embankments and estuary closures;

(f) to generate hydro-power where feasible; and

(g) to improve river channels for navigation and provide regulated navigation routes.<sup>342</sup>

197. The Sudanese hydraulic engineer who later served as the Secretary-General of the United Nations Water Conference has written the following of special relevance to contemporary use of data:

The integrated river basin approach has become possible as a result of developments in aeronautics, aerial survey, geophysics, mathematical models and computers; and, most essentially, because of the availability of the basic physical data accumulated accurately over a long period of time ...

Integrated river basin development, in addition to the evaluation of water resources, requires the surveying of all the natural resources of the basin, the land resources, human resources, animal resources; and the economic, social and environmental conditions. Among all these fields, the evaluation of the water, being a mobile resource, is the most difficult and complex ... Therefore, the evaluation of the water resources of a basin requires strong and very well equipped institutions which possess the technology, the trained and experienced personnel and the adequate, accurate basic data necessary for rational development ...

The problem becomes more complex when the river is a multinational resource. In most of such basins, co-operation among the basin States is fully realized. However, in major basins which traverse different geographical and climatological zones, different traditions and habits of basin populations, needs and priorities for development plans, diverse water institutions and know-how all have an impact on the activities of the basin countries towards the integrated river basin approach ...<sup>343</sup>

198. At the most important and all-embracing world-wide intergovernmental meeting on water resources, the very first set of recommendations arrived at and

<sup>341</sup> *Ibid.*, pp. 180-181. See also L. Lukács, "International co-operation in water management research" (*ibid.*, vol. II, pp. 92-98); B. Binson, "Views on river basin development in Thailand" (*ibid.*, especially p. 184); S. N. Gupta, "Brahmaputra river basin development: a case study" (*ibid.*, especially p. 215).

<sup>342</sup> B. M. Abbas, "River basin development for socio-economic growth: Bangladesh" (*ibid.*, p. 190). The three international watercourses are the Brahmaputra, the Ganges and the Meghna. Cf. the "water control" objectives for the Vistula: "(a) Water-supply to population, agriculture and industry; (b) Maintenance of the minimum acceptable flows (established after a detailed study ...); (c) Water pollution control; (d) Flood control; (e) Development of recreational facilities; (f) Development of hydro-power production and inland navigation ...", as listed by J. Kinder, "Vistula river basin development: a case study" (*ibid.*, p. 282).

<sup>343</sup> Y. A. Mageed, "Problems encountered in integrated river basin development: case study of the River Nile" (*ibid.*, p. 17).

adopted dealt with data and information.<sup>344</sup> These recommendations, which *inter alia* call for countries to co-operate "in the co-ordination, collection and exchange of relevant data in the case of shared resources",<sup>345</sup> read in part:

A. Assessment of water resources

1. In most countries there are serious inadequacies in the availability of data on water resources, particularly in relation to ground-water and water quality. Hitherto, relatively little importance has been attached to its systematic measurement. The processing and compilation of data have also been seriously neglected.

2. To improve the management of water resources, greater knowledge about their quantity and quality is needed. Regular and systematic collection of hydrometeorological, hydrological and hydrogeological data needs to be promoted and be accompanied by a system for processing quantitative and qualitative information for various types of water bodies. The data should be used to estimate available precipitation, surface water and groundwater resources and the potentials for augmenting these resources. Countries should review, strengthen and co-ordinate arrangements for the collection of basic data. Network densities should be improved; mechanisms for data collection, processing and publication and arrangement for monitoring water quality should be reinforced.

3. To this end, it is recommended that countries should:

(a) Establish a national body with comprehensive responsibilities for water-resources data, or allocate existing functions in a more co-ordinated way, and establish data banks for the systematic collection, processing, storage and dissemination of data in agreed formats and at specific intervals of time;

(b) Expand and extend the network of hydrological and meteorological stations, taking a long-term view of future needs . . . and use existing meteorological and hydrological data series for the study of seasonal and annual fluctuations in climate and water resources . . .

(c) Establish observation networks and strengthen existing systems and facilities for measurements and recording fluctuations in groundwater quality and level; organize the collection of all existing data on groundwater (borehole logs, geological structure, and hydrogeological characteristics, etc.); systematically index such data, and attempt a quantitative assessment so as to determine the present status of and gaps in knowledge; increase the search for, and determination of, the variables of aquifers, with an evaluation of their potential and the possibilities of recharge;

(d) Standardize and organize as far as possible the processing and publication of data so as to keep the statistics up to date and take advantage of the observations made in stations operated by different institutions;

(e) Include consideration of diseases associated with water as an integral part of water assessments and the consideration of the interrelationships of water quality, quantity and related land use;

(f) Make periodic assessments of surface and ground water resources, including rainfall, evaporation and run-off, lakes, lagoons, glaciers and snowfields, both for individual basins and at the national level, in order to determine a programme of investigation for the future in relation to developments needs; . . .

(h) Standardize measurement techniques and instruments, and automate stations as appropriate; . . .

(i) Support and promote national contributions to regional and international programmes on hydrological studies . . . ;

(n) Develop methods for the estimation of available water resources using aerological observations for the computation of the atmospheric water budget in large river basins, rivers and continents;

(o) Provide for the studying and analysing of hydrological data on surface and ground water by multidisciplinary teams so as to make adequate information available for planning purposes;

(p) Include the development of forecasting methods in quantitative and qualitative assessment, especially in the developing countries;<sup>346</sup>

199. At the regional meetings held in Africa, Asia and the Pacific, Europe, Latin America and Western Asia<sup>347</sup> in preparation for the United Nations Water Conference, attention was also given to the fundamental need for information and scientific studies. For example, the Western Asia meeting recommended the formation of a water resources council for Western Asia to include at the outset, *inter alia*, a "task force on data collection networks".<sup>348</sup> The regional meeting for Europe focused particularly on international water-course systems:

5. In the case of transboundary river basins, and other shared waters, the active co-operation of the riparian countries should be promoted, in particular in water pollution control . . .

6. Co-operation at the regional and international levels should be developed along the following guidelines:

(i) Exchange of scientific and technical information and documentation;

(ii) Review and analysis of the existing situation and prospects concerning the use of water resources, including:

Improving forecasting methods of hydrological régimes and exchanging forecasts on a regional scale;

Research into water resources in transboundary river and sea basins to estimate the effects of human activity factors on water régimes and quality;

Intensification of research and development applied to water management, including the design and demonstration of new systems and instruments for measuring and monitoring water quality and quantity . . . as well as low cost, easily maintained and reliable technologies for use by all nations, . . .<sup>349</sup>

200. The United Nations Water Conference devoted a special section of its recommendations to "Regional co-operation".<sup>350</sup> The first recommendation in that section states:

In the case of shared water resources, co-operative action should be taken to generate appropriate data on which future management be based . . .<sup>351</sup>

To this end, it is more specifically recommended that countries sharing a water resource should, *inter alia*:

(b) Establish joint committees, as appropriate with the agreement of the parties concerned, so as to provide for co-operation in areas such as the collection, standardization and exchange of data . . . ;

<sup>346</sup> *Ibid.*, pp. 7-9. See also resolution I of the Conference ("Assessment of water resources") (*ibid.*, p. 66). The Second International Conference on Water Law and Administration of the International Association for Water Law (Caracas, 1976), designated as a technical preparatory conference for the United Nations Water Conference, adopted, *inter alia*, a recommendation that international organizations: "Make every effort to support the creation of the appropriate legal régimes and institutional machinery for the effective realization of the required multidisciplinary data base with respect to water resources" (recommendation 48 (a)) (International Association for Water Law, *Annales Juris Aquarum-II*, vol. 1, 1976, p. clxiii). Another recommendation, addressed to Governments "in the cases where they share international basins", urged the establishment of "mechanisms for co-operation" to include "the need to exchange information among interested States with respect to the projects and activities that may cause pollution or other harmful effects in another State" (*ibid.*, p. clxiv).

<sup>347</sup> See e.g. the recommendations put forward by these regional meetings, consolidated in the annex to *Report of the United Nations Water Conference* . . . , pp. 59-65.

<sup>348</sup> *Ibid.*, pp. 63-64.

<sup>349</sup> *Ibid.*, p. 60.

<sup>350</sup> *Ibid.*, pp. 51-52, paras. 84-89.

<sup>351</sup> *Ibid.*, p. 51, para. 84.

<sup>344</sup> *Report of the United Nations Water Conference* . . . , pp. 7-10.

<sup>345</sup> Recommendation 3 (j) (*ibid.*, p. 8).

(f) Institute action for undertaking surveys of shared water resources and monitoring their quality;"

(g) In the absence of an agreement on the manner in which shared water resources should be utilized, countries which share these resources should exchange relevant information on which their future management can be based in order to avoid foreseeable damages;<sup>352</sup>

201. More recently, at the Interregional Meeting of International River Organizations, held under United Nations auspices, in Dakar, Senegal, 5–14 May 1981,<sup>353</sup> pursuant to resolution VII of the Mar del Plata Action Plan,<sup>354</sup> subsequently endorsed by the Economic and Social Council (resolution 2121 (LXIII) of 4 August 1977), several of the conclusions call for the collection and exchange of data expressly, or embrace the need as self-evident in a larger context of optimum development, use or protection of shared water resources. The principal conclusion addressed to this concern appears under topic II, "Progress in co-operative arrangements":

An adequate and reliable data base is deemed indispensable to rational planning and project and programme execution. Since data gathering, processing and dissemination for complex shared water resources systems is costly and is a continuous process, it is more than normally important that the system States agree quite specifically on the kinds of data needed for different purposes, and on the scheme for their collection. With respect to the basic hydrologic data and operational information, however, a free and ample flow on a timely basis is called for at all times.<sup>355</sup>

202. Another of the conclusions, regarding pollution, public health and the environment, also recognizes this need:

Water quality, water-related disease and environmental protection considerations have to date received inadequate attention in most cases, and Governments need to request their river and lake organizations to include these aspects as part of their information and data, project and programme planning or monitoring functions, as appropriate.<sup>356</sup>

203. Considerable attention was devoted to shared groundwater, with the following as one of the conclusions:

Those co-operating States that have not yet included groundwater

as a part of the shared water resources system need to recognize this part of the hydrologic cycle as intimately linked to the quantity and quality of their shared surface waters, and could entrust their international river and lake organizations with the task to initiate technical studies and to call for hydrogeologic data. Concerned Governments may thus apprise themselves of the specifics of the interactions throughout the system, or portion thereof, with a view to benefiting from conjunctive use and to adopting the indicated conservation and protection measures for the underground environment.<sup>357</sup>

204. Under topic III, "Economic and other considerations", agreement was expressed "on steps or stages of co-operation, from the initial conversations through preliminary fact-finding, sound data collection, pre-feasibility and feasibility studies, planning, design, construction, operation and maintenance".<sup>358</sup> Though it was noted that some aspects regarding joint studies and exchange of information had already been covered under topics I and II, this additional statement was entered:

... Information exchange was considered a prerequisite to basin-wide planning and to the establishment of useful co-operative arrangements for the many basin issues that arise. Joint studies, it was pointed out, could produce information fully acceptable to participating Governments, and could save time and money. Various types of exchanges were considered among basin States; between the latter and such river basin commission as they may establish; and among international river basin commissions through the United Nations acting as a clearing house. Some emphasis was put on systematic, continuous exchange as distinct from sporadic efforts.<sup>359</sup>

205. The technical experts in water resources have repeatedly espoused the application of modern, multi-disciplinary techniques of analysis, especially where an international watercourse is subjected to multiple use or where future development plans depend upon water, as most do. The developing countries, most of which must maximize their available resources and achieve efficacious marshalling of their efforts, may find, with assistance as required, that methods such as systems analysis will allow them to make better judgments with insufficient data than otherwise would be the case. No known data base for a watercourse system has ever been complete and entirely current even in the most advanced situations. Many social and economic development decisions cannot be held up indefinitely while the "full" data base is being accumulated; it is

<sup>352</sup> *Ibid.*, pp. 51–52, para. 86. It should be noted that the text of subparagraph (g) quoted above was submitted to a roll-call vote in the plenary of the Conference; it was adopted by 29 votes to 13, with 48 abstentions (*ibid.*, p. 126, para. 162). The other parts of the recommendations quoted above were adopted without a vote. Other groups of recommendations adopted at the Conference return again and again to the need for data and information exchange, systems analysis and research studies. See e.g. under heading B ("Water use and efficiency"), paragraphs 8(a), 10(b), (c), (d), (e) and (g), 11, 12, 13, 19(b), 23(b), 26(a) and (b), 27(i) and (iv), 29(a), (b), (f) and (g), 32(a) and (c) (*ibid.*, pp. 11–23); under heading C ("Environment, health and pollution control"), paragraphs 36(b), (c), (d), (e), (f), (k), (o) and (p), and 39(a), (b), (f), (h), (j), (k), (s), (u) and (v) (*ibid.*, pp. 25–29); under heading D ("Policy, planning and management"), paragraphs 41 and 44(d), (f), (g) and (h) (*ibid.*, pp. 30–31); under heading E ("Natural hazards"), paragraphs 65(c) and (d), 67 and 68(a), (b), (d), (e), (j) and (n) (*ibid.*, pp. 40–41); under heading F ("Public information, education, training and research"), paragraphs 81 and 82(d), (f), (g), (h) and (i) (*ibid.*, pp. 47–49). Many, if not most, of the recommendations of the Conference presume the creation and maintenance of the pertinent data bases upon the analysis of which policy and management decisions are to be founded.

<sup>353</sup> For the report of the meeting, see United Nations, *Experiences in the Development and Management* . . . , pp. 3–41.

<sup>354</sup> *Report of the United Nations Water Conference* . . . , p. 77.

<sup>355</sup> United Nations, *Experiences in the Development and Management* . . . , p. 15, para. 49, conclusion 11.

<sup>356</sup> *Ibid.*, p. 14, para. 49, conclusion 4.

<sup>357</sup> *Ibid.*, conclusion 6.

<sup>358</sup> *Ibid.*, p. 17, para. 58.

<sup>359</sup> *Ibid.*, p. 18, para. 64. These sentiments were condensed as conclusion 7 under topic III (*ibid.*, p. 20, para. 69). In addition, see conclusion 5 concerning prevention and mitigation of floods, droughts and other hazards under topic II (*ibid.*, p. 14, para. 49). In the course of the general debate and working group sessions it was generally recognized that there should be some data and information exchange, notably as an aspect of equitable utilization. However, there were differences with respect to the source and scope of the obligation. The need for sharpening means and criteria for data gathering was emphasized, especially in the case of developing countries, which would necessitate technical and financial assistance (*ibid.*, p. 13, para. 45). In presenting topic II, the rapporteur reiterated the call "for the collection and sharing of information and data on a timely basis and in accordance with an agreed scheme tailored to meet the needs of the system States individually and collectively in the future. The indispensability of a proper and reliable data base was stressed; the undertaking of at least some kinds of data gathering, collation and analysis as a joint effort under some circumstances was posed as a technique to be discussed; the general acceptability to all parties of data so generated and the assurance of compatibility if not uniformity for analysis were noted" (*ibid.*, p. 11, para. 33). See also Hayton, "Progress in co-operative arrangements", background paper for topic II (*ibid.*, p. 65), and documents and works there cited.

also too expensive to attempt all-embracing data collection, collation, analysis and dissemination, even for developed countries.<sup>360</sup> Information and data are essential. Properly selected data, collected reliably and processed and exchanged promptly can yield sound understanding and forecasts at least adequate to the appointed tasks. The pooling of information and data, in compatible form, by the system States on a regular basis, and above all when one or more of the countries determines a need, is indispensable to the accumulation of that essential, minimum body of knowledge allowing development, use and protection of water undertakings to proceed with some confidence.<sup>361</sup>

206. At the United Nations Water Conference, special attention was devoted to this aspect of methodology. One set of recommendations, concerned with efficiency at the regional, national and farm level, stated that "systems analysis and modelling techniques should be applied to improve efficiency and efficacy in storage operation and distribution systems".<sup>362</sup> Another proposition endorsed at the Conference reads in part as follows:

In particular, the construction of new works should be preceded by a detailed study of the agricultural, industrial, municipal and hydro-power needs of the area concerned. Water management plans may be prepared using systems analysis techniques and developed on the basis of already adopted indicators and criteria. This analysis would take into account the economic and social evolution of the basin and be as comprehensive as possible; it would include such elements as time horizon and territorial extent, and take into account interactions between the national economy and regional development . . .<sup>363</sup>

In implementation of the national strategies recommended, the Conference spelled out a number of things that countries should do, including those pertinent to information and data:

<sup>360</sup> See I. Bogárdi, "Uncertainty in water resources decision-making" (United Nations, *River Basin Development* . . . , vol. I, p. 188, and works there cited), and WMO, "River basin models and their application with scarcity of data" (*ibid.*, p. 132, and works there cited).

<sup>361</sup> See e.g. I. Dégen, "Integrated development of river basins: overview and perspectives" (*ibid.*, especially pp. 17-19, and works there cited); L. Dávid, "River basin development for socio-economic growth: general report" (*ibid.*, especially pp. 25 and 29, and works there cited); G. W. Reid and M. I. Muiga, "Aggregate modelling of water demands for developing countries utilizing socio-economic growth patterns" (*ibid.*, p. 77); D. G. Jamieson, "A hierarchical approach to the analysis of water resource systems" (*ibid.*, p. 123, and works there cited); B. W. Mar, "Systems approach to river basin and interbasin development" (*ibid.*, p. 155); L. Dávid and L. Duckstein, "Long-range planning of water resources: a multi-objective approach" (*ibid.*, p. 160, and works there cited); T. Scudder, "Social impacts of river basin development on local populations" (*ibid.*, p. 45, and works there cited); E. Plate, "Simulation as a tool in international river development" (*ibid.*, vol. II, p. 33); K. Chaemsaitong, "Multipurpose river project planning in the Lower Mekong basin: a decisional approach" (*ibid.*, p. 205; and works there cited); J. A. Dracup and A. P. Feldman, "Systems approach for the planning and management of the Morava river basin in Yugoslavia" (*ibid.*, p. 286). See also M. B. Fiering, "The role of systems analysis in water programme development", *Natural Resources Journal*, vol. 16, 1976, p. 759; C. W. Howe, "The effects of water resource development on economic growth" (*ibid.*, p. 939); A. K. Biswas, ed., *Systems Approach to Water Management* (New York, McGraw Hill, 1976); United Nations, *The Demand for Water: Procedures and Methodologies for Projecting Water Demands in the Context of Regional and National Planning*, Natural Resources/Water Series No. 3 (Sales No. E.76.II.A.1), especially pp. 22-23, and works there cited.

<sup>362</sup> *Report of the United Nations Water Conference* . . . , p. 12, para. 10(c).

<sup>363</sup> *ibid.*, p. 30, para. 41.

(d) Improve the availability and quality of necessary basic information, e.g. cartographic services, hydrometry, data on water-linked natural resources and ecosystems, inventories of possible works, water demand projections and social cost;

...

(f) Develop and apply techniques for identifying, measuring and presenting the economic, environmental and social benefits and costs of development projects and proposals . . . ;

...

(h) Formulate master plans for countries and river basins to provide a long-term perspective for planning, including resource conservation, using such techniques as systems analysis and mathematical modelling . . .<sup>364</sup>

207. While it is not proposed that international law should require application of such techniques, it is important to realize that pursuit of the water development and conservation objectives of Governments will probably involve these methods. Information and data must be "fed into" these models in order that a result be produced. "International co-operation for development is the shared goal and common duty of all States" declares the Charter of Economic Rights and Duties of States.<sup>365</sup> The sharing of data and information, and the formulation by system States of compatible data collection and collation, if not uniformity of analysis and dissemination formats, is becoming increasingly inescapable. The Commission's article on this subject should not lag far behind the exigencies of shared water resources development, use and protection. At the very least, the residual rule should facilitate and not obstruct the collection and sharing of information and data of a fundamental nature and, upon a proper request, of a specialized nature. Costs may have to be borne "equitably", that is, in proportion to the benefit conferred by the supplying State upon system States utilizing the data, including itself, and in proportion to financial capability as well. There will be considerations, also, of technical capability; reciprocity and mutual assistance will undoubtedly figure heavily in the specific arrangements agreed upon. The function of the Commission's article is to provide the minimal point of departure for information and data sharing where the watercourse system is an international one.

208. The importance of a not too burdensome sharing was recognized by the International Law Association, which recommended in its Helsinki Rules that "each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of and activities with respect to such waters . . ."<sup>366</sup> This sharing was there expressly cast, however, as an aid to preventing disputes rather than as an affirmative element in achieving more rational development, use and protection of the resource.<sup>367</sup> In the commentary to the article, this explanation is given with respect to the quoted passage:

<sup>364</sup> *ibid.*, p. 31, para. 44. Although this section of recommendations was directed primarily to the national level, the implications for all watercourse systems, including international watercourse systems, is evident; moreover, the Conference frequently used the terms "river basin", "different countries", "subregions", etc., in its report without differentiation.

<sup>365</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>366</sup> Art. XXIX, para. 1 (ILA, *Report of the Fifty-second Conference* . . . , p. 518).

<sup>367</sup> See the commentary to art. XXIX, para. 1: "The exchange of

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.<sup>368</sup>

This final version in the Helsinki Rules derived from the agreed recommendations of the Association's "New York resolution" of 1958, which provided:

Co-riparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to stream-flow, quantity and quality of water, rain and snow fall, water tables and underground water movements.<sup>369</sup>

209. While the recent "Athens resolution" of the Institute of International Law does not address the entire gamut of information and data exchange, devoted as it is to pollution, it nonetheless includes a rule obliging States, at the international level, to co-operate "in good faith with the other States concerned".<sup>370</sup>

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:

(a) inform co-riparian States regularly of all appropriate data on the pollution of the basin, its causes, its nature, the damage resulting from it and the preventive procedures;

(b) notify the States concerned in due time of any activities envisaged in their own territories which may involve the basin in a significant threat of transboundary pollution;

(c) promptly inform States that might be affected by a sudden increase in the level of transboundary pollution in the basin and take all appropriate steps to reduce the effects of any such increase;

(d) consult with each other on actual or potential problems of transboundary pollution of the basin so as to reach, by methods of their own choice, a solution consistent with the interests of the States concerned and with the protection of the environment;

(e) co-ordinate or pool their scientific and technical research programmes to combat pollution of the basin;

(h) establish harmonized, co-ordinated or unified networks for permanent observation and pollution control.<sup>371</sup>

210. Also focusing on transfrontier pollution, OECD has made much of the importance of information and data exchange in an active context of neighbourly consultation. A recent study by the OECD Environment Committee merits quotation in part:

5. *Information procedure* means the dissemination of various data and information on activities or measures, proposed activities or measures undertaken or envisaged in a country . . . Depending on the case, it may be followed either on the initiative of the country

originating the activity or measure concerned, or at the request of the country or countries exposed by this activity or measure . . .

6. (a) It may take the form of the *ad hoc* provision of information regarding a specific activity or measure likely to cause a significant risk of transfrontier pollution.

(b) Alternatively the information procedure can take the form of the routine communication by any suitable means, notably within international commissions or organizations, of data concerning pertinent aspects of the environmental policy of the country providing the information when these might result in a problem of transfrontier pollution in the informed country. Such practices are clearly not merely *ad hoc*, but form part of a general context of co-operation and concerted action between countries concerned to protect the same environment. In this case they cannot be unilateral, but instead take the form of an exchange of relevant information and data. This makes clear the interrelation between information, concerted action and consultation.

7. The consultation procedure usually assumes that information has been disseminated or exchanged in advance . . .<sup>372</sup>

211. In 1977, the OECD Council adopted a recommendation on principles concerning transfrontier pollution, which included these statements:

11. Countries concerned should exchange all relevant scientific information and data on transfrontier pollution, when not prohibited by legislative provisions or prescriptions or by applicable international conventions. They should develop and adopt pollution measurement methods providing results which are compatible.

12. They should, when appropriate, co-operate in scientific and technical research programmes *inter alia* for identifying the origin and pathways of transfrontier pollution, any damage caused and the best methods of pollution prevention and control, and should share all information and data thus obtained.

They should, where necessary, consider setting up jointly, in zones affected by transfrontier pollution, a permanent monitoring system or network for assessing the levels of pollution and the effectiveness of measures taken by them to reduce pollution.<sup>373</sup>

212. In short, as another intergovernmental body has concluded: "States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects."<sup>374</sup> The Commission's articles on the law of the non-navigational uses of international watercourses are by no means limited to environmental aspects, but the conclusion is applicable to other aspects of the problem as well. For example, the articles of the International Law Association on flood control give a partial list of co-operative activities by the basin States in that regard:

(a) collection and exchange of relevant data;

(b) preparation of surveys, investigations and studies and their mutual exchange;

(c) planning and designing of relevant measures;

such information can play an important role in the composition of disputes which may actually turn on nothing more than a question of fact. Even in those instances in which a question of law is presented, the provision of information by one party to the other can bring into focus and clarify the legal issues in the case" (*ibid.*, p. 519). The article is, moreover, part of the chapter on "procedures for the prevention and settlement of disputes".

<sup>368</sup> *Ibid.*

<sup>369</sup> ILA, *Report of the Forty-eighth Conference* . . . , p. ix.

<sup>370</sup> Art. IV(b) of resolution II, entitled "The pollution of rivers and lakes and international law" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 199).

<sup>371</sup> Art. VII, para. 1 (*ibid.*, p. 201). For "States bordering the same hydrographic basin", the French text, which is the authentic one, reads "les Etats faisant partie d'un même bassin fluvial ou lacustre".

<sup>372</sup> "Application of information and consultation practices for preventing transfrontier pollution", OECD, *Transfrontier Pollution and the Role of States* (op. cit.), p. 10. The OECD position has also been examined in sect. D above, on responsibility for appreciable harm.

<sup>373</sup> Title G, "Exchange of scientific information, monitoring measures and research", OECD, *Legal Aspects of Transfrontier Pollution* (op. cit.), p. 17.

<sup>374</sup> UNEP/IG.12/2, annexed to document UNEP/GC.6/17, principle 5. Principle 7 provides that:

"Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects."

- (d) operation and maintenance of works;
- (e) flood forecasting and maintenance of works;
- (f) flood forecasting and communication of flood warnings;
- (g) setting up of a regular information service charged to transmit the height of water levels and the discharge quantities.<sup>375</sup>

213. Further, with respect to information and data, the same articles provide:

1. Basin States should communicate amongst themselves as soon as possible on any occasion such as heavy rainfalls, sudden melting of snow or on other events likely to create floods and of dangerous rises of water levels in their territory.

2. Basin States should set up an effective system of transmission in order to fulfil the provisions contained in paragraph 1, and should ensure priority to the communication of flood warnings in emergency cases . . .<sup>376</sup>

214. The Action Plan of the United Nations Environment Conference advised the Governments concerned to create appropriate machinery for co-operation with respect to water resources common to more than one jurisdiction:

Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

- (i) Collection, analysis, and exchange of hydrologic data . . . ;
- (ii) Joint data-collection programmes to serve planning needs;
- (iii) Assessment of environmental effects of existing water uses;
- (iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic and social considerations of water quality control;<sup>377</sup>

215. These works and the earlier reports to the Commission on this question establish the crucial value of information and data with respect to the water resources and water-related activities of international watercourse systems. To summarize those findings: knowledge of the physical and chemical characteristics of the system, of the kinds and intensities of water uses, and of the demands that growth and development in the system States can be expected to make in the future—in terms of both quantity and quality—is fundamental to meaningful consultations and negotiations. Specific programmes or projects cannot be rationally considered or carried out without an adequate and reliable data base. It only remains to find the correct and acceptable formula for expressing such basic requirements as are, or ought to be, a part of the principles and rules of applicable international law. Properly stated, the Commission's article should, in addition, promote agreement between or among the system States with respect to the requirements of particular international watercourse systems.

216. It is understood that specific, detailed needs cannot be dealt with effectively except in system agreements. On the other hand, there are general requirements, perhaps including those of method, that the technical and scientific communities have long pleaded for.<sup>378</sup> The collection of data, to be useful, must be

accomplished if not on a uniform then on a compatible basis; the collection plan must be systematic and include the essential elements, embracing the territorial reach relevant to the project, programme or overall development scheme, as appropriate. The content of the collection plan, the sophistication of the instrumentation for data gathering and the determinations as to cost sharing and implementation must, of course, be left to system agreements. Agreement is general, nonetheless, that in the absence of ample, accurate and verifiable information and data—either as a joint effort or on the basis of periodic exchange—the problems of international watercourse systems cannot be intelligently addressed.<sup>379</sup>

217. Once the data and information are in hand, their scientific collation and analysis must also be undertaken. Raw data are useless and often overwhelming.<sup>380</sup> System States might be wise to assign at least this aspect to a joint or international staff, but international law does not reach so far as a matter of obligation, unless a systems agreement so provides. The collated and analysed data covering a project, programme or watercourse system need also to be disseminated in timely fashion to the people at the technical and policy levels who are to use it.<sup>381</sup> Reliance upon inaccessible or out-of-date information and data may be, it could be argued, a more dangerous basis for decisions and investment of the countries' precious resources than acknowledged lack of sufficient and good information, which would at least give the planners and decision-makers pause. The Secretary-General's study of the issues before the Committee on Natural Resources of the Economic and

formation and the gathering of basic data, a United Nations panel of experts concluded the following:

"The mere process of preparing and implementing such a scheme will afford practice in working together and tend to generate an atmosphere of collaboration. Then, in order to arrive at some indication of the extent of surveys necessary and the cost of various works, the technical characteristics of such works and their functions in the general scheme will have to be discussed. This discussion will include at least some of the following: flood control, river training, reservoirs, river gains and losses, silt charge, reclamation in the various aspects required, surface and subsoil conditions, drainage, farm-cropping patterns, irrigation layouts, hydro-electric installations, domestic water supply, fish life, sanitation (especially anti-malarial measures), soil erosion and pollution" (United Nations, *Integrated River Basin Development* (Sales No. E.70.II.A.4), p. 37).

As to the "reconnaissance of existing conditions":

"One of the most important evaluations to make is the adequacy of water supply in view of requirements for the whole broad range of water uses (for livestock, households, industry, navigation, power, sanitation, irrigation). In determining the annual water cycle it is essential to know not only the usual or average conditions but also the recurrent or random variations in the relation between supply and demand which create medium-term and long-term disequilibria. Storage facilities may have to be included in the plan for the purpose of extending the period over which there is equilibrium between supply and need. Storage which changes the incidence of surplus supply may also reduce dangers of floods" (*ibid.*, p. 11).

The tasks were characterized as "a careful evaluation of the human or socio-economic factors in the area, their present state, their trends, and of the corresponding needs and requirements; a detailed study of development potentials offered by water and other natural resources; and preparation of a preliminary general programme of development" (*ibid.*, p. 10).

<sup>379</sup> "Without an appraisal of monthly or biweekly changes in the supply of, and demand for, water, not even a provisional estimate can be made of expected benefits" (*ibid.*, p. 11).

<sup>380</sup> *Ibid.*, annex I ("Organization of basic surveys"), pp. 47.

<sup>381</sup> *Ibid.*, especially pp. 12-15 and 49-50.

<sup>375</sup> Art. 3 (ILA, *Report of the Fifty-fifth Conference* . . . , p. xvi).

<sup>376</sup> Art. 4 (*ibid.*). Art. 6, para. 1, states: "Expenses for collection and exchange of relevant data, for preparation of surveys, investigations and studies, for flood forecasting and communication of flood warnings, as well as for the setting up of a regular information service shall be borne jointly by the basin States co-operating in such matters" (*ibid.*, p. xvii).

<sup>377</sup> Recommendation 51(c) (*Report of the United Nations Conference on the Human Environment* . . . , p. 17).

<sup>378</sup> Concerning the preparation of a scheme for exchange of in-



Social Council, in connection with international water resources, evaluated "the need for adequate information on international water resources and their development potential" in these terms:

8. The major incentive to co-operate in the development of international water resources depends largely upon an identification and appreciation of the benefits to be derived from such co-operation. It is thus imperative that the benefits in quantitative and qualitative terms be clearly known to the national decision-makers concerned. International co-operation should, to the fullest extent possible, be based upon reliable knowledge and a thorough understanding of alternative courses of action.

9. Unfortunately, for a large portion of the world's international water resources, information is still insufficient or non-existent. Nevertheless, in many of these cases co-operative efforts by the Governments in developing these resources could provide valuable benefits to the people in the area. To some extent, "international projects" have received second priority in national water development plans and often there are unrealistic expectations or misinformed apprehensions about international undertakings.<sup>382</sup>

### 3. STATE PRACTICE

218. Most international agreements for the purpose of development, use or protection of international watercourses contain provisions with respect to information or data sharing. In their Indus Waters Treaty of 1960, India and Pakistan agreed to exchange the following data on a monthly basis: gauge and discharge data relating to flow of the rivers at all observation points (daily observations, or as less frequently taken); daily extractions for or releases from reservoirs; daily withdrawals at the heads of all canals operated by government; daily escapages from all canals; daily deliveries from link canals. To the extent that other data are available, these are also to be supplied on request; hydrologic and meteorological observation stations may, by agreement, be set up at the request and expense of one party in the territory of the other. Data must also be communicated when any planned engineering work would materially affect the other party.<sup>383</sup>

219. At their second meeting, in 1968, the Foreign Ministers of the Plata Basin approved a series of studies, including studies of seven projects in which all five system States would participate. Two of these were on "Hydrometeorology and the subsequent establishment and operation of the regional network of hydrometeorological stations" and "Inventory and analysis of basic information on the natural resources of the basin and related issues".<sup>384</sup> At their fourth meeting, the Foreign Ministers made a distinction, however, between raw data and processed data:

3. As to the exchange of hydrological and meteorological data:

(a) Processed data shall be disseminated and exchanged systematically through publications;

<sup>382</sup> E/C.7/2/Add.6.

<sup>383</sup> Arts. VI and VII (1) (a) (United Nations *Treaty Series*, vol. 419, p. 144); see also Baxter, *loc. cit.*, pp. 470-471.

<sup>384</sup> Acta de Santa Cruz de la Sierra, part II, A, reproduced in *Organization of American States, Ríos y lagos internacionales* . . . (*op. cit.*), p. 152. The meeting also approved the Statute of the Comité Intergubernamental Coordinador de los Países de la Cuenca del Plata, which is therein charged with, among other things, "centralizing the exchange of information of relevance to the stated objectives and such other information as the specialized national agencies consider pertinent" (art. 1 of the Statute) (*ibid.*, p. 157). See also art. 3 (b) (*ibid.*, p. 158).

(b) Unprocessed data, whether in the form of observations, instrument measurements or graphs, shall be exchanged or furnished at the discretion of the countries concerned.

4. The States shall try as far as possible gradually to exchange the cartographic and hydrographic results of their measurements in the River Plate Basin in order to facilitate the task of determining the characteristics of the flow system.<sup>385</sup>

220. Greece and Yugoslavia reached agreement in 1957 on a procedure and plan for co-operation in making hydro-economic studies of the drainage area of Lake Dojran. Topographical, hydrological, pedological, agronomic, fishing, alluvial accumulation, present uses and flood damage studies were worked out. For example, concerning hydrological studies, the parties agreed on the installation of meteorological, evaporimetric, heliographic and limnigraphic stations and on ways of measuring the flow of the lake's tributaries. A study of the level of subterranean waters was also recognized as useful; each country was to organize and carry out such a study in its own territory. It was also decided that the competent services of the two countries would proceed as soon as possible to exchange findings already established concerning water levels, the depth and duration of rainfall in the lake basin, the temperature and rate of evaporation of the water and the discharge coefficient in the lake basin.<sup>386</sup>

221. In at least one case, a penalty is expressly not attached to non-compliance with the provisions on exchange of information. The Treaty of 1950 between the Soviet Union and Hungary concerning the régime of their common frontier places the parties under a duty to exchange information concerning the level of rivers and ice conditions, so as to avert danger from floods or from drifting ice. Delay in communicating or failure to communicate such information shall not, however, constitute grounds for a claim to compensation for damage.<sup>387</sup>

222. In an early agreement between France and Switzerland concerning the disposition of hydro-power on the Rhone, the usefulness of data exchange was recognized: "For the purpose of checking the apportionment, the two Governments will provide each other with all the statistical data concerning the generation and use of the energy."<sup>388</sup> In the 1944 Treaty between Mexico and the United States of America, the two countries charged their International Boundary and Water Commission as follows with respect to data on the Rio Grande:

The Commission shall keep a record of the waters belonging to each country and of those may be available at a given moment, taking

<sup>385</sup> Declaration of Asunción on the use of international rivers (resolution No. 25), reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326.

<sup>386</sup> United Nations, *Legislative Texts* . . . , pp. 813-818.

<sup>387</sup> Art. 19 (*ibid.*, p. 825). A "regular system of signals to be used during periods of high water or drifting ice" is called for. On the other hand, art. 14, para. 2, of the Treaty provides:

"Where one contracting party occasions material damage to the other contracting party by failing to comply with the provisions of paragraph 1 of this article ['ensure that the frontier waters are kept in proper order'; 'take steps to prevent deliberate damage to the banks of frontier rivers'], compensation for such damage shall be paid by the party responsible therefor" (*ibid.*, p. 823).

<sup>388</sup> Art. 5, final para, of the 1913 Convention between France and Switzerland for the development of the water-power of the Rhone between the power station planned at La Plaine and a point to be specified (*ibid.*, p. 709). See also *Yearbook* . . . 1974, vol. II (Part Two), p. 161, document A/5409, para. 844.

into account the measurement of the allotments, the regulation of the waters in storage, the consumptive uses, the withdrawals, the diversions, and the losses. For this purpose the Commission shall construct, operate and maintain on the main channel of the Rio Grande (Rio Bravo) and each section shall construct, operate and maintain on the measured tributaries in its own country, all the gauging stations and mechanical apparatus necessary for the purpose of making computations and of obtaining the necessary data for such record. The information with respect to the diversions and consumptive uses on the unmeasured tributaries shall be furnished to the Commission by the appropriate section. The cost of construction of any new gauging stations located on the main channel of the Rio Grande (Rio Bravo) shall be borne equally by the two Governments. The operation and maintenance of all gauging stations or the cost of such operation and maintenance shall be apportioned between the two sections in accordance with determinations to be made by the Commission.<sup>389</sup>

223. Protocol No. 1 annexed to the Turkey-Iraq Treaty of friendship and neighbourly relations of 1946 recognizes the importance of data from the upper riparian, Turkey, and expresses the parties' agreement on the necessity "for installing permanent observation stations in Turkish territory to record the water-flow of the [Tigris and Euphrates] rivers and to communicate regularly to Iraq the result of these observations".<sup>390</sup> In the 1978 Treaty for Amazonian Co-operation, two articles are instructive on this subtopic concerning information and data:

#### Article VII

Taking into account the need for the exploitation of the flora and fauna of the Amazon region to be rationally planned so as to maintain the ecological balance within the region and preserve the species, the contracting parties decide to:

(a) Promote scientific research and exchange information and technical personnel among the competent agencies within the respective countries so as to increase their knowledge of the flora and fauna of their Amazon territories and prevent and control diseases in said territories.

(b) Establish a regular system for the proper exchange of information on the conservationist measures adopted or to be adopted by each State in its Amazonian territories; these shall be the subject of an annual report to be presented by each country.

...

#### Article XV

The contracting parties shall seek to maintain a permanent exchange of information and co-operation among themselves and with the agencies for Latin American co-operation in the areas pertaining to matters covered by this Treaty.<sup>391</sup>

224. In a related field, another recent treaty merits attention. In 1977, Denmark and the Federal Republic of Germany entered into an Agreement regulating the exchange of information on the construction of nuclear installations along the border.<sup>392</sup> Article 1 requires that

a contracting party inform a neighbouring State of nuclear installations and that "suitable documents" be made available. Included are decisions regarding site, construction and operation authorizations, as well as fundamental changes in such authorizations. Other pertinent provisions include:

#### Article 3

Information as specified in article 1 together with relevant documents should be made available in sufficient time so as to permit the authorities of the constructing State to consider any comments and observations of the contracting party of the neighbouring State before a final decision is reached. The contracting party of the neighbouring State is obligated to examine without delay any documents obtained.

#### Article 4

Upon request, the contracting party of the neighbouring State undertakes to provide the contracting party of the constructing State information necessary to the evaluation of an installation, such as that relating to population distribution, or similar information relating to conditions within the neighbouring State which could operate to the detriment of the plant's security.

#### Article 5

The exchange of information, under the provisions of article 4, and of documents, under the provisions of article 3, shall be free of charge. Only if especially costly documents are requested must the contracting party which requests such information bear the costs which arise.<sup>393</sup>

225. The Republics of Sierra Leone and Liberia, assisted by UNDP, have undertaken along their common border the Mano River Basin Development Project, monitored by the countries' Mano River Union. The project, looking towards the construction of a major dam, involves a topographic survey, geological investigations, geophysical studies, socio-economic investigations, a power market survey, studies on transportation, agriculture, tourism and irrigation, as well as the collection and compilation of hydrometeorological data.<sup>394</sup> This kind of undertaking illustrates well the many kinds of data that may be relevant to a particular undertaking, as well as the fundamental role played by information and data in development projects involving shared water resources.

226. In those international watercourse systems for which the system States have opted for comprehensive planning and development with an international commission or organization as their agent, the handling of information and data tends to be centralized, including joint collection and processing, rather than simply "exchanged" between or among system States. Examples of such integrated action would include the system agreements for the Senegal, the Niger, the Kagera, the Gambia and Lake Chad in Africa and the lower Mekong in Asia, even though financial and human resources constraints may have limited the attainment of objectives in most of those systems.<sup>395</sup> Indicative of

<sup>389</sup> Art. 9 (j) (United Nations, *Treaty Series*, vol. 3, p. 334).

<sup>390</sup> Preamble (*ibid.*, vol. 37, p. 287). See also arts. 1, 2 and 3, providing for technicians from Iraq to conduct the field surveys, with collaboration from the Turkish technicians, and the assumption by Turkey of the responsibility to install, operate and maintain the observation stations, with equal sharing by the two parties of the expense of operation, etc. (*ibid.*, pp. 287-289).

<sup>391</sup> Text circulated to the General Assembly as document A/35/580, to be issued as No. 19194 in the United Nations *Treaty Series*. The signatories are Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela. See also art. IX, dealing with scientific and technological research on a joint or co-ordinated basis, including "seminars and conferences, exchange of information and documentation, and organization of means for their dissemination".

<sup>392</sup> *International Legal Materials*, vol. XVII, No. 2, 1978, p. 274.

<sup>393</sup> *ibid.*, p. 275.

<sup>394</sup> See "The Mano River Basin development project", paper prepared by S. A. Ricks for the 1981 Dakar Interregional Meeting, reproduced in United Nations, *Experiences in the Development and Management* . . . , especially pp. 168-171.

<sup>395</sup> See e.g. the 1977 Agreement between Burundi, Rwanda and the United Republic of Tanzania concerning the establishment of the Organization for the Management and Development of the Kagera River Basin, especially arts. 2, 7, 10 and 11; "Powers of the Organization for the Development of the Senegal River in development of the river basin", paper prepared by Q. L. Nguyen for the 1981 Dakar Interregional Meeting, reproduced in United Nations,



this centralized approach, even where neither comprehensive planning nor integrated development has been embraced, are the data and information arrangements found in the Great Lakes water quality Agreement of 1978. There the parties' International Joint Commission is given a series of specific responsibilities with respect to the implementation of the Agreement, the first two of which are:

(a) Collation, analysis and dissemination of data and information supplied by the parties and State and Provincial Governments relating to the quality of the boundary waters of the Great Lakes System and to pollution that enters the boundary waters from tributary waters and other sources;

(b) Collection, analysis and dissemination of data and information concerning the general and specific objectives and the operation and effectiveness of the programme and other measures established pursuant to this Agreement;<sup>396</sup>

227. In this connection, the former Chairman of the International Joint Commission (Canada-United States of America), Canadian Section, has reflected upon the matter of "fact-gathering and fact-sharing", and has concluded as follows:

A dominant purpose of all co-operative exercises involving binational or multinational commissions or technical committees is that of obtaining information in aid of co-operative endeavours by the co-riparians. What distinguishes many of the agencies involved, however, is the extent to which facts are gathered jointly or only by national officials and, equally, the degree to which nationals alone or multinational agencies and personnel are involved in the fact-evaluation process. In short, while almost all the models seem to be concerned with some fact-finding and fact-sharing there is a fundamental distinction between facts found by teams jointly and made up from all the riparians and facts gathered only by national public servants and not by co-operative multinational teams with the results placed in a common pool of information. Unless this distinction is understood it will not often be easy to appreciate the difficulties that some river basin states face in dealing with data which may or may not be verifiable and therefore not effectively usable by the commission or technical committee concerned.<sup>397</sup>

228. Examples of data and information sharing on the basis of treaty arrangements could be multiplied many times. Included here have been what appeared to be representative samples of the wide variety of arrangements and requirements that system States have found suitable for their particular situations at the time that the treaties were concluded. Such arrangements may

become dated, however, with the passage of time, so that they no longer provide the parties with the information and data, in whole or in part, relevant to contemporary uses and conditions of the international watercourse. Pending the reaching of replacement or supplementary agreements, system States expect to be able, under international law, to count on the co-operation of their co-system States for needed information and data where that is justified by existing or projected hydraulic works or other development, use or protection considerations. It is to support that felt need that the Commission's articles require provisions to make the rules in this area more definite and certain and to bring them into consonance with the burgeoning demands, world-wide, upon the resource. The United Nations General Assembly has put the matter succinctly in article 3 of the Charter of Economic Rights and Duties of States:<sup>398</sup>

In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.

229. This indispensability of information and data collection and exchange is undisputed with regard to co-operation and collaboration with a view to rational utilization of the water resources of an international watercourse system. It is equally fundamental if it is the desire of the parties to accommodate differences that have arisen or may arise, or to settle their formal disputes on a sound basis with a view to optimum development, use and protection of their shared water resources.

#### 4. THE PROPOSED ARTICLE

230. A general provision among the Commission's articles, properly limited and taking into account the differing capabilities of system States, is thus justified. The terms proposed for the consideration of a successor Special Rapporteur and of the Commission are:

##### *Article 9. Collection, processing and dissemination of information and data*

1. System States are under a general duty to provide one another at regular intervals with the available basic hydrological, meteorological and hydrogeological information and data pertinent to the planning for, and rational utilization of, the water resources of their international watercourse system or systems, including information and data previously collected, unless no system State is presently using or planning to use the water resources of the system. If a system State requests from another system State information or data that are not available, the system State from which the information or data are requested will use its best efforts to provide the information or data but may require the requesting system State to pay the reasonable costs of collecting and, where appropriate, processing such information or data.

2. In any international watercourse system where system States have decided to develop, use, protect or study the watercourse system as a whole, it is the duty of each system State, unless otherwise agreed, to furnish

*Experiences in the Development and Management* . . . , p. 142; "Co-operation in the Lower Mekong River Basin", paper prepared by the Mekong Secretariat for the 1981 Dakar Interregional Meeting (*ibid.*, especially pp. 245-247); Statute of the Committee for Co-ordination of Investigations of the Lower Mekong Basin established by the Governments of Cambodia, Laos, Thailand and the Republic of Viet Nam, 1957, especially arts. 4 and 6 (United Nations, *Legislative Texts* . . . , pp. 268-269); "Background, history and activities of the Lake Chad Basin Commission", paper prepared by the Lake Chad Basin Commission for the 1981 Dakar Interregional Meeting, reproduced in United Nations, *Experiences in the Development and Management* . . . , p. 184; "Technical note on the Gambia River Development Organization", prepared by that body for the 1981 Dakar Interregional Meeting (*ibid.*, p. 420).

<sup>396</sup> Art. VII, para. 1, of the 1978 Agreement between the United States of America and Canada on Great Lakes water quality (*United States Treaties and other International Agreements, 1978-1979* (Washington, D.C., 1980), vol. 30, part 2, p. 1393). Under art. VI of the 1977 Agreement between India and Bangladesh on sharing of the Ganges waters at Farakka and on augmenting its flows (*International Legal Materials*, vol. XVII, No. 1, 1978, p. 104), the Indo-Bangladesh Joint Committee, created to administer the sharing arrangements for the Ganges waters, is also expected to generate data of its own, which it must then submit to the Governments.

<sup>397</sup> Cohen, *loc. cit.*, p. 112.

<sup>398</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

the other system States the information and data pertinent to the system State agreement.

3. In those cases where a data collection and processing scheme is implemented by system States individually, each such system State is under a duty to execute the scheme faithfully and to ensure the reliability of collection and the timeliness of processing, if required, and reporting of the data to the other system States concerned or to their joint or international data centre, as appropriate.

4. In an international watercourse system where an actual or potential question of conflict between existing or planned uses, of water quality or of hazard control has been raised by a system State, all system States concerned shall undertake or make arrangements to accomplish, jointly with other system States or individually and taking into account the resources available to the individual system States, the systematic collection, processing and dissemination to the Governments concerned, on a regular and timely basis, of the information and data pertinent to the question raised.

5. Each system State shall employ its best efforts to collect and, where required, to process information and data in a manner which facilitates co-operative utilization of the information and data by the other system States to which it is to be disseminated.

6. Information or data vital to a system State's national defence need not be provided to other system States, provided that the system State declining to provide such information or data co-operates in good faith with the other system State in order to inform it as fully as practicable under the circumstances. Information and data determined in good faith by a system State to be of a restricted nature only shall be provided to other system States upon request, provided that the requesting system State demonstrates its willingness and ability to safeguard the information or data in a manner consistent with its restricted nature.

7. Each system State is under a special obligation to inform, by the most rapid means available, any other system State concerned in the event of any condition or incident, or immediate threat of any condition or incident affecting shared water resources that could result in a loss of human life, a failure of a hydraulic work or other calamity in the other system State or States.

231. Article 9 as here propounded endeavours to cover the salient concerns of system States without going beyond what is to be expected from a "residual" set of rules on information and data. Clearly, system States should conclude among themselves system agreements to take care of their special requirements; in the proposed article only available information and data need be exchanged as a matter of general legal duty, unless a requesting system State is willing to pay for the cost of their acquisition and handling (para. 1). If such be the case, the requesting system State must certainly value the information or data and no reasonable request should then be denied. If "payment" alone is inadequate to obtain the desired result, there is precedent for the system States to agree to allow the requesting system State or a third party to undertake the task, providing the necessary expertise and equipment; the result would ordinarily also be useful to the system State from whose territory the information

or data must be collected. Where the international watercourse system is not being used, and there are no plans for its use, the duty to furnish information and data is excused. As a whole, article 9 is limited to situations actually requiring information or data.

232. Obviously international watercourse systems that are intensively used or are intended for multipurpose development by the system States require a much more ambitious data and information programme than is called for in this article; more elaborate information and data schemes are given their specificity in system agreements. The current state of development and use of most international watercourses has long ago made the necessity for a data base abundantly clear. Nonetheless, a number of international watercourses are not yet being used or have not been developed sufficiently to justify the burdens of even technical information exchange. Should the system States of a little utilized international watercourse nonetheless deem it advisable to collect and exchange information or data—possibly with a view to future plans, disease or flood control or drought mitigation, for example—international law interposes no barrier. On the other hand, the law does not require a futile thing and, if information and data cannot or will not be turned to relevant use, there is no legal obligation to exchange or report.

233. Paragraph 2 addresses itself to a situation where some of or all the system States have agreed to treat the international watercourse system in its entirety, and not piecemeal. Their agreement may contain adequate provision for information and data collection, processing and dissemination, but where it does not, an underlying duty is imported to support the realization of the system State agreement. As in paragraph 1, the information or data required to be furnished need not, in the absence of agreement to the contrary, be processed. With this general international rule as the point of departure, system States should be motivated to spell out an agreed content for this necessarily indefinite provision.

234. Paragraph 3, focused on data, concerns itself with the "quality" of the effort by system States, where a jointly or internationally operated information and data programme has not been adopted, but a decentralized one has been chosen. Consequently, system States will have to depend upon the accuracy and promptness of the product produced by each of the other system States. Agreement upon some specific collection programme is presumed. To serve the purpose for which it was designed, a system State must be able to rely upon the work done by other system States. The agreed arrangement may be for exchange only, or it may provide for or designate an agency of one of the system States as a central clearing house or documentation centre. For a number of international watercourse systems, this is a prime function of the joint or international staff. In the event that there is such a central receiving point, the article allows for that alternative.

235. Paragraph 4 is concerned with the interest of one system State in acquiring important information or data when it ascertains that a water-related issue has arisen or may arise, the evaluation of which, and the appropriate measures in response to which, must rest upon analysis of the relevant information and data. This aspect of the information and data requirements is triggered by the action of any system State. Assuming

good faith, the question or problem being experienced or foreseen will be a genuine one; "fishing expeditions", feared by some States (that is, where the request is without justification in terms of shared water resources development, use or protection), are best averted by a showing of the facts dissipating the claimed apprehension of the requesting system State. The paragraph anticipates that one or more system States may have limited capabilities and not be able themselves to perform the obligation. In such cases, a system State may seek the assistance of another Government or of an international organization, thus making "arrangements to accomplish" the tasks associated with its duty under this provision. The information and data are required to be systematically collected, processed and transmitted, reflecting again the essential need for information and data that can readily be put to use. Although this clause falls far short of obliging the adoption of formal systems analysis, or even of an agreed "design" as advocated by modern water resources managers, it does mean thoroughness and coherence, according to accepted and practicable methods, probably including minimum standards of periodicity of recording.

236. Information and data are often fragile, that is, lose value with the passage of time, except for supplementing the longer-range historical data base; therefore the rule requires regular and timely communication of the information and data to the user. This point is universally regarded as indispensable to the process. Governments have been known to complain that information and data exchange may be readily agreed to but that, from administrative inefficiency or otherwise, another Government's reports are not received, are long delayed or are incomplete when received. The requirement of "regular and timely" here is intended to make clear that, once such an information and data programme is called for, the system States are under an ancillary duty to ensure seasonable preparation and dispatch of their contributions.

237. It will be noted that the kinds of information and data to be collected and processed are not at all specified. Hydrologic or hydrographic data, including flow regimes, power potentials, etc., are most frequently indicated in this context. The kinds, intensities and economic values of the uses to which the system water is put are also, of course, likely to be pertinent; increasingly the emphasis may be placed on contaminants. Where a "new" region is receiving intensive joint planning, socio-economic data and a variety of other kinds of information—even critical—may be called for in calculating the potential for hydro-electric power consumption, irrigation, or floods, for example. Nonetheless, the requirement is restricted to such information and data as are relevant to the issue raised by the requesting system State. It may be said that this rule is "the other side of the coin" of the rule requiring a system State to inform in connection with appreciable harm: the right of a system State to demand information and data under the stated circumstances.

238. In *all* aspects of information and data sharing, the matter of usability is fundamental. Thus the rule in paragraph 5 makes general the requirement that the methods employed by a system State in furnishing any information or data to its co-system States be such as not to make difficult their incorporation into the larger

information and data picture when received. Each system State benefits from the observance of such a basic requirement. It is not disputed that compliance with the specifications of the scheme adopted is a *sine qua non* in the creation and maintenance of a reliable and adequate data base.

239. Paragraph 6 addresses itself to a persistent concern of sovereign States: the non-disclosure of "classified" information. The very real needs in the information and data field when dealing with shared water resources must here be balanced against this undeniable interest of the system State to retain confidentiality in sensitive circumstances. This sensitive area is not limited to strategic or military types of information, however. The matter of "trade secrets", national or corporate, has also come up in this context, as has a reluctance to divulge certain aspects of economic planning or local socio-economic conditions. The specialists in water resources have to date given little attention to this problem, although it certainly has been recognized; a number of treaties have exempted "defence" or "proprietary" information. The most useful comments on the issue are those of OECD. That organization's work on the point in relation to transfrontier pollution is summarized in a recent report, which reads in part as follows:

*C. Difficulties met with in transmitting certain types of information*

40. The *transmission of information*, even among countries which have long entertained bonds of friendship and neighbourliness, is *however subject to certain restrictions*. In order to protect its economic, industrial, commercial or strategic interests, it would seem normal for a country to have provided under its national legislation (statutes and regulations, decrees, etc.) that certain data relating to such matters, notably national defence, should not in principle be divulged to foreign countries. Such a limitation as a rule is explicitly recognized in the texts of agreements or recommendations concerning information and consultation . . .

41. On this score, it is interesting to refer to the most recent practice regarding information and consultation procedures between certain member countries concerning activities in their frontier regions. Documents which are classified as confidential according to national law may however be excluded from the exchange of information. In such cases, "the country of origin should nevertheless co-operate with the exposed country with the aim of informing it as completely as possible, or of finding another satisfactory solution".

42. In this regard it would seem that in general everything depends on how the countries interpret the concept of "confidential documents". The *key principle in the matter of information and consultation is good faith*. On this account it need not be stressed that a country would depart from this principle, one underlying all neighbourly relations, were it to fall back on a too extensive "State-secret" concept, thus making entirely void information and consultation of its substance.

Anyway, certain manufacturing processes or military security arrangements, for example, will doubtless always be regarded as covered by secrecy. From a more general standpoint the information which a country might be induced to provide or especially ask for must be *directly related* to assessment of the transfrontier pollution risk involved by the proposed activity or measure and to methods for dealing with any such pollution if it arises.<sup>399</sup>

The provision proposed in the draft article does not automatically excuse the system State asked to furnish information or data by a mere showing of a municipal law or regulation barring disclosure. The duty is divided into two categories. If the matter be vital from

<sup>399</sup> OECD, *Transfrontier Pollution and the Role of States* (op. cit.), p. 23.

the standpoint of national defence, the system State is excused on condition that it furnish as much of the requested information or data, perhaps in condensed or paraphrased form, or in approximations, as will be sufficient to apprise the other system State of the basic situation and allow it to take such informed action as may be appropriate. If, on the other hand, the information or data be of a lesser, "restricted" character, whether economic, military or social, the duty to furnish is not excused where the other system State can show that it is prepared to protect the restricted status and that its laws, regulations and practices give assurances that the information or data will in fact be so protected. It is, after all, not uncommon for "classified" information to be shared with friendly foreign Powers, although verifications from time to time of the receiving Government's safeguarding may be exacted.

240. In the last analysis, some provision covering "sensitive" information and data is unavoidable; the use of two "classifications" is well understood by Governments; legitimate refusals to disclose must be honoured. Yet it would not be tolerable to other system States to accept as a general rule that the unilateral characterization as "secret", be it based on domestic law or otherwise, suffices to relieve a system State of any or all of its duty to share information and data regarding the development, use or protection of something itself so vital as an international watercourse system. An initial, perhaps inevitably not wholly satisfactory, attempt to deal with the problem is submitted in paragraph 6 of this draft article.

241. The final paragraph, paragraph 7, of the article addresses a well recognized need to warn and to warn quickly. The substance of rules with respect to floods, toxic pollution spills and other hazardous events, be they caused by man or nature, belongs in other, separate articles. However, the duty of immediate communication of information about the hazard, it is suggested, can properly be placed in this article. Many international watercourse systems are already provided with early warning machinery by express agreement. These, of course, would not be replaced by this rule. For systems without such arrangements, system States may rely upon this provision but are likely to be stimulated to seek accords for warnings, including designation of specific communications facilities. Paragraph 7 evidences the residual rule.

242. In summary, the proposed article does not pretend to regulate all the variables in the field of information and data sharing. System States are expected to reach agreement in due course, tailoring their information and data sharing to their requirements as conditioned by the realities of a specific international watercourse system. Collection, processing and dissemination of information and data are perhaps the very best example of the need to respect the uniqueness not only of the physical water resources system but of socio-political and economic factors as well.

## F. Environmental pollution and protection

243. Under section D, on responsibility for appreciable harm, treated *in extenso* above, problems of pollution have been addressed. Similarly, environmental damage that results in appreciable harm to co-system States is taken up in that section. The general article there proposed does not, however, comprehen-

sively deal with developing practice and doctrine regarding either pollution or the environment.

244. For some, pollution has now become a subsumed portion of the newer field of environmental law, including international environmental law.<sup>400</sup> To be sure, much of the scope of the already numerous international environmental agreements is directly or indirectly concerned with pollution; many of the illustrations employed in environmental studies are drawn from pollution or contamination problems.<sup>401</sup> And yet the field of environmental improvement, as well as protection, is not exhausted with treatment of the standard situations of pollution. It is indeed difficult to constrict the scope of "the environment" to something less than all relationships between man and the earth's ecosystems. With man included or man excluded, the environment embraces, technically, all natural phenomena.<sup>402</sup> In practice, however, it is clear and understandable that States have, neither in their domestic policies and legislation nor in their international relations, acquiesced in this all-embracing approach of some students of the environment.

245. Yet the record seems to admit legitimate concern, including international concern, for practices that impinge unfavourably on some aspects of nature, but which ultimately are not limited to effects that have a directly or even indirectly adverse impact upon man and his activities. Moreover, beginning clearly at the Stockholm Conference<sup>403</sup> and emphasized at the Vancouver "Habitat" Conference,<sup>404</sup> national and international agencies have been directed to regard improvement of the "quality of life" for human beings as being among the objectives of environmental programmes.<sup>405</sup> Thus this section submits for the consideration of a successor Special Rapporteur and of the Commission an approach to the realities of present-day environmental concerns, identifying the obligations of States to protect and also, in general terms and under certain

<sup>400</sup> See e.g. V. G. Arnaud, *Derecho internacional ambiental: la contaminación de los ríos en el derecho internacional público* (Buenos Aires, Instituto Nacional de Ciencia y Técnica Hídricas, 1974), pub. No. 11; American Society of International Law, *Proceedings of the 71st Annual Meeting* (San Francisco, Calif., 21-23 April 1977), session on "International environmental protection: policy, legal and trade aspects", especially S. McCaffrey, "Pollution of shared natural resources: legal and trade implications" (p. 56).

<sup>401</sup> See e.g. E. Brown, "The conventional law of the environment", *International Environmental Law*, L. A. Teclaff and A. E. Utton, eds. (New York, Praeger, 1974), p. 25; L. A. Teclaff, "The impact of environmental concern on the development of international law", *Natural Resources Journal*, vol. 13, 1973, p. 357; H. J. and R. F. Taubenfeld, "Modification of the human environment", *The Future of the International Legal Order*, vol. IV: *The Structure of the International Environment*, C. E. Black and R. A. Falk, eds. (Princeton, N.J., Princeton University Press, 1972), p. 124.

<sup>402</sup> See e.g. L. K. Caldwell, "Concepts in development of international environmental policies", *International Environmental Law* (op. cit.), p. 12; M. Hardy, "The United Nations Environment Programme" (*ibid.*, p. 57).

<sup>403</sup> See *Report of the United Nations Conference on the Human Environment* . . .

<sup>404</sup> See *Report of Habitat: United Nations Conference on Human Settlements, Vancouver, 31 May-11 June 1976* (United Nations publication, Sales No. E.76.IV.7).

<sup>405</sup> See e.g. the first of six "priority subject areas of the [United Nations Environment] Programme", namely, "Human settlements, human health, habitat and well-being", listed in UNEP Governing Council decision 8 (II) of 22 March 1974 (*Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 25* (A/9625), pp. 59-61). The second priority subject area was "Land, water and desertification" (*ibid.*, p. 61).

conditions, to improve the environment, as these involve international watercourse systems. These duties, it is widely recognized, are not, in the context of this topic, limited to "appreciable harm" to the environment of other States or of other system States.

246. The law in this field is largely new and less than may be desired by many concerned with the fragility of many of the ecosystems of "planet earth" and the urgency of measures of protection in numerous critical areas. The record at the level of conventional international law is already remarkable; the inferences that can at this juncture justifiably be drawn from that body of contractual norms are few but important. As with other of the Commission's articles on this topic, system States will be well advised to reach agreement on the particulars of their joint action and responsibilities. However, it is believed that there has emerged, over and above the rights and obligations which two or more States may confirm and assume vis-à-vis one another, a normative principle making protection of the environment a universal duty even in the absence of agreement, a principle born of sharpened awareness of the vast ramifications consequent upon man's tampering with the intricate relationships among the elements and agents of nature.<sup>406</sup>

247. Conversely, however, it is not possible to subsume all environmental problems under the rubric of pollution. Leaving a precise legal definition for subsequent consideration, it may be said that, for watercourse systems, pollution involves the use of water by man (or his animals, crops or industries) and the impact upon water of other activities for which man is responsible, with consequent detrimental effect. Commonly perceived, environmental damage is harm to nature in the broader sense, more especially, perhaps, to biological complexes of myriad sorts. The impact of such damage upon man, while probable, even if in the very long run, may be highly indirect or not even ascertainable. Thus environmental damage currently measurable solely within the territory of a system State arguably may fall under international regulation because the legal presumption is that preservation of the environment in the large is a licit concern of all nations.<sup>407</sup>

248. As a result, and after fashioning on a trial basis separate articles for pollution and for environment, the article herein proposed comprehends but distinguishes between these related concerns. Naturally, under this topic of the law of the non-navigational uses of international watercourses, all aspects of international environmental law are not treated. In like manner, principles and rules for transnational pollution not water-related are by definition excluded. Traditionally, international water resources law has addressed the problems of pollution, omitting concern for the environment as a whole.<sup>408</sup> Common cause could have

been made with the traditional approach, leaving to what has come to be called international environmental law the water-related aspects of environmental regulation. International environmental law generally is in a less codified state, however, than even the law of international watercourses. Since environmental aspects are of real consequence to the rational development, use and protection of shared water resources, principles and rules pertaining to the environment have here been integrated with pollution into one proposed draft article.

# 1. HISTORICAL DEVELOPMENT OF POLLUTION CONTROL

249. A brief survey of the traditional view, confined to pollution, makes a good starting point for the development of this subtopic. The direct link with the doctrine of appreciable harm and of reparations in this record is manifest.

250. Treaty practice concerning pollution of international watercourses is by no means a recent development. The earliest anti-pollution clauses occurred most frequently in treaties to safeguard fishing in boundary waters.<sup>409</sup> Several other conventions covering boundary waters have given attention to water quality, also from relatively early times.<sup>410</sup> Over time the pollution problems have become more apparent and the prospects more alarming; consequently, anti-pollution articles have become more common, if not virtually standard.<sup>411</sup> The Indus Waters Treaty of 1960 between

thereto (ILA, *Report of the Fifty-second Conference* . . . , pp. 494-505).

<sup>409</sup> See e.g. the following fisheries agreements: between the Grand Duchy of Baden and Switzerland of 1869 (G. F. de Martens, ed., *Nouveau recueil général de traités* (Göttingen, Dieterich, 1875), vol. XX, p. 166, and of 1875 (*ibid.*, 2nd series, 1878, vol. II, p. 60); between France and Switzerland of 1880 (*ibid.*, 2nd series, 1884, vol. IX, p. 111), and of 1904, arts. 6, 11, 17 and 29 (United Nations, *Legislative Texts* . . . , pp. 703 and 705-707); between Italy and Switzerland of 1882 (G. F. de Martens, *op. cit.*, 2nd series, vol. IX, p. 564), and of 1906, art. 12, especially the fifth para. (United Nations, *Legislative Texts* . . . , pp. 841-842); between the Grand Duchy of Luxembourg and Prussia of 1892, art. 2, sect. 11 (G. F. de Martens, *op. cit.*, 2nd series, 1899, vol. XXIV, p. 153); between Switzerland, the Grand Duchy of Baden and Alsace-Lorraine of 1887, establishing uniform provisions regarding fishing in the Rhine and its tributaries, as well as in Lake Constance, art. 10 (United Nations, *Legislative Texts* . . . , p. 401). See also Manner, "Water pollution in international law: the rights and obligations of States concerning pollution of inland waters and enclosed seas" (United Nations, *Conference on Water Pollution Problems in Europe* (Geneva, 22 Feb.-3 March 1961), vol. II (Sales No. 61.II.E/mim.24), pp. 450-453).

<sup>410</sup> See e.g. the Convention of 1904 between France and Switzerland (United Nations, *Legislative Texts* . . . , p. 701); the Treaty of 1909 between the United Kingdom and the United States of America relating to boundary waters between the United States and Canada, art. IV (*ibid.*, p. 261); the Treaty of 1925 between Germany and France, art. 44 (League of Nations, *Treaty Series*, vol. LXXV, p. 275); the frontier settlement Agreement of 1948 between Finland and the Soviet Union (United Nations, *Treaty Series*, vol. 217, p. 159); the Final Act on delimitation of the frontier between France and Spain of 1868, part I, para. 6 (United Nations, *Legislative Texts* . . . , p. 676); the 1963 Agreement between France, Federal Republic of Germany, Luxembourg, Netherlands and Switzerland concerning the International Commission for the Protection of the Rhine Against Pollution (*Journal officiel de la République française* (Paris), 97th year, No. 135, 13 June 1965, pp. 4909-4910) (for a summary of the Agreement, see B. Rüster and B. Simma, eds., *International Protection of the Environment*, vol. X (Dobbs Ferry, N.Y., Oceana Publications, 1977), p. 4820).

<sup>411</sup> See e.g. the 1957 Treaty between El Salvador and Guatemala on the utilization of the waters of Lake Güija (El Salvador, *Diario*

<sup>406</sup> See Inter-American Bar Association, Committee XV (Natural Resources and Environmental Protection), resolution 30 (*Resolutions, Recommendations and Declarations approved by the XXII Conference* (Quito, 14-20 March 1981), p. 7).

<sup>407</sup> See the observations and precedents considered in the final report by J. J. A. Salmon, "La pollution des fleuves et des lacs et le droit international" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, pp. 330), and the text of the relevant draft resolution (*ibid.*, p. 358).

<sup>408</sup> See e.g. chap. 3 of the Helsinki Rules and the commentary

Pakistan and India, for example, contains this language:

(10) Each Party declares its intention to prevent, as far as practicable, undue pollution of the waters of the rivers which might affect adversely uses similar in nature to those to which the waters were put on the effective date, and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such manner as not materially to affect those uses: provided that the criterion of reasonableness shall be the customary practice in similar situations on the rivers.<sup>412</sup>

251. The corresponding provision in the 1956 Agreement between the Soviet Union and Czechoslovakia requires the parties to ensure that the waters are kept clean and not artificially polluted or fouled in any way.<sup>413</sup> The Agreement concluded by Hungary and Yugoslavia in 1957 concerning fishing in frontier waters provides:

It shall be prohibited . . . to discharge untreated waste waters and other substances harmful to aquatic wildlife, irrespective of the manner in which and the distance from which such substances reach the frontier waters. A contracting party failing to respect this provision shall make compensation for any damage caused.<sup>414</sup>

252. With respect to the Danube, in 1958 Bulgaria, Romania, the Soviet Union and Yugoslavia imposed on themselves the duty to

work out and apply measures to prevent the contamination and pollution of the river Danube and of the waters referred to in article 3 by unclarified sewage and other waste from industrial and municipal undertakings which are harmful to fish and other aquatic organisms . . .<sup>415</sup>

The 1952 Agreement between Poland and the German Democratic Republic concerning navigation in frontier waters provides that each contracting party undertakes:

4. To prevent, by appropriate means and installations, any waters entering the frontier sector of the rivers Oder and Nysa Luzyczna . . . and any effluents from towns, settlements or industrial plant from introducing into the said rivers physical, chemical or bacteriological impurities of such nature and in such quantities as:

(a) To affect adversely the use of the water of the said rivers for domestic requirements, water supply, industry and agriculture;

(Footnote 411 continued)

official, vol. 175, No. 108, 12 June 1957, p. 4994); the 1956 Convention between the Federal Republic of Germany, France and Luxembourg (duty to take necessary measures to keep the Moselle and its tributaries clean) (United Nations, *Legislative Texts* . . . , p. 424); the 1956 Treaty between France and the Federal Republic of Germany concerning the settlement of the Saar problem, annex 8, art. 8: ". . . ensure the purity and salubrity of the waters" of the Saar and its tributaries (*ibid.*, p. 659); the 1960 Settlement Treaty between the Netherlands and the Federal Republic of Germany (United Nations, *Treaty Series*, vol. 508, p. 148); the 1960 Convention between the Land Baden-Württemberg, the Free State of Bavaria, Austria and Switzerland on the protection of Lake Constance against pollution (United Nations, *Legislative Texts* . . . , p. 438).

<sup>412</sup> Art. 4, para. (10) (United Nations, *Treaty Series*, vol. 419, pp. 138-140).

<sup>413</sup> Art. 14, para. 1 (*ibid.*, vol. 266, p. 312). See the almost identical provision in the 1949 Norway-USSR frontier Agreement (*ibid.*, vol. 83, p. 352, art. 14, para. 1); the 1960 Finland-USSR frontier Agreement (*ibid.*, vol. 379, p. 342, art. 15); the 1948 Poland-USSR frontier Agreement (*ibid.*, vol. 37, p. 82, art. 17).

<sup>414</sup> Art. 5 (United Nations, *Legislative Texts* . . . , p. 837).

<sup>415</sup> Art. 7, Convention concerning fishing in the waters of the Danube (United Nations, *Treaty Series*, vol. 339, p. 62). Art. 3 provides:

"This Convention shall apply to the waters of the Danube, including its mouth, to tributaries of the Danube up to the maximum extent of its flood waters, and to lakes, estuaries and pools permanently or temporarily connected with the Danube, in the Danube flood-basin in the territory of the contracting parties, including the area adjoining the mouth" (*ibid.*, p. 60).

(b) To cause bridges, dams, other water engineering works and installations, and vessels to become corroded and overgrown with slime and aquatic flora and fauna;

(c) To cause the excessive accumulation of slime on the beds and banks;

(d) To affect adversely the normal development of the typical aquatic flora and fauna of the said rivers.<sup>416</sup>

## 2. THE MODERN PRACTICE OF POLLUTION CONTROL

253. By Convention in 1962, France and Switzerland agreed to co-operate closely in order to protect the waters of Lake Léman against pollution, including the surface water and ground water of tributaries, in so far as these contribute to the pollution of the lake and its effluent to the point at which it leaves Swiss territory.<sup>417</sup> The 1964 Agreement between Finland and the Soviet Union concerning frontier watercourses requires the parties to take measures to ensure that frontier watercourses are not polluted by untreated industrial effluents and sewage, by waste materials from timber floating or ships, or by other substances that immediately or over time might cause diminution of the depth of the watercourses, harmful changes in the composition of the water, damage to fish stock, substantial scenic deterioration, endangering of public health or have similar consequences for the population and the economy.<sup>418</sup> The 1971 frontier rivers Agreement between Sweden and Finland requires that the greatest possible attention be given to the preservation of fish stocks and the prevention of water pollution.<sup>419</sup>

254. Except for a few agreements concluded by the then colonial Powers,<sup>420</sup> the international watercourses of Africa apparently received scant international attention in respect of their quality until quite recently. Even the Nile Waters Agreement of 1959 concluded by the Sudan and the United Arab Republic carries no water quality provision.<sup>421</sup> By 1963, however, the question of contamination of shared water resources had ceased to be a mere technical matter in that continent. In that year, Cameroon, Chad, Dahomey, Ivory Coast, Guinea, Mali, Niger, Nigeria and Upper Volta joined to undertake close co-operation with respect to the study and the execution of any project likely to have an appreciable effect on, *inter alia*, the sanitary conditions of the waters of the River Niger, its tributaries and sub-tributaries, and the biological characteristics of

<sup>416</sup> Art. 17, para. (4) (*ibid.*, vol. 304, pp. 168-170). See also art. 2, para. 7, of the 1956 Treaty between Hungary and Austria concerning the regulation of water economy questions in the frontier region (*ibid.*, vol. 438, p. 150). There are numerous other similar examples of agreements concluded in Western, Central and Eastern Europe beginning some 30 years ago.

<sup>417</sup> See *Yearbook* . . . 1974, vol. II (Part Two), p. 308, document A/CN.4/274, paras. 202-205. See also the 1963 Treaty between Belgium and the Netherlands concerning the connection between the Scheldt and the Rhine, arts. 16 and 17, dealing with salinization and radioactive waste and other kinds of pollution (United Nations, *Treaty Series*, vol. 540, pp. 62-64).

<sup>418</sup> Art. 4 (*ibid.*, vol. 537, p. 254). See also arts. 10 and 11 of the 1964 Agreement between Poland and the Soviet Union concerning the use of water resources in frontier waters (*ibid.*, vol. 552, p. 194).

<sup>419</sup> Chap. 1, art. 3 (*ibid.*, vol. 825, p. 274).

<sup>420</sup> See the 1934 Agreement between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and the Ruanda-Urundi, art. 3 (League of Nations, *Treaty Series*, vol. CXC, p. 104).

<sup>421</sup> United Nations, *Treaty Series*, vol. 453, p. 64.



their fauna and flora.<sup>422</sup> And in 1964, Guinea, Mali, Mauritania, and Senegal agreed, with respect to the Senegal River, as follows:

The riparian States undertake to submit to the Inter-State Committee, as from their initial stage, projects whose execution is likely appreciably to alter . . . the sanitary conditions of [the river's] waters, and biological characteristics of its fauna and flora.<sup>423</sup>

255. In Asia, aside from the landmark Treaty between India and Pakistan regarding the use of the waters of the Indus already cited, apparently few agreements devoted to international watercourses have as yet made provision for water quality.<sup>424</sup> Occasionally a boundary treaty has employed language within which attention to pollution control measures arguably may be implied, particularly where a joint commission has been set up.<sup>425</sup>

256. Notable agreements in the Western Hemisphere, beyond the cited basic Treaty of 1909 between Canada and the United States of America, include the 1961 Treaty between Argentina and Uruguay concerning the countries' boundary in the Uruguay River. There the parties stated that they "shall agree on a statute governing the utilization of the river, which shall cover", among other things, "provisions designed to avoid pollution of the waters".<sup>426</sup> In 1975, the two system States concluded the promised Statute and created the Uruguay River Administrative Commission.<sup>427</sup> The provisions most pertinent for this section of the report, including environmental protection, are as follows:

#### Article 35

The parties undertake to adopt the necessary measures to ensure that the management of land and forests and the use of the groundwaters and of the tributaries of the river do not effect an alteration such as to cause appreciable harm to the regime of the river or the quality of its waters.

#### Article 36

The parties shall, through the Commission, co-ordinate appropriate measures to prevent the alteration of the ecological balance, and

<sup>422</sup> See art. 4 of the 1963 Act regarding navigation and economic co-operation between the States of the Niger Basin (*ibid.*, vol. 587, p. 13).

<sup>423</sup> Art. 3 of the 1964 Convention relating to the status of the Senegal River, reproduced in *Revue juridique et politique* (Paris), vol. XIX, No. 2, p. 303; see also the similar provision in art. 5 of the 1964 statutes relating to the development of the Chad Basin adopted by Cameroon, Chad, Niger and Nigeria (*Journal officiel de la République fédérale du Cameroun* . . . , 4th year, No. 18, 15 Sept. 1964, p. 1003). See also *Yearbook* . . . 1974, vol. II (Part Two), pp. 289-291, paras. 45-56.

<sup>424</sup> See, however, the 1958 Treaty between the Soviet Union and Afghanistan, art. 13: "The competent authorities of both contracting parties shall take the necessary measures to protect the frontier waters from pollution by acids and waste products and from fouling by any other means" (United Nations, *Treaty Series*, vol. 321, p. 180).

<sup>425</sup> See clause II of the Final Demarcation Protocol of the Commission on the Demarcation of the Turco-Syrian Frontier of 1930, stipulating:

"As regards questions arising from the joint use of the river [Tigris]:

. . . The settlement of all such questions as navigation, fishing, industrial or agricultural utilization of the waters and policing of the river shall be based on the principle of complete equality" (United Nations, *Legislative Texts* . . . , p. 290).

See also *Yearbook* . . . 1974, vol. II (Part Two), p. 107, document A/5409, para. 416.

<sup>426</sup> Art. 7, especially subpara. (f) (United Nations, *Legislative Texts* . . . , p. 164).

<sup>427</sup> *Actos internacionales Uruguay-Argentina 1830-1980 (op. cit.)*, pp. 604-606, chap. XIII, arts. 49-57.

to control impurities and other harmful elements in the river and its catchment area.

#### Article 37

The parties shall agree on measures to regulate fishing activities in the river with a view to the conservation and preservation of living resources.

#### Article 41

Without prejudice to the functions assigned to the Commission in the matter, the parties undertake:

(a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution by enacting appropriate regulations and adopting appropriate measures, in accordance with the applicable international conventions and, where relevant, in conformity with the guidelines and recommendations of the international technical organizations;

(b) Not to attenuate, in their respective legislations:

(1) The technical requirements in force to prevent the pollution of the waters, and

(2) The severity of the penalties established for infringements;

(c) To inform one another of any regulation that they intend to impose in connection with the pollution of the waters, with a view to establishing equivalent regulations in their respective legislations.

#### Article 42

Each party shall be liable to the other for damage resulting from pollution caused by its own activities or by those of natural or juridical persons in its territory.<sup>428</sup>

257. Mexico and the United States of America, in their 1944 Treaty relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo), did not, in the ordinary sense, include a quality term.<sup>429</sup> The salinity of the water delivered to Mexico in the Colorado River gave rise to problems for Mexico and occasioned protracted negotiations with the United States. The two countries in 1973 came to an agreed solution, through their International Boundary and Water Commission. The maximum permissible salinity of the water delivered to Mexico is specified.<sup>430</sup>

258. Although additional treaty provisions could be marshalled to show the awareness of most system States of the significance of international co-operation in the field of pollution, such as the elaborate Great Lakes Water Quality Agreement of 1978 between

<sup>428</sup> *Ibid.*, pp. 600-602. The Treaty on the La Plata River and its maritime limits, entered into by the same parties in 1973, has similar provisions in chap. IX ("Pollution"), arts. 47-52 (*International Legal Materials*, vol. XIII, No. 2, 1974, pp. 259-260). See also *Yearbook* . . . 1974, vol. II (Part Two), p. 299, document A/CN.4/274, para. 121.

<sup>429</sup> However, art. 3 of the Treaty, listing "as a guide" to the parties' joint commission an order of use preferences, concludes with this statement: "All of the foregoing uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two Governments, which hereby agree to give preferential attention to the solution of all border sanitation problems" (United Nations, *Treaty Series*, vol. 3, p. 320).

<sup>430</sup> Minute No. 242, 30 August 1973, approved by both Governments by an exchange of notes of same date (*International Legal Materials*, vol. XII, No. 5, 1973, pp. 1105-1107). The same minute provides, in clause 6: "With the objective of avoiding future problems, the United States and Mexico shall consult with each other prior to undertaking any new development of either the surface or the groundwater resources, or undertaking substantial modifications of present developments, in its own territory in the border area that might adversely affect the other country" (*ibid.*, pp. 1106-1107). On the future use problem generally, see Bourne, "The right to utilize the waters of international rivers", *loc. cit.*, p. 184.



Canada and the United States of America,<sup>431</sup> the record seems clear that pollution monitoring and pollution control measures have acquired a permanent place in the principles governing the relations of States with respect to their shared water resources.

### 3. DOCTRINAL DEVELOPMENTS

259. Doctrinal developments have kept pace with the practice of States in this sphere. The latest effort at affirmation of the prevailing international law on the question is by the Institute of International Law. At its Athens session of 1979, the Institute approved a resolution entitled "The pollution of rivers and lakes and international law". It merits close consideration. The resolution reads:<sup>432</sup>

The Institute of International Law.

Recalling its resolutions of Madrid in 1911 and of Salzburg in 1961;

Conscious of the multiple potential uses of international rivers and lakes and of the common interest in a rational and equitable utilization of such resources through the achievement of a reasonable balance between the various interests;

Considering that pollution spread by rivers and lakes to the territories of more than one State is assuming increasingly alarming and diversified proportions whilst protection and improvement of the environment are duties incumbent upon States;

Recalling the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the obligation to avoid any use of its own territory that causes injury in the territory of another State,

Hereby adopts the following articles:

#### Article I

1. For the purpose of this resolution, "pollution" means any physical, chemical or biological alteration in the composition or quality of waters which results directly or indirectly from human action and affects the legitimate uses of such waters, thereby causing injury.

2. In specific cases, the existence of pollution and the characteristics thereof shall, to the extent possible, be determined by referring to environmental norms established through agreements or by the competent international organizations and commissions.

3. This resolution shall apply to international rivers and lakes and to their basins.

#### Article II

In the exercise of their sovereign right to exploit their own resources pursuant to their own environmental policies, and without prejudice to their contractual obligations, States shall be under a duty to ensure that their activities or those conducted within their jurisdiction or under their control cause no pollution in the waters of international rivers and lakes beyond their boundaries.

<sup>431</sup> *United States Treaties and other International Agreements (op. cit.)*, p. 1383. See also the parties' 1972 Agreement on Great Lakes water quality (United Nations, *Treaty Series*, vol. 837, p. 213); and "Pollution in the Great Lakes Basin from land use activities" (International Joint Commission, 1980 *Annual Report* (Windsor, Ontario), p. 16).

<sup>432</sup> *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, pp. 196-203 (the resolution is reproduced in French and English, the French text being the authentic one). For the record of discussion and refinement of the provisional and final reports prepared by J. J. A. Salmon ("La pollution des fleuves et des lacs et le droit international"), *ibid.*, p. 104 and *ibid.*, Part One, p. 193. The "Salzburg resolution" of the Institute, on utilization of non-maritime international waters except for navigation, focused on "maximum utilization" of the available resources "of interest to several States" and emphasized "consultation", "plans established in common" and "reciprocal concessions" (preamble) (*Annuaire de l'Institut de droit international*, 1961, vol. 49, Part Two, p. 370). Disagreements are to be settled "on the basis of equity" (art. 3) (*ibid.*, p. 371).

#### Article III

1. For the purpose of fulfilling their obligation under article II, States shall take, and adapt to the circumstances, all measures required to:

(a) prevent any new form of pollution or any increase in the existing degree of pollution; and

(b) abate existing pollution within the best possible time limits.

2. Such measures shall be particularly strict in the case of ultra-hazardous activities or activities which pose a danger to highly exposed areas or environments.

#### Article IV

In order to comply with the obligations set forth in articles II and III, States shall in particular use the following means:

(a) at national level, enactment of all necessary laws and regulations and adoption of efficient and adequate administrative measures and judicial procedures for the enforcement of such laws and regulations;

(b) at international level, co-operation in good faith with the other States concerned.

#### Article V

States shall incur international liability under international law for any breach of their international obligations with respect to pollution of rivers and lakes.

#### Article VI

With a view to ensuring an effective system of prevention and of compensation for victims of transboundary pollution, States should conclude international conventions concerning in particular:

(a) the jurisdiction of courts, the applicable law and the enforcement of judgments;

(b) the procedure for special arrangements providing in particular for objective liability systems and compensation funds with regard to pollution brought about by ultra-hazardous activities.

#### Article VII

1. 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:

(a) inform co-riparian States regularly of all appropriate data on the pollution of the basin, its causes, its nature, the damage resulting from it and the preventive procedures;

(b) notify the States concerned in due time of any activities envisaged in their own territories which may involve the basin in a significant threat of transboundary pollution;

(c) promptly inform States that might be affected by a sudden increase in the level of transboundary pollution in the basin and take all appropriate steps to reduce the effects of any such increase;

(d) consult with each other on actual or potential problems of transboundary pollution of the basin so as to reach, by methods of their own choice, a solution consistent with the interests of the States concerned and with the protection of the environment;

(e) co-ordinate or pool their scientific and technical research programmes to combat pollution of the basin;

(f) establish by common agreement environmental norms, in particular quality norms for the whole or part of the basin;

(g) set up international commissions with the largest terms of reference for the entire basin, providing for the participation of local authorities if this proves useful, or strengthen the powers or co-ordination of existing institutions;

(h) establish harmonized, co-ordinated or unified networks for permanent observation and pollution control;

(i) develop safeguards for individuals who may be affected by polluting activities, both at the stages of prevention and compensation, by granting on a non-discriminatory basis the greatest access to judicial and administrative procedures in States in which such activities originate and by setting up compensation funds for ecological damage the origin of which cannot be clearly determined or which is of exceptional magnitude.

## Article VIII

In order to assist developing States in the fulfilment of the obligations and in the implementation of the recommendations referred to in this resolution, it is desirable that developed States and competent international organizations provide such States with technical assistance or any other assistance as may be appropriate in this field.

## Article IX

This resolution is without prejudice to the obligations which fundamental human rights impose upon States with regard to pollution occurring in their own territories.

260. An article by article analysis of the Institute's imposing product will not be undertaken in this report, but a few observations may be in order. It is not proposed that the Commission venture to recommend to States the measures to be undertaken in municipal law in implementation of obligations of international law.<sup>433</sup> As sound as the Institute's listed means and ways may be, certainly these and indeed other measures of a specific nature, consistent with the Commission's approach to the topic, are to be left to system agreements, as the system States deem appropriate, not only in satisfaction of their international obligations but also in furtherance of their concerted efforts to achieve optimum utilization with minimum detriment to one another in the process.

261. Chapter 3 of the Helsinki Rules of the International Law Association, chiefly an attempt to restate binding rules but with some recommendatory clauses, deals with pollution in these terms:

## Article X

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State

(a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury to the territory of a co-basin State, and

(b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.

2. The rule stated in paragraph 1 of this article applies to water pollution originating:

(a) within a territory of the State, or  
(b) outside the territory of the State, if it is caused by the State's conduct.

## Article XI

1. In the case of a violation of the rule stated in paragraph 1 (a) of article X of this chapter, the State responsible shall be required to cease the wrongful conduct and compensate the injured co-basin State for the injury that has been caused to it.

2. In a case falling under the rule stated in paragraph 1 (b) of article X, if a State fails to take reasonable measures, it shall be required promptly to enter into negotiations with the injured State with a view towards reaching a settlement equitable under the circumstances.<sup>434</sup>

262. The aspect of responsibility for appreciable harm has already been dealt with in detail in this report (see sect. D above), in connection with a proposed special

article on that aspect. Consequently those portions of the articles on pollution in the Helsinki Rules and the corresponding provisions in the "Athens resolution" of the Institute of International Law concerning harm will not be taken up directly in this section of the report. If appreciable harm is inflicted upon a co-system State, responsibility is incurred, unless the particular harm is permitted the system State causing the harm as part of its equitable participation (see paras. 41-81 and 156-157 above). In that regard, the Helsinki Rules are consistent with the articles herein proposed, that is, the requirements of article X of the Helsinki Rules are prefaced with the qualifying clause, "Consistent with the principle of equitable utilization . . .".<sup>435</sup>

## 4. NEW AND EXISTING POLLUTION

263. Like the Institute's "Athens resolution",<sup>436</sup> the Helsinki Rules distinguish between two "categories" of pollution: existing and new.<sup>437</sup> With respect to "existing water pollution", a State *should* take "all reasonable measures to abate" to a level below "substantial damage", assuming that the offending system State's pollution is not allowable within its equitable utilization, or equitable participation; the penalty attached to failure to take such measures is merely an obligation "promptly to enter into negotiations with the injured State" with a view to an agreed, equitable accommodation.<sup>438</sup> The Institute, on the other hand, prescribes, adapted to the circumstances, "all measures required" to "abate existing pollution within the best possible time limits".<sup>439</sup> Moreover, the Institute adds that these measures "shall be particularly strict in the case of ultra-hazardous activities or activities which pose a danger to highly exposed areas or environments".<sup>440</sup>

264. It is fair to say that international environmental law had not developed at the time the Helsinki Rules were being formulated. Thus the broader application and stronger language of the Institute's resolution, adopted 13 years later, is understandable and appears more accurately to reflect currently accepted norms. For the "Athens resolution", abatement of existing

<sup>435</sup> See the commentary to that effect (ILA, *Report of the Fifty-second Conference* . . . , pp. 499-500), in which it is stated: "This duty, therefore, does not apply to a State whose use of the waters is consistent with the equitable utilization of the drainage basin", the authority cited being Jiménez de Aréchaga, *Curso de derecho internacional público* (Montevideo, Centro Estudiante de Derecho, 1961), pp. 532-534. The commentary states further:

"The principle of equitable utilization of the waters of an international drainage basin may require, in a particular case, that the several co-basin States participate jointly in the financing of pollution control measures".

<sup>436</sup> Art. III, para. 1.

<sup>437</sup> Art X, para. 1. At the fourteenth session of the Asian-African Legal Consultative Committee, the Standing Sub-Committee submitted for consideration a revised draft of its propositions on the law of international rivers. The pertinent part, proposition VIII, includes this first paragraph:

"Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial damage in the territory of a co-basin State, regardless of whether or not such pollution originates within the territory of the State" (Asian-African Legal Consultative Committee, *Report of the Fourteenth Session* . . . (op. cit.), p. 105).

<sup>438</sup> Art. XI, para. 2.

<sup>439</sup> Art. III, para. 1 (b).

<sup>440</sup> Art. III, para. 2.

<sup>433</sup> Cf. the Helsinki Rules on the Uses of the Waters of International Rivers (ILA, *Report of the Fifty-second Conference* . . . p. 484).

<sup>434</sup> *Ibid.*, pp. 494-505, including commentary. The definition of pollution in art. IX of the Helsinki Rules will be considered later, in connection with that problem.

pollution is no longer merely a recommendatory proposition, even though the duty is softened by allowing a period of time within which to achieve the goal of abatement. Not qualified by a time period is the Institute's absolute, separate requirement that existing pollution not increase.<sup>441</sup> Indeed, the Institute's article does not contemplate residual or permissible pollution short of appreciable harm. The first substantive article of the resolution flatly states, in the absence of agreement with the affected State, an unqualified "duty to ensure that . . . no pollution" is caused in the water of international rivers and lakes beyond their boundaries.<sup>442</sup> And the preamble to the resolution is similarly unqualified, speaking of an "obligation to avoid any use of its own territory that causes injury in the territory of another State". Nonetheless, subsequently the resolution requires, "as far as practicable", accommodation of interests between or among system States, consistent with protection of the environment, where there are problems of actual or potential transboundary pollution.<sup>443</sup> As indicated, the resolution posits a separate concern for "ultra-hazardous activities or activities which pose a danger to highly exposed areas or environments", with regard to which measures are to be "particularly strict".<sup>444</sup> The Helsinki Rules contain no such provision; however, in the commentary to article X, a special paragraph is headed "(e) Danger to human life":

If the activity or conduct causes pollution that endangers human life in another State, such activity or conduct would probably be deemed inconsistent with the principle of equitable utilization and the duty referred to in paragraph 1 (b) of this Article "to take all reasonable measures" could become an absolute duty to abate the pollution.<sup>445</sup>

265. The relevant Committee of the International Law Association, in a draft produced at its meeting in 1963, had made it, where equitable utilization of the waters would not be defeated thereby, not only a duty to prevent any new form of or any increase in the degree of existing pollution that would cause substantial injury, but also a duty "to take all reasonable measures to abate existing water pollution . . . to such an extent that no substantial injury is caused . . .".<sup>446</sup> At a subsequent meeting, the Committee retreated from that position to the above-quoted recommendation.<sup>447</sup> The counterpart committee of the Association's American Branch criticized this step as "unfortunate" and made these observations:

. . . No reason seems apparent to accord existing pollution, in effect, the rank of a vested right, and it is in the opinion of this Committee that the appropriate and necessary international law rule on the subject was correctly stated in the [1963 draft].

<sup>441</sup> Art. III, para. 1 (a), second phrase.

<sup>442</sup> Art. II. See P. M. Dupuy, "International liability of States for damage caused by transfrontier pollution" (OECD, *Legal Aspects of Transfrontier Pollution*, p. 353, para. 23): ". . . it is clear that such a prohibition could not in practice be taken as absolute . . . Thus there will always be some residual transfrontier pollution which may be regarded as lawful."

<sup>443</sup> Art. VII, para. 1 (d).

<sup>444</sup> Art. III, para. 2.

<sup>445</sup> ILA, *Report of the Fifty-Second Conference* . . . , p. 501.

<sup>446</sup> As reported by the Committee on Uses of Waters of International Rivers of the American Branch of the International Law Association (*Proceedings and Committee Reports of the American Branch of the International Law Association, 1963-1964* (New York), p. 35).

<sup>447</sup> *Ibid.*

Placing a State under a duty to take "reasonable measures" against serious pollution, subject always to the limitation that it could not thereby be deprived of its own equitable utilization, would not seem unduly burdensome. Justice would seem to require no less. As the report on pollution . . . now reads, it is inconsistent with equitable utilization as we understand that principle, since it permits existing pollution to continue although such pollution may well prevent an equitable utilization or, indeed, any utilization by co-riparian States. Moreover, advising a State that it is legally free to continue polluting if it has done so in the past is not conducive to cleaning up international rivers.

Article [XI] (2), the remedies article, then takes the curious position that, if a State fails to follow the *recommendation* to take reasonable measures, . . . it comes under a *duty* "to enter into negotiations with the injured State . . .". It seems a strange formulation to have a duty arise as a consequence of a State's failure to take certain actions, which it was admittedly not legally obliged to undertake. Of course, placing existing pollution outside of existing international law regulation likewise nullifies the salutary compensation provisions for injury resulting from failure to take reasonable measures, which were contained in [the 1963] draft.<sup>448</sup>

266. Such marked divergence of opinion within the Association as existed in the early 1960s is less likely at the present time, for students of the topic generally have been persuaded that a duty simply to maintain the *status quo* with regard to the pollution of shared water resources is insufficient: that merely exhorting Governments to do something about existing pollution is an untenable position. The language of the "Athens resolution" of the Institute of International Law manifests that shift.

267. The dichotomy between existing and new pollution accepted both by the International Law Association and the Institute of International Law must be examined squarely.<sup>449</sup> As a practical matter, drawing the time line between existing and new pollution seems workable only in the case of agreement between the system States on an "effective date".<sup>450</sup> For a supposedly pre-existing customary rule of international law, there is no "coming into force" or other date that can be used as a reference point. "New sources of pollution arise almost daily as new industries develop and older industries expand and discharge greater quantities of wastes into overloaded streams", says the Helsinki Rules commentary.<sup>451</sup> But by the time the harm or hazard is identified, it may be argued that it is already an "existing" pollution.<sup>452</sup> And if the time has come to

<sup>448</sup> *Ibid.*, pp. 35-36.

<sup>449</sup> There are some examples of this duality in treaty practice. See e.g. the 1960 Convention of the protection of Lake Constance against pollution (Land of Baden-Württemberg, Free State of Bavaria, Austria and Switzerland), art. 1, para. 2: "The riparian States shall take in their territories the necessary measures to prevent an increase in pollution . . . and to improve as much as possible the sanitary condition of its waters" (United Nations, *Legislative Texts*, p. 439). Para. 1 of the article commits the riparian States "to co-operate in protecting the waters of Lake Constance against pollution". J. Zourek has argued: "The ambiguous formulation of the principle . . . has the effect of legalizing, not only for the present but also for the future, any pollution which does not exceed a tolerable level. That in my opinion is the sense of draft article 2 [submitted by J. J. A. Salmon]. This is unacceptable and represents a backward step even by comparison with the Stockholm Declaration" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, p. 379).

<sup>450</sup> See the repeated use of this term in the carefully drafted Indus Waters Treaty of 1960, e.g. in art. IV (United Nations, *Treaty Series*, vol. 419, p. 136). The term is defined in art. 1, para. (16) (*ibid.*, p. 130).

<sup>451</sup> Commentary to art. IX (ILA, *Report of the Fifty-second Conference* . . . , p. 496).

<sup>452</sup> For example, would the pollution involved in the *Trail Smelter*

articulate the duty of system States to abate all forms of pollution to levels below those that cause appreciable harm to co-system States—subject always to the possible permissibility of appreciable harm within an equitable participation determination—the need formerly felt by some jurists to distinguish between old and new pollution would not obtain.

268. In any event, the majority of relevant treaties do not deal with pollution in terms of existing/new, or past/future, and most specialists no longer conceptualize the problem in that fashion.<sup>453</sup>

arbitration (United Nations, *Reports of International Arbitral Awards*, vol. III . . . , pp. 1905–1910) be classified as existing, or new? Had there been pollution of which Spain could have complained in the *Lake Lanoux* arbitration (*ibid.*, vol. XII . . . , p. 285), how would it have been regarded?

<sup>453</sup> Even the commentary to the Helsinki Rules, developed essentially for the earlier, stronger version of the provision on existing pollution, offers no support for the bifurcation. On the contrary, the commentary makes a consistent case for abatement, at least to within the permissible levels. The illustration given under sub-heading (b) “New or increased pollution”, in the commentary, hypothesizes use by adjacent co-basin States for drinking purposes; the upper basin State “builds a number of slaughterhouses along the banks of a river in the basin”, the discharge from which renders the water no longer suitable for drinking in the lower riparian State; the upper basin State “is, required to abate the pollution” (ILA, *Report of the Fifty-second Conference* . . . , pp. 509–503). Under sub-heading (d), “Existing pollution”, the illustration is that:

“State A has for many years utilized the waters of an international drainage basin for the disposal of sewage, causing repeated typhoid epidemics in the territory of co-basin State B. As a result of urbanization, the level of the pollution is greatly increased. State A is required to abate the increase and should take reasonable measures to reduce the prior pollution . . . ” (*ibid.*, p. 504). Today, pollution causing “repeated typhoid epidemics” would, it is believed, constitute appreciable harm and State A would be under a general duty to abate, irrespective whether the pollution was longstanding (as postulated in the illustration) or only recently practised, which might also be construed as already existing. Only if State B anticipates the epidemics with a charge of threatened pollution, which might not be within its capabilities, could this (potential) pollution, it is submitted, be incontestably characterized as “new”. It may be significant that the commentary does not offer treaty precedent or real cases drawing the distinctions enshrined in the rule. On the other hand, in the third principle set out in an annex entitled “Some principles concerning transfrontier pollution”, formulated by OECD in 1974, countries “should endeavour to prevent any increase in transfrontier pollution, including that stemming from new or additional substances and activities, and to reduce and as far as possible to eliminate any transfrontier pollution existing between them within time limits to be specified” (OECD, *Legal Aspects of Transfrontier Pollution* (*op. cit.*), p. 14, para. 3). This language follows, however, the second principle, which gives no hint of or basis for the distinctions: “Pending the definition of . . . concerted long-term policies, countries should, individually and jointly, take all appropriate measures to prevent and control transfrontier pollution and harmonize as far as possible their relevant policies” (*ibid.*, para. 2). Read together, these two principles are open to the interpretation that the problem for system States in an industrialized region being so vast, not all fronts in the battle against pollution can, as a practical matter, be attacked simultaneously. First things first, therefore: endeavour to hold the line against the introduction of additional contaminants and contaminating activities, while the studies on already existing problems may be completed and evaluated, and the will and capabilities of the system States concerned ascertained. Art. 2 of the 1969 draft European convention on the protection of fresh water provided:

“Contracting States shall take measures to abate any existing pollution and to prevent any new form of water pollution or any increase in the degree of existing water pollution causing or likely to cause substantial injury or damage in the territory of any other contracting State . . . ” (Council of Europe, Consultative Assembly, recommendation 555 (1969) (doc. 2561)), reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 344, document A/CN.4/274, para. 374.

The preamble to the draft showed concern for industrial competitiveness:

“Considering that the cost of measures . . . should be distributed

## 5. POLLUTION REGULATION ON THE BASIS OF HAZARD

269. What has come to the fore is the differentiation among different kinds of pollutants, particularly with respect to the gravity of the hazard they present in given concentrations.<sup>454</sup> And some “existing” pollution may be allowed as part of an equitable participation determination that protects certain existing (beneficial) uses.<sup>455</sup> That is to say that the apprehension, especially of upstream industrialized States, that their polluting industries may be made non-competitive if severe pollution controls are imposed upon current processes, can receive a hearing in the larger context of each system State’s equitable participation.<sup>456</sup>

270. One student of the subject has differentiated water pollution into five general categories on the basis of what produces the pollution:

- (a) The addition of non-toxic solid matter;
- (b) The addition of non-toxic salts;
- (c) Deoxygenation;
- (d) Heating of the waters, and
- (e) The addition of toxic substances.<sup>457</sup>

as fairly as possible in order not to disturb the relative competitive positions of European industries”

and yet twice iterates the *sic utere tuo* principle without qualification

“Considering that it is a general principle of international law that no country is entitled to exploit its natural resources in a way that may cause substantial damage in a neighbouring country”;

“Considering also that it is a fundamental principle of law that any person who enjoys the use of property in common with other persons must not interfere with such enjoyment by other persons and is liable to pay compensation for any damage so caused”.

For relevant international agreements, see, *inter alia*, *Annuaire de l’Institut de droit international*, 1979, vol. 58, Part One, pp. 317–329, annex IV to the provisional report by J. J. A. Salmon (list of conventions consulted); “International and intrafederal commissions dealing with transfrontier pollution in hydrographic basins”, report by the secretariat of the OECD Environment Committee, and annexed tables on 26 international commissions with transfrontier jurisdiction and four interstate or interprovince commissions) (OECD, *Transfrontier Pollution and the Role of States* (*op. cit.*), pp. 133–189).

<sup>454</sup> See e.g. the 1976 Convention on the protection of the Rhine against chemical pollution, annexes I, II and III (*International Legal Materials*, vol. XVI, No. 2, 1977, pp. 253–255) (to be issued as No. 17511 in the United Nations *Treaty Series*), and the 1980 Protocol for the protection of the Mediterranean sea against pollution from land-based sources, annexes I, II and III (*ibid.*, vol. XIX, No. 4, 1980, pp. 875–878).

<sup>455</sup> See *Annuaire de l’Institut de droit international*, 1979, vol. 58, Part One, p. 225 (statement by M. S. McDougal).

<sup>456</sup> But see the observations of J. Žourek, especially the following: “The principle of equitable sharing of water resources can never prevail over the rules prohibiting pollution. This truth should be stated clearly in the regulations to be prepared. It must be borne in mind that a violation of the rule prohibiting pollution is at the same time a violation of human rights and that not only States are involved” (*ibid.*, p. 315, para. 8); and: “There is no comparison between the pollution of the past and modern pollution, which in the space of a generation has made sewers of all major rivers, which continues to degrade the atmosphere to the point where historical monuments that had stood for more than 2,000 years are now crumbling, and which is responsible for the disappearance of life from broad expanses of the sea, not to mention the dangers of nuclear pollution which threatens future generations because of our rushing to use atomic power without resolving the problem of vital concern to mankind, namely, the problem of radioactive waste. Sources of pollution and their level of injuriousness have changed completely and, in my view, one cannot make that an excuse for legalizing the old forms of pollution, which were simply tolerated and were not a right” (*ibid.*, pp. 315–316, para. 9).

<sup>457</sup> Žourek *ibid.*, p. 379), based on H. B. Hynes, *The Biology of Polluted Waters* (Liverpool University Press, 1963), p. 64. K.

(Continued on next page.)

In other documents, the division into two lists has become common: "black" for the most threatening, or toxic contaminants; "grey" for those less so but meriting monitoring and control.<sup>458</sup> Clearly in this context the attempt to consider some pollution as new and other pollution as existing is ephemeral, if not missing the point and confounding those charged with the development or application of pollution control measures. The technical view is that it is far more important to distinguish between grades or gravities of threat—and not forgetting cumulative effects and even the possibly radically serious effect of two or more contaminants when they combine in the same watercourse.<sup>459</sup>

271. In the field of water pollution generally, as well as with respect to environmental matters, the technical problems are so complex that considerable international effort is often called for before effects can be accurately determined or practical measures can be devised for control or abatement. Some situations may be regarded as so threatening that interim measures may be adopted pending further clarification of the matter. The Council of OECD adopted recommended principles concerning transfrontier pollution in 1974. Under the heading "International solidarity", countries were urged to "define a concerted long-term policy for the protection and improvement of the environment in zones liable to be affected by frontier pollution", and, in implementation of this "concerted policy" they should, among other things:

(a) Take account of:

levels of existing pollution and the present quality of the environment concerned;

(Footnote 457 continued.)

Cuperus arrived at this classification of the main sources of pollution: (i) organic matters originating from domestic and industrial wastes; (ii) inorganic salts, originating from industry; (iii) bacteria and other organisms; (iv) specific toxic substances; (v) mineral oils; and (vi) radio-active substances (reproduced in Lester, "Pollution", *The Law of International Drainage Basins* (op. cit.), p. 90). With respect to water quality, this differentiation is instructive: "In case of domestic supplies, the required analysis is generally prescribed by regulation or ordinances relating to public health. Water for industrial use must be suitable for the special processes involved. Irrigation water must not contain objectionable salts, solids and other substances, dissolved and suspended beyond certain limits. Surface waters utilized for recreation purposes must be free from pollutions materials creating a nuisance and from pathogenic bacteria while those for fish breeding should be free from toxic substances and should meet necessary standards as to dissolved oxygen" (United Nations, *Multipurpose river basin development—Part 1: Manual of river basin planning*, Flood Control Series No. 7 (Sales No. 1955.II.F.1), pp. 24–25).

<sup>458</sup> On agreed standards, see e.g. the 1960 Treaty between Belgium and the Netherlands concerning the improvement of the Terneuzen and Ghent Canal, etc., providing that the parties shall ensure that the waters of the canal and in the vicinity of the frontier meet the standards of quality set forth in an annex (art. 27), agree to co-operate in order to determine the extent of radioactivity in the waters (art. 29), instruct their respective technical services to make regular observations and to submit a joint report (art. 31), and ensure that the fresh water/salt water mix is in a specified proportion (art. 32) (United Nations, *Treaty Series*, vol. 423, pp. 65–66).

<sup>459</sup> In this general connection, see the summary of the statement of N. Ushakov during the discussion in Athens of the draft articles as proposed by J. J. A. Salmon, in which he "regretted the imprecision of art. 2. In particular, it was not clear what the expression 'new sources of pollution' covered. It was also very vague to speak of 'the increase in the existing level of pollution' or to specify an obligation to 'reduce, as soon as possible, existing pollution'. He emphasized that pollution should be considered primarily from the standpoint of the basic needs of human life, especially the need for drinking water" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 122).

the nature and quantities of pollutants;  
the assimilative capacity of the environment, as established by mutual agreement by the countries concerned, taking into account the particular characteristics and use of the affected zone;

activities at the source of pollution and activities and uses sensitive to such pollution;

the situation, prospective use and development of the zones concerned from a socio-economic standpoint;

(b) Define:

environmental quality objectives and corresponding protective measures;

(c) Promote:

guidelines for a land-use planning policy consistent with the requirements both of environmental protection and socio-economic development;

(d) Draw up and maintain up to date:

(i) lists of particularly dangerous substances regarding which efforts should be made to eliminate polluting discharges, if necessary by stages, and

(ii) lists of substances regarding which polluting discharges should be subject to very strict control.<sup>460</sup>

In this delineation of relevant recommendations, not only is the now common "overlay" from the environmental field seen, but it becomes clear that a merely static prohibition against pollution, new and existing, will not suffice, above all under industrialized conditions. Yet the extent to which a "residual" rule of international law may properly prescribe active collaboration against the common "enemy", pollution, is not easily settled. An article not recognizing in some measure the inherent dynamics of the problem, it must be acknowledged, would almost certainly fail to have meaningful application as between most system States within a few decades. In any event, a cardinal requirement must be the sharing of information and data among system States in order that the technical picture may be pieced together, revealing the kinds, extent and effects of pollution already present in shared water resources.<sup>461</sup>

272. In recognition of the dynamic dimensions of the problems of pollution of international watercourses, a number of international river commissions have been charged with pollution responsibilities, or special commissions have been set up.<sup>462</sup> The Consultative Assembly of the Council of Europe adopted "Guiding princi-

<sup>460</sup> OECD, *Legal Aspects of Transfrontier Pollution* (op. cit.), pp. 13–14.

<sup>461</sup> The system States of the Niger, in establishing the Niger River Commission by their Agreement of 1964, not only undertook, in order "to achieve maximum co-operation", to inform the Commission "at the earliest stage" of all studies and works upon which they proposed to embark and to abstain from any works likely to pollute the waters, or any modification likely to affect the biological characteristics of its fauna and flora, without adequate notice to and prior consultation with the Commission (art. 12), but also assigned to the Commission the tasks, *inter alia*, of collecting, evaluating and disseminating basic data on the whole of the basin (art. 2 (c)) (United Nations, *Treaty Series*, vol. 587, pp. 27 and 23.) In art. 29(2) of their 1954 Agreement, Czechoslovakia and Hungary agreed as follows: "The contracting parties shall communicate to each other their experience with pollution-abatement measures on frontier watercourses". (*ibid.*, vol. 504, p. 274). On information and data sharing generally, see sect. E of this chapter.

<sup>462</sup> See e.g. the 1963 Agreement between France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland creating the International Commission for the Protection of the Rhine against Pollution (*Yearbook . . . 1974*, vol. II (Part Two), p. 301, document A/CN.4/274, paras. 138–141); the 1978 Canada-United States Great Lakes Water Quality Agreement (*United States Treaties and other International Agreements* (op. cit.), p. 1383).

ples applicable to fresh water pollution control" in 1965, the final item of which states: "A special body for water pollution control should be set up for each international drainage area . . ."<sup>463</sup> In its European Water Charter, the Council of Europe devotes several sections to pollution considerations:

III. *To pollute water is to harm man and other living creatures which are dependent on water*

Water in nature is a medium containing beneficial organisms which help to keep it clean. If we pollute the water, we risk destroying those organisms, disrupting this self-purification process, and perhaps modifying the living medium unfavourably and irrevocably.

Surface and underground waters should be preserved from pollution.

Any important reduction of quantity and deterioration of quality of water, whether running or still, may do harm to man and other living creatures.

IV. *The quality of water must be maintained at levels suitable for the use to be made of it and, in particular, must meet appropriate public health standards*

These quality levels may vary according to the different uses of water, namely food supplies, domestic, agricultural and industrial needs, fisheries and recreation. Nevertheless, since all life on earth in its infinite variety depends upon the manifold qualities of water, arrangements should be made to ensure as far as possible that water retains its natural properties.

V. *When used water is returned to a common source it must not impair the further uses, both public and private, to which the common source will be put*

Pollution is a change, generally man-made, in the quality of water which makes it unusable or dangerous for human consumption, industry, agriculture, fishing, recreation, domestic animals and wildlife.

The discharge of residue (wastage) or of used water which causes physical, chemical, organic, thermal or radio-active pollution, must not endanger public health and must take into account the capacity of the receiving waters to assimilate (by dilution or self-purification) any waste matter discharged. The social and economic aspects of water-treatment methods are of great importance in this connection.

IX. *Conservation of water calls for intensified scientific research, training of specialists and public information services*

Research with regard to water in general and waste water in particular should be encouraged in every way possible. Means of providing information should be increased and international exchange facilitated; at the same time, the technical and biological training of qualified personnel is necessary in the various fields of activity involved.<sup>464</sup>

None the less, at the 1981 Dakar Interregional Meeting, it was concluded that:

"Water quality, water-related disease and environmental protection considerations have to date received inadequate attention in most cases, and Governments need to request their river and lake organizations to include these aspects as part of their information and data, project and programme planning or monitoring functions, as appropriate (United Nations, *Experiences in the Development and Management* . . ., p. 14, para. 49, topic II, conclusion 4).

See also, Hayton, "Progress in co-operative arrangements" (*ibid.*, pp. 65 *et seq.*), and agreements and works there cited, in particular sect. A (a), "Pollution control and health management" (*ibid.*, pp. 70-71).

<sup>463</sup> Para. 12 (Council of Europe, Consultative Assembly, recommendation 436 (1965) (doc. 1965) on fresh water pollution control in Europe), reproduced in *Yearbook* . . . 1974, vol. I (Part Two), p. 342, document A/CN.4/274, para. 372. Para. 4 of the preamble to the recommendation provides: "International co-operation in the field of water pollution control, in particular with regard to research, training of experts and exchange of information, should be strengthened . . .".

<sup>464</sup> *Ibid.*, p. 343, para. 373. The European Water Charter was adopted in 1967 and proclaimed in Strasbourg in 1968.

273. In the 1969 draft European convention on the protection of fresh water against pollution of the Consultative Assembly of the Council of Europe, some provisions not yet cited appear of particular interest:

. . . [Pollution abatement] measures shall be designed to preserve, to the maximum extent possible, the qualities of the waters of international drainage basins in order to safeguard public health and to permit their use, after such economically justified treatment as may be necessary, in particular for:

- (a) The production at a reasonable cost of drinking water of good quality;
- (b) The conservation and development of aquatic resources, including both fauna and flora;
- (c) The production of water for industrial purposes;
- (d) Irrigation;
- (e) Use by domestic animals and wild life;
- (f) Recreational amenities, with due regard to health and aesthetic requirements.<sup>465</sup>

In effectively implementing the above, contracting States would:

- (a) Wherever possible, agree to establish and maintain standards of quality for the waters of an international drainage basin extending over their territories;
- (b) Where appropriate in the circumstances, establish joint commissions to regulate usage of such waters;
- (c) Inform the other contracting States about standards in force under paragraph (a);
- (d) From time to time inform and consult with other contracting States concerned, about the usages of such waters;
- (e) Adopt legislative and administrative measures to implement this Convention within their respective territories.<sup>466</sup>

274. The 1974 draft European convention for the protection of international water courses against pollution contains these pertinent provisions:

*Article 2*

Each Contracting Party shall endeavour to take, in respect of all surface waters in its territory, all measures appropriate for the reduction of existing water pollution and for the prevention of new forms of such pollution.

*Article 3*

1. Each Contracting Party undertakes, with regard to international watercourses, to take:

- (a) All measures required to prevent new forms of water pollution or any increase in the degree of existing water pollution;
- (b) Measures aiming at the gradual reduction of existing water pollution.

2. This Convention is not to lead to the replacement of existing measures by measures giving rise to increased pollution.

*Article 4*

1. Each Contracting Party shall take all measures appropriate for maintaining the quality of the waters of international watercourses at, or for raising it to, a level not lower than:

- (a) The specific standards referred to in article 15, paragraph 2: or
- (b) In the absence of such specific standards, the minimum standards laid down in appendix I to this Convention, subject to any derogation provided for in paragraph 2 of the present article.

2. The minimum standards laid down in appendix I shall be applied:

- (a) In the case of freshwater standards, at the freshwater limit and at each point upstream from this limit where the watercourse is crossed by a frontier between States;

<sup>465</sup> Art. 2, para. 1 (*ibid.*, p. 344, para. 374).

<sup>466</sup> Art. 2, para. 2 (*ibid.*).

(b) In the case of brackish water standards, at the baseline of the territorial sea and at the points where the estuary is crossed by a frontier between States;

3. Derogations to the application of appendix I at the points fixed by the previous paragraph are authorized for the watercourses and the parameters listed in appendix IV to this Convention. The contracting parties riparian to such a watercourse shall co-operate with each other in accordance with the provisions of article 10.

#### Article 5

1. The discharge into the waters of international hydrographic basins of any of the dangerous or harmful substances listed in appendix II to this Convention shall be prohibited or restricted under the conditions provided for in that appendix.

2. In so far as a contracting party cannot immediately give effect to the provisions of the preceding paragraph, it shall take steps to comply with them in a reasonable time.

#### Article 6

1. The provisions of articles 3 and 4 may not be invoked against a contracting party to the extent that the latter is prevented, as a result of water pollution having its origin in the territory of a non-contracting State, from ensuring their full application.

2. However, the said contracting party shall endeavour to co-operate with the non-contracting State so as to make possible the full application of these provisions.

#### Article 8

The contracting parties undertake to co-operate with each other with a view to achieving the aims of this Convention.

#### Article 9

The contracting parties riparian to an international watercourse to which the minimum standards laid down in appendix I to this Convention are to be applied and the waters of which do not yet meet the level of these standards shall advise each other of the measures they have taken with a view to reaching, within a fixed time-limit, this level at the points fixed by article 4, paragraph 2.

#### Article 10

1. The contracting parties situated either upstream or downstream of a point on an international watercourse at which the derogations provided for in article 4, paragraph 3, apply, shall carry out, in consultation with each other and before the end of the first year after this Convention enters into force in respect of them, an inquiry with a view to establishing the quality of the waters at this point as regards the parameters covered by the derogation.

2. The contracting parties riparian to such a watercourse shall jointly establish a programme designed to achieve, within a fixed time-limit, certain objectives for reducing pollution at the point referred to in the preceding paragraph. This programme may envisage various stages, each reaching intermediate objectives. A comparison shall be effected between the objectives envisaged and the results obtained at the expiration of the fixed time-limits.

3. If the inquiry or the results mentioned in the preceding paragraphs show that it is no longer necessary to maintain the derogation as regards one of the parameters, the contracting party which requested the derogation shall notify the Secretary-General of the Council of Europe of its suppression as regards that parameter.

#### Article 11

As soon as a sudden increase in pollution is recorded, the contracting parties riparian to the same watercourse shall immediately warn each other, and shall take unilaterally or jointly all measures in their power to avert injurious consequences or to limit the extent thereof, having recourse to the early warning system envisaged in article 15 . . .

#### Article 12

1. The [interested] contracting parties . . . undertake to enter

into negotiations with each other, if one of them so requests, with a view to concluding a co-operation agreement or to adapting existing co-operation agreements to the provisions of this Convention.

2. When the interested contracting parties admit expressly or tacitly that the contribution of one of them to the pollution of the international watercourse can be deemed negligible, the latter contracting party is not bound to enter into negotiations . . .<sup>467</sup>

### 6. THE TREND TOWARDS POLLUTION MANAGEMENT BY COMMISSION

275. Article 14 of the 1974 draft European convention requires the establishment of an international commission as part of the co-operation agreement referred to in article 12, quoted above, unless the parties decide otherwise.<sup>468</sup> The functions of commissions so established are spelled out in some detail. These include collection and verification at regular intervals of data concerning water quality, proposal of additional investigations to establish the nature, degree and source of pollution, proposal of an early warning system for serious accidental pollution, and proposal of additional measures and inquiries and programmes.<sup>469</sup>

276. ECE adopted in 1966 a series of principles as part of an ECE policy declaration on water pollution control. Two of these principles are additional evidence of the growth of international understanding of the problem.

1. Water pollution control constitutes a fundamental governmental responsibility and calls for close international collaboration . . . All problems concerning the rational utilization of water resources should be viewed in relation to the special features of each drainage basin.

. . .

9. States bordering on the same surface water should reach an understanding to the effect that such water represents for them a common asset, the use of which should be based on the desire to reconcile their respective interests to the greatest possible extent. This involves more particularly concerted action in pollution control, and such States should, by means of bilateral or multilateral agreements, define their mutual relations on water pollution. These agreements should provide that States are to maintain water at a

<sup>467</sup> Council of Europe, Consultative Assembly, doc. 3417 (1974), reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 346-347, document A/CN.4/274, para. 377.

<sup>468</sup> *Ibid.*, p. 347.

<sup>469</sup> Art. 15, para. 1 (*ibid.*). The Consultative Assembly of the Council of Europe had previously adopted recommendation 629 (1971) (doc. 2904) on the pollution of the Rhine valley water-table, the preamble to which included these important statements:

"Considering that the efficacy of fresh water pollution control depends on the acceptance of certain principles by as many countries as possible, . . . and in general calls for concerted action within a given drainage basin . . .";

"Reaffirming that most environmental problems, including water pollution, are of an international character";

"Noting in this connection that the Rhine valley water-table is not only the most important fresh water reservoir in Europe but also the indivisible asset of a number of European countries";

"Noting that . . . pollution increasingly threatens this vital fresh water reserve";

"Noting further that the management of this water reserve and its safeguarding against pollution are tasks whose effective accomplishment can only be ensured jointly by all countries bordering on it . . .";

and

"Emphasizing the urgent need for such co-operation, which is a proof of both the solidarity existing between frontier regions and the practical nature of the problems calling for common action" (*ibid.*, p. 349, para. 378).



quality such that neither public health nor the basic needs of the economy are jeopardized.<sup>470</sup>

277. The preamble to the ECE recommendation concerning river basin management of 1971 includes these statements:

Rapid industrial development and intensive urbanization, together with increased standards of living throughout the last decades, have resulted in ever higher demands for water and an increasing deterioration of the environment in virtually all ECE countries. These growing demands, including more stringent needs for high quality water, in conjunction with the natural fluctuations and the growing pollution of the water resources, have caused water shortages to occur in more and more regions. In certain areas water has thus become a determining factor in the location of water-using industries, and a shortage of it is considered a limiting factor in economic and social development. It is accepted that only careful planning and rational management of the allocation, utilization and conservation of water resources . . . can assure that requirements will be met in the future and that the natural environment will be improved and preserved.<sup>471</sup>

The Governments of southern Europe, in a 1971 ECE recommendation, are urged to strengthen "international co-operation in water management, especially in the protection of quality, above all in countries sharing a river basin".<sup>472</sup>

278. One student of the international problem, after formulating two "optimum rules", listed the following two implementation rules he regarded as necessary on frontier waters:

(a) The quality of waters should be determined for a given time (in comparison with which any new forms of pollution and any increase in the degree thereof should be prevented);

(b) The quality of "pure water" should be specified (this water quality must be reached through gradual reduction of the existing water pollution).<sup>473</sup>

Moreover, if certain conditions are met, there is "a realistic possibility of pollution control". Some of these conditions are:

(a) Polluted water should only be discharged with permission from a competent authority, according to the national legal system of the concerned countries. In the licences, the level of sewage treatment should be prescribed and adequate measures should be applied against those who do not meet these requirements.

(b) Identical methods should be applied for the sampling, analysis, evaluation and classification of water quality; that is, data obtained in one country should be comparable with those of the other country;

(c) The possibility of solving problems related to the planning, construction and operation of treatment plants and to the sharing of

costs related to the establishment and operation thereof should be spelt out.<sup>474</sup>

279. In its report on pollution in the waters of the St. Clair River, Lake St. Clair and the Detroit River, the International Joint Commission (Canada-United States of America) pointed out the changes which had occurred since its original study of river pollution, beginning in 1913, and concluded as follows:

The pollution problem must be considered not only on the basis of present-day conditions but also in terms of the future. Facilities for the treatment of municipal sewage must incorporate sufficient flexibility to permit of ready expansion to satisfy future demands. Industrial waste disposal programmes must not only provide adequate treatment for the present, but they must ensure that new industries or new industrial processes which may be established will not jeopardize the rights of users of these waters.<sup>475</sup>

The Commission found that water of a certain quality was required for each water use; the system States had to approve a set of water quality objectives before the necessary remedial measures could be worked out.<sup>476</sup> Under the then prevailing conditions, it regarded it as impossible accurately to determine the relative responsibilities of the system States for transboundary pollution.<sup>477</sup>

280. Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania and the Soviet Union have approved common criteria and standards of purity for surface waters and water classification principles by way of the Conference of Heads of Water Management Services of the member countries of CMEA.<sup>478</sup> In Western Europe, a special Convention on the protection of the Rhine against chemical pollution has been concluded.<sup>479</sup> This Convention adopts the modern technique of listing polluting substances, classified as to their gravity as pollutants. Dangerous substances, with respect to which the parties will take appropriate measures to eliminate their discharge into the Rhine, are identified in annex I of the Convention.<sup>480</sup> Pollution by this group of sub-

<sup>474</sup> *Ibid.*

<sup>475</sup> International Joint Commission, *Report on the Pollution of Boundary Waters*, 1951, p. 72.

<sup>476</sup> *Ibid.*, pp. 169-170.

<sup>477</sup> *Ibid.*, p. 166. The two Governments approved the Commission's proposals regarding the quality control objectives of boundary waters and decided to monitor the waters by international control boards as well as by means of their national agencies. See "Measures to control pollution authorized in Great Lakes area", *The Department of State Bulletin* (Washington, D.C.), vol. XXV, No. 650, 10 Dec. 1951, p. 947.

<sup>478</sup> A. Wolman, "Pollution as an international issue", *Foreign Affairs* (New York), vol. 47, No. 1, 1968, p. 164; "Co-operation among CMEA member countries in long-term water management planning", paper presented by the Soviet Union at the United Nations Workshop on Water Resources Planning Experiences in a National and Regional Context (Castlegondolfo, Italy, 18-29 June 1979) (TCD/SEM.80/1, p. 275); Prehoffer, *loc. cit.*, pp. 48-49.

<sup>479</sup> Signed by EEC, France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland at Bonn, 3 December 1976 (*International Legal Materials*, vol. XVI, No. 2, 1977, p. 242 (to be issued as No. 17511 in the United Nations *Treaty Series*)).

<sup>480</sup> *Ibid.*, pp. 253-254. The seven families and groups of substances there listed were chosen primarily on the basis of their toxicity, persistence and, with exceptions, bioaccumulation. These include, in brief, organohalogen compounds and substances that can give rise to such compounds in a water environment, organophosphoric compounds, organostannic compounds, substances proven to be carcinogenic, mercury and mercury compounds, cadmium and cadmium compounds, and persistent mineral oils and petroleum phrycarbons. Cf. the recommendations under the heading "Identification

(Continued on next page.)

<sup>470</sup> ECE resolution 10(XXI) of 29 April 1966, appendix (*Official Records of the Economic and Social Council, Forty-first Session, Supplement No. 3* (E/4177), pp. 61-62).

<sup>471</sup> E/ECE/WATER/9, annex II.

<sup>472</sup> ST/ECE/WATER/6/Add.1, p. 11, para. 5 (d).

<sup>473</sup> E. Prehoffer, "Legal framework of co-operation in the field of water management between Hungary and its neighbouring countries", *River Basin Development* . . . , vol. II . . . , p. 46. The author cites two rules, expressly based on principle 21 of the Stockholm Declaration as affirmed by General Assembly resolution 2996 (XXVII) of 15 December 1972:

"(a) The co-basin States should take all measures required to prevent new forms of water pollution or any increase in the degree of existing water pollution;

"(b) Those States should take all measures directed towards the gradual reduction of existing water pollution".

Although neither the treaty practice adduced in the study nor principle 21 conforms to the rules cited, the practical problems aired certainly indicate the need for pollution abatement over time. How the distinctions would be made, failing agreements, the author does not discuss.

stances is nonetheless to be eliminated gradually, "taking into account the results of studies made by experts concerning each one, as well as the technical means available".<sup>481</sup> With respect to a second group, pollution is merely to be reduced;<sup>482</sup> the list is shown in annex II of the Convention.<sup>483</sup> The necessity for drawing up such specific lists seems now fully accepted. Other provisions of the Convention provide for national inventories of discharges, to be reported to the International Commission for the Protection of the Rhine against Pollution.<sup>484</sup> Each Government assumes responsibility for the installation and operation of measuring instruments and systems to determine the concentration of the substances listed in the cited annexes.<sup>485</sup> When one of the Governments notes a sudden and sizeable increase in any of the substances listed in the annexes, or has knowledge of an accident that may seriously endanger the quality of the waters, it will inform the International Commission and the parties likely to be affected "without delay".<sup>486</sup> "Any discharge into the surface waters of the Rhine basin that may contain one of the annex I substances" is subject to prior authorization;<sup>487</sup> concentration limits and time limits are to be set, on the proposal of the International Commission.<sup>488</sup> Finally, the parties "will endeavour to establish within two years" from the Convention's entry into force their "national programmes for reducing the pollution" by substances listed in annex II; any discharge of such substances is to be limited "severely".<sup>489</sup>

(Footnote 480 continued)

and control of pollutants of broad international significance' in the Action Plan for the Human Environment, especially recommendations 71-73, 75-77, 81 and 83; also recommendations 51-53 on machinery for international co-operation (*Report of the United Nations Conference on the Human Environment* . . . , pp. 20-21 and 17-18).

<sup>481</sup> Art. 1, para. 1 a (*International Legal Materials*, vol. XVI, No. 2, 1977, p. 243).

<sup>482</sup> Art. 1, para. 1 b (*ibid.*).

<sup>483</sup> *Ibid.*, pp. 254-255. These include, in brief, parts of families and groups of substances for which the concentration limits (referred to in art. 5 of the Convention) have not been established, plus some families and groups of substances that have a detrimental effect on the water medium, but can be limited to a certain area. Included are certain metalloids and metals (as well as their compounds), biocides and their derivatives (excluding those listed in annex I), substances having a detrimental effect on the taste or smell or giving rise to such substances in water, toxic or persistent organosilicon compounds (with exceptions), inorganic phosphorus, non-persistent mineral oils and petroleum hydrocarbons, cyanides, fluorides, ammonia and nitrates.

<sup>484</sup> Art. 2, paras. 1 and 2 (*ibid.*, p. 244). The International Commission was created by an Agreement of 29 April 1963; in 1976, EEC became a member of the Commission.

<sup>485</sup> Art. 10, para. 1 (*ibid.*, p. 248). Each Government is to report its results regularly to the International Commission; in turn, the Commission is to prepare an annual report making it possible to follow changes in the quality of the Rhine waters (art. 10, paras. 2 and 3).

<sup>486</sup> Art. 11 (*ibid.*, p. 249).

<sup>487</sup> Art. 3, para. 1 (*ibid.*, p. 244).

<sup>488</sup> Art. 3, paras. 2-4, and art. 5, paras. 1-3 (*ibid.*, pp. 244-246).

<sup>489</sup> Art. 6, paras. 2 and 1 (*ibid.*, p. 247). On the same date, 3 December 1976, the same Governments (but not EEC) concluded a Convention on the protection of the Rhine against pollution by chlorides (*ibid.*, p. 265). One of the objectives is to reduce the discharge of chloride ions into the Rhine by at least 60 kg on an annual average, to be achieved gradually and on French territory (art. 2, para. 1). Measures are to be taken by all the parties to prevent an increase in the discharge of chloride ions (art. 3); the Commission is to have proposed "means to achieve progressively a new chloride-ion concentration limitation over the entire course of the Rhine"

281. In recent years, the topics of water pollution and pollution in general have spawned a vast, specialized literature, both technical and legal, a literature that embraces inter-State relations.<sup>490</sup> Most of the scholars

within four years of the entry into force of the Convention (art. 6). A number of other provisions are similar to those of the convention on chemical pollution. See also Council Directive of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (80/68/EEC). (*Official Journal of the European Communities* (Luxembourg), vol. 23, No. L 20, 26 Jan. 1980, p. 43).

<sup>490</sup> See *inter alia* Bourne, "International law and pollution of international rivers and lakes", *loc. cit.*, p. 115, and works there cited; P-M Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle* (Paris, Pedone, 1977), and works there cited; Lester, "Pollution", *loc. cit.*, p. 88, and works there cited; Utton, "International water quality law", *International Environmental Law* (*op. cit.*), p. 154, and works there cited; G. Gaja, "River pollution in international law" (The Hague Academy of International Law, *Colloquium 1973—The Protection of the Environment and International Law*, A.-Ch. Kiss, ed. (Leyden, Sijthoff, 1975), p. 353; H. Brownell and S. D. Eaton, "The Colorado River salinity problem with Mexico", *American Journal of International Law*, vol. 69, 1975, p. 255; A. Gonzales de León, "The Mexican position: national and international considerations", *Natural Resources Journal*, vol. 15, 1975, p. 109; "Proceedings of the Conference on International and Interstate Regulation of Water Pollution", 12-13 March 1970, *Columbia Journal of Transnational Law*, C. K. H. O'Malley, ed. (New York, 1970); WHO, *Water Pollution Control in Developing Countries*, Technical Report Series No. 404 (Geneva, 1968), and *Aspects of Water Pollution Control* (*op. cit.*), with contributions by W. Christ, H. Fischerhof, C. W. Klassen, E. J. Manner, G. McNaughton, T. Nagibina and M. Petrik; G. Handl, "Territorial sovereignty and the problem of transnational pollution", *American Journal of International Law*, vol. 69, 1975, p. 50; "Balancing of interests and international liability for the pollution of international watercourses: customary principles of law revisited", *The Canadian Yearbook of International Law*, 1975 (Vancouver), vol. XIII, p. 156; and "The principle of 'equitable use' as applied to internationally shared natural resources: its role in resolving potential international disputes over transboundary pollution", *Belgian Review of International Law* (Brussels), vol. XIV, 1978-1979-1, p. 40; J. L. Serwar, "International co-operation for pollution control", *Law, Institutions and the Global Environment*, L. Hargrove, ed. (Dobbs Ferry, N.Y., Oceana Publications, 1972), p. 178; W. Ferguson, "Note on international trade implications of pollution control", *Cornell Law Review* (Ithaca, N.Y.), vol. 58, 1973, p. 368; Dupuy, "International liability of States for damage . . .", *loc. cit.*; S. Rubin, "Pollution by analogy: the Trail Smelter arbitration", *Oregon Law Review* (Corvallis, Oreg.), vol. 50, 1971, p. 259; J. E. Read, "The Trail Smelter dispute", *The Canadian Yearbook of International Law* 1963 (Vancouver) vol. I, p. 213; Ianni, *loc. cit.*; V. Koutikov, "Quelques aspects de l'évolution récente du droit international en Europe" *Conférence sur le droit international* (Lagonissi, Greece, 3-8 April 1966), *Rapports et travaux, I: Les cours d'eaux internationales* (Geneva, 1967), p. 97; R. E. Stein, "Legal and institutional aspects of transfrontier pollution control" (OECD, *Problems in Transfrontier Pollution* (Paris, 1974), p. 285); A. Scott and C. B. Bramsen, "Draft guiding principles concerning transfrontier pollution" (*ibid.*, p. 299); B. Pacteau, "Les problèmes juridiques internationaux de la pollution", *Les aspects juridiques de l'environnement: actes du colloque de la Section belge de l'Institut international de droit d'expression français* (Namur, 25-26 Oct. 1974) (Namur, Presses universitaires, 1975), p. 144; Ballenegger, *op. cit.*; J.-P. Dobbet, "Water pollution and international river law", *Yearbook of the Association of Attenders and Alumni of The Hague Academy of International Law*, 1965 (The Hague), vol. 35, 1965, p. 60; H. L. Dickstein, "International lake and river pollution control: questions of method", *Columbia Journal of Transnational Law*, vol. 12, 1973, p. 487; P. Stainov, "Les aspects juridiques de la lutte internationale contre la pollution du Danube", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXIX, No. 1, 1968, p. 97; J. J. Baskin, "Questions de droit international relatives à la pollution des eaux", *ibid.*, 3rd series, vol. XL, No. 2, 1969, p. 421; R. Bystricky, "La pollution des eaux de surface du point de vue international", *Revue de droit contemporain* (Brussels), 13th year, No. 2, 1966, at p. 76; M. Wolfrom, "La pollution des eaux du Rhin", *Annuaire français de droit international*, 1964 (Paris), vol. X, at p. 754; A.-Ch. Kiss and C. Lambrechts, "La lutte contre la pollution de l'eau en Europe occidentale", *ibid.*, 1969, vol. XV, p. 718; H. R. Bijl, "La lutte contre la pollution de l'eau un cas de coordination d'action internationale", *ibid.*, 1967, vol. XIII, p.

specializing in the subject, following the findings of scientific and technical experts, urge system-wide scope for the study of the problems of water quality and environmental protection, even if specific measures to deal with these problems are to be undertaken by the individual system States. For example, at the 1975 Seminar in Budapest on River Basin Development many of the studies presented and the conclusions reached emphasized the importance of a systems-wide approach. In this context, the work of I. Dégen of Hungary was summarized, in part, as follows:

In the modern era, virtually all aspects of the multilateral relationship between socio-economic development and the natural environment are closely related to water conditions. Therefore, river basin development designed to manage water resources on a basin-wide scale has become one of the decisive factors in the evolution of socio-economic advancement.

The growing economic and social need for river basin development has resulted in the replacement of former isolated projects of local significance by technically, economically superior water resources systems developed gradually and operated in co-ordination. Considering the large number of natural and economic factors affecting water resources systems, it is very difficult to determine the proper development option in which limited economic and natural resources can be developed to the greatest benefit. This task calls for the integrated approach . . . which is realized substantially by attempting to include the largest possible number of effects into the sphere of decisions related to the development objectives . . .

The exact identification and evaluation of development objectives and effects are fundamental prerequisites . . . , especially in international river basins. In order to evaluate the achievement, multi-objective decision theory should be applied, along with systems analysis, in which special emphasis should be placed on the social and environmental aspects . . .<sup>491</sup>

282. The panel of experts convoked by the United Nations in 1957 gave extended attention to the techniques for more effective use of water resources. The panel's report, *Integrated River Basin Development*, was in such demand that, after several reprintings, a second edition was brought out. In the preface to the second edition, the panel's chairman G. F. White, reported, *inter alia*:

The past decade has . . . seen a pronounced change in public concern for reducing the growing pollution of streams from the

wastes of city, farm and factory. As pollution loads increase through rising population, new agricultural technologies and complexity of industrial processes, and as the standards of public health and of recreational and aesthetic uses of water are raised in industrial countries, the demands on water management schemes to take account of opportunities to eliminate, dilute or treat effluents become more exacting. These demands show themselves in enlarged attention to pollution abatement in basin development schemes, and in strengthened national programmes to cope with pollution problems.<sup>492</sup>

The conviction of the Panel with respect to a system-wide approach for planning purposes is manifested in many parts of the report, including this statement:

The need for integrated river basin development arises from the relationship between the availability of water and its possible uses in the various sectors of a drainage area. It is now widely recognized that individual water projects—whether single or multipurpose—cannot as a rule be undertaken with optimum benefit for the people affected before there is at least the broad outline of a plan for the entire drainage area.<sup>493</sup>

And with specific reference to "co-operative action in developing an international river basin", the Panel observed that such action "might be expected to present problems similar to those encountered in dealing with national rivers, on the premise that a river basin is a coherent topographic feature", but, though "this concept may be correct in principle, political considerations often make it difficult to apply".<sup>494</sup> The Panel drew special attention to the "inadequacy of relevant international law",<sup>495</sup> but did not qualify its position. The Panel recommended external help through the United Nations family of organizations "for gathering the information necessary to make a [factual] report on the *status quo*",<sup>496</sup> as a basis for policy planning discussions between the countries concerned.

The Panel felt strongly that such discussions ultimately required institutionalization by the creation of permanent joint commissions. In this regard, it was felt to be

. . . apparent that there is a wide range of matters which may be discussed and clarified by joint commissions. . . . It is only to be expected that some of the points will be controversial and will stimulate vigorous argument. But in a functioning commission such arguments will be conducted in an atmosphere of co-operation rather than dispute, with a view to arriving at the right answer in the light of integrated planning.<sup>497</sup>

580; J. G. Lammers, "International co-operation for the protection of the waters of the Rhine basin against pollution", *Netherlands Yearbook of International Law*, 1974 (Leyden), vol. V, p. 59; Seidl-Hohenveldern, "La pollution transfrontière et la recommandation C(74)224 de l'OCDE", *Temis* (Saragossa), No. 33-36, 1973-1974, p. 273.

<sup>491</sup> Dégen, "Integrated development of river basins: overview and perspectives" (United Nations, *River Basin Development* . . . , vol. I, p. 3); see also the working papers cited in that study. The Seminar considered useful the establishment of "centres in the major or otherwise important international river basins to promote investigation, collection and management of basic data, to promote technical development (remote sensing, computer facilities, etc.) and to co-ordinate socio-economic planning activities of the basin countries . . ." (*ibid.*, p. 20, recommendation 5). See also ECE, *Long-term Planning of Water Management*, vol. I (United Nations publication, Sales No. E.76.II.E.27), especially the conclusions in paras. 24-63; United Nations, *Management of International Water Resources* . . . , especially pp. 9-10, 14-19 and 64-67, and works and examples there cited; A. B. Futa, "Volta River project, evolution of the integrated basin development approach" (United Nations, *River Basin Development* . . . , vol. II, p. 220); Colliard, *op cit.*, pp. 356 and 384-416; F. B. Lotspeich, "Watersheds as the basic ecosystem: this conceptual framework provides a basis for a natural classification system", *Water Resources Bulletin* (Minneapolis, Minn.), vol. 16, No. 4, 1980, p. 581. Cf. G. Schramm, "Integrated river basin planning in a holistic universe", *Natural Resources Journal*, vol. 20, 1980, p. 787, and works and examples there cited.

<sup>492</sup> United Nations, *Integrated River Basin Development* . . . , p. x. See also L. A. Teclaff, *The River Basin in History and Law* (The Hague, Nijhoff, 1967).

<sup>493</sup> United Nations, *Integrated River Basin Development* . . . , p. 1.

<sup>494</sup> *Ibid.*, p. 33.

<sup>495</sup> *Ibid.*, pp. 34-35.

<sup>496</sup> *Ibid.*, p. 35. The Panel had in mind international watercourses lacking management machinery, especially those shared by developing countries. For a report on an environmental impact assessment study undertaken to ascertain the impact on water quality from water resources development and funded by the United States Agency for International Development, see M. S. Gould, "A water quality assessment of development in the Senegal River Basin", *Water Resources Bulletin*, vol. 17, No. 3, 1981, p. 466. See also C. Reizer, *Contribution à l'étude hydrobiologique du Bas-Sénégal* (Nogent-sur-Marne, Centre technique forestier tropical, 1971).

<sup>497</sup> United Nations, *Integrated River Basin Development* . . . , p. 37. Annex I of the report, "Organization of basic surveys", lists, under the heading "Progressive collection of additional data", physical data, including biological, chemical, pollution and public health data (*ibid.*, p. 48). Annex IV is devoted to "health implications of water-related parasitic diseases in water development schemes" (*ibid.*, pp. 60-64).

### In any event:

Having regard to the fact that any incentive to co-operation depends on the material and moral benefits derived from such co-operation, it is imperative that the benefits in quantitative and qualitative terms be clearly described as early as possible.<sup>498</sup>

### Moreover,

... it is clear that co-operation must be fostered and nurtured if any real progress ... is to be made. The question arises as to what might be the sequence of steps and who is to initiate and promote them.<sup>499</sup>

283. Finally, in this connection, an experienced student of the problems associated with international watercourses concludes that:

... some questions of water management, such as water-quality problems, and allocations of resources cannot be adequately solved on the basis of [bilateral] treaties [of limited territorial competency]. These questions necessitate the co-operation of all countries concerned, with a basin-wide territorial competency. The trend indicates an evolution towards this type of treaties.<sup>500</sup>

284. The Special Rapporteur believes it to be appropriate, in the light of the trend of State practice and expert opinion, to suggest an article respecting water quality that would foster active co-operation, even if it must fall short of prescribing "permanent joint commissions".<sup>501</sup> That proposed draft article is set forth after the following exposition of closely related environmental problems.

## 7. SHARED WATER RESOURCES AND THE ENVIRONMENT

285. With respect to the additional dimensions of the topic which reflect the now universal concern for the preservation and even improvement of the environment, less space may be devoted. Major elements of the concern, and of the material, have just been covered in the treatment of water pollution. Environmental protection, in so far as watercourse systems are concerned, involves, however, much more than the quality of water as such. At issue also are the effects, through water, on wildlife, including endangered species, on the flora of the area reached by waters, on the genetic resources and on the biotic potentials of the region. Even the viability and durability of machines, pipelines, instruments and port facilities are directly affected by the ambient conditions. None of these may be part of a "use" of the waters, properly so called. In many but not all cases, water use may give rise or contribute to the totality of conditions that produce damaging results.<sup>502</sup>

<sup>498</sup> *Ibid.*, p. 33.

<sup>499</sup> *Ibid.*, p. 35.

<sup>500</sup> Prehoffer, *loc. cit.*, vol. II, p. 49.

<sup>501</sup> It may be noted that the Assistant Administrator of UNDP and Regional Director for Africa, M. Doo Kingué, recalled at the 1981 Dakar Interregional Meeting "the compelling physical and economic reasons justifying the need for regional co-operation in the development, conservation and use of shared river and lake basins and the need to channel such co-operation through intergovernmental river organizations" (United Nations, *Experiences in the Development and Management* ... , p. 4, para. 3).

<sup>502</sup> Pollutants in water may become airborne and result in air pollution. See P. Raunta, "Jäteveden käsittely ja ilman mikrobi" (Sewage treatment and airborne microbes), *Vesitalous* (Helsinki), vol. 21, 1980, p. 16. Conversely, certain air pollutants may precipitate as "acid rain", causing serious transfrontier water pollution, as in the case along the eastern United States-Canadian border and over large parts of Europe. See "Acid rains, a new problem for UNEP", *Uniterria* (Nairobi), vol. 4, No. 9, 1979, pp. 1, 3; F. H. Braekke, ed., *Impact of Acid Precipitation of Forest and Freshwater Ecosystems in*

286. For some purposes "environment" is described, or defined, as the "assemblage of material factors and conditions surrounding the living organism and its component parts". Thus it includes "both external and internal factors. In the external environment inanimate objects and the forces associated with them constitute the physical environment, and the living things and their derivatives with which the animal may be associated constitute the organic environment."<sup>503</sup> In modern practice, aesthetics and vegetation and even bacterial populations are embraced.<sup>504</sup> Many industrial processes,<sup>505</sup> and perhaps more significantly "human habitats",<sup>506</sup> involve substantial control of the environment, while in the field of environmental protection, preserving or restoring the free state of nature is the fundamental focus, plus the special feature of improving the "quality of life" for man.<sup>507</sup>

Norway, (Oslo, Norwegian Forest Research Institute, 1976); R. W. Shaw, "Acid precipitation in Atlantic Canada", *Environmental Science and Technology* (Washington, D.C.), vol. 13, No. 4, April 1979, p. 406; A. Holt-Jensen, "Acid rains in Scandinavia", *Ecologist* (Wadebridge, Cornwall), vol. 3, No. 9, 1973, p. 378; G. Hidy et al., "International aspects of the long-range transport of air pollutants", report prepared for the United States Department of State, 1978; United States of America, Department of State and Council on Environment Quality, G. O. Barney, ed., *The Global 2000 Report to the President—Entering the Twenty-first Century*, vol. 2: *The Technical Report* (Washington, D.C., 1980), pp. 335–337. On genetic aspects, see Action Plan for the Human Environment, recommendations 39–45, and on fisheries, *ibid.*, recommendations 48–50 (*Report of the United Nations Conference on the Human Environment* ... , pp. 13–17).

<sup>503</sup> Van Nostrand's *Scientific Encyclopedia*, 5th ed. (New York, Van Nostrand Reinhold, 1976). Biological oxygen demand, salinity and toxicity figure prominently in assessing the freshwater environments; ecologically significant "limiting factors" include temperature, clarity, concentrations of oxygen and various salts and evaporation rate. See *inter alia* R. E. Dickinson, *Regional Ecology: the Study of Man's Environment* (New York, Wiley, 1970); R. H. MacArthur, *Geographical Ecology* (New York, Harper and Row, 1972); B. J. Meggers, E. S. Ayensu and W. D. Duckworth, eds., *Tropical Forest Ecosystems in Africa and South America* (Washington, D.C., Smithsonian Institution Press, 1973); G. L. Clarke, *Elements of Ecology* (New York, Wiley, 1965); E. P. Odum, *Ecology* (New York, Holt, Rinehart and Winston, 1963).

<sup>504</sup> See the works cited above; also F. Graham, Jr., *Since Silent Spring* (Boston, Houghton Mifflin, 1970); H. W. Helfrich, Jr., ed., *Agenda for Survival* (New Haven, Conn., Yale University Press, 1970).

<sup>505</sup> See e.g. T. R. Camp, *Water and its Impurities* (New York, Reinhold, 1963); C. Furnham, ed., *Industrial Wastewater Control* (New York, 1965); E. W. Steel, *Water Supply and Sewerage*, 4th ed. (New York, McGraw Hill, 1960); H. F. Lund, ed., *Industrial Pollution Control Handbook* (New York, McGraw Hill, 1971). From the technical viewpoint, "pollution" is not restricted to detrimental change introduced by man, but includes "natural" pollution: the major categories for the hydro-environments are suspended solids, oils and greases, organic matter, dissolved metals, and toxic chemicals ("Water pollution", *Van Nostrand's Scientific Encyclopedia* (*op. cit.*)).

<sup>506</sup> Hospitals, museums, hothouses and laboratories are usual examples, but housing, offices, farms and conveyances of people and goods are also "controlled environments".

<sup>507</sup> *Report of the United Nations Conference on the Human Environment* ... , p. 4, principle 8. See also the Declaration of the Council of the European Communities and of the representatives of the Governments of the member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment (*Official Journal of the European Communities* (Luxembourg), vol. 16, No. C.112, 20 Dec. 1973), especially part I, title II, "Principles of a Community environment policy" (*ibid.*, p. 6); A. Pollis, ed., *Quality of Living: Environmental Viewpoints* (Oklahoma City, American Institute of Discussion, 1973); W. Rosenbaum, *The Politics of Environmental Concern* (New York, Praeger, 1973).

## 8. HEALTH CONSIDERATIONS

287. In this connection, water-related disease is now commonly regarded as an environmental control problem.<sup>508</sup> Not a few developing country States have addressed this increasingly grievous problem in their system agreements or consultations. In Asunción, Paraguay, for example, the Foreign Ministers of the Plata Basin countries adopted a typical statement on the "importance of taking health problems into account in studies and plans for the development of the Basin":

*Considering*

That there are grave health problems arising from ecological relationships in the geographic area of the River Plate Basin, which have an unfavourable impact on the social and economic development of the region;

That this health syndrome is related to the quality and quantity of the water resources;

That close co-ordination and co-operation between the countries concerned in programmes for the control and eradication of these diseases is important;

That these problems are aggravated by the shortage of medical resources, particularly in the rural areas,

*Decides*

1. To emphasize the importance of taking health problems into account in plans and studies for the development of the Basin and to incorporate specific health activities in such plans and studies;

2. To recommend that when it is considering the health aspects of projects for the Basin, the Intergovernmental Committee on Co-ordination . . . should bear in mind the recommendations and decisions adopted by the Ministers of Health of the member countries at their periodic meetings . . . ,

3. To transmit to the Intergovernmental Co-ordinating Committee CI/RC/IV Working Paper No. 4.1 for its consideration and study in consultation with the Ministers of Health . . .<sup>509</sup>

288. The Treaty for Amazonian Co-operation of 1978 includes a special article in recognition of the matter's importance:

*Article VIII*

The contracting parties decide to promote co-ordination of the present health services in their respective Amazonian territories and to take other appropriate measures to improve the sanitary conditions in the region and perfect methods for preventing and combating epidemics.<sup>510</sup>

<sup>508</sup> See e.g. B. Diamant, "Environmental control of water-borne diseases", *Water International* (Lausanne), vol. 6, 1981, p. 50; WHO, *Health Hazards of the Human Environment* (Geneva, 1972), and "The functions of the engineer in the assessment and control of the environmental conditions and hazards that affect man's health" (document DIS/74.2) (mimeo.); UNEP, "Action plan on ecological and habitat management of schistosomiasis" (UNEP/GC(IV)/INF.1); *Proceedings of the International Conference on Water Pollution Control in Developing Countries* (Bangkok, 21–25 Feb. 1978) (Bangkok, Asian Institute of Technology, 1978), vol. I, p. 9. Malaria and intestinal diseases are the prime causes of infant mortality in developing countries; animal health is also seriously affected. See E. G. Wagner and J. N. Lanoix, *Excreta Disposal for Rural Areas and Small Communities* (WHO monograph No. 39) (Geneva, 1958); B. A. Weisbrod, *Disease and Economic Development: the Impact of Parasitic diseases in St. Lucia* (Madison, University of Wisconsin Press, 1973).

<sup>509</sup> Resolution No. 15, Act of Asunción, adopted by the Ministers for Foreign Affairs of the States of the River Plate Basin at their Fourth Meeting, in June 1971. (The text of the resolution is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 323, document A/CN.4/274, para. 322.) See also the review of treaty obligations concerning protection of the aquatic environment ("Les obligations relatives à la protection du milieu aquatique") by J. J. A. Salmon (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, especially pp. 195–200 and 268–271).

<sup>510</sup> Text circulated to the General Assembly as document A/35/580, to be issued as No. 19194 in the United Nations *Treaty*

289. The Programme of Action of the European Communities on the environment devotes a chapter to "Objective evaluation of the risks to human health and to the environment from pollution". The passages of note include:

Pollution will be combated all the more effectively by the possession of objective knowledge of its effects. With this knowledge, it will be possible, . . . to set limits to the presence of pollutants in the environment and determine quality values for products in terms of standards designed to protect human health and the environment.

This requires standardization or harmonization of the methods and instruments used to monitor the various pollutants . . . , so as to render comparable the data obtained from measurements of these pollutants and of their effects.

This action may also reveal gaps in knowledge of pollutants and their effects, as well as indicate certain research subjects to be undertaken in the Community.<sup>511</sup>

The chapter goes on to list the tasks to be undertaken as quickly as possible and to set forth on a provisional basis a first and a second category of pollutants for priority investigation.<sup>512</sup> The action programme further declares:

Care should be taken to ensure that the quantity and quality of water resources available correspond to the various needs and requirements relating to health, ecology and economic activity.

*Series.* Among the environmental problems identified as common to Africa and Asia and in need of urgent attention by the Expert Group Meeting on the Environment of the Asian-African Legal Consultative Committee (New Delhi, 18–21 Dec. 1978) were waste disposal and treatment and public health service schemes.

"A wide variety of water developments can increase the incidence of water-related diseases. The creation of ponds, reservoirs and irrigation and drainage canals in the course of water resource development, and the widespread inadequacy of waste water disposal systems in LDC cities, all favour the persistence or spread of a number of such diseases. In recent years new irrigation systems and reservoirs in Middle and North Africa and West Asia have provided ideal habitats for the intermediate snail host of schistosomiasis, which has spread dramatically among rural populations. This debilitating disease of the intestinal and urinary tract now affects an estimated 250 million people throughout the world. . . . In some irrigation-project and reservoir areas, up to 80 per cent of the population is affected.

"In addition . . . there are numbers of other serious water-related diseases. These include malaria, filariasis (elephantiasis), and yellow fever, all of which are transmitted by mosquitoes. Onchocerciasis, 'river blindness' disease, is transmitted by flies. Paragonimiasis is a disease transmitted by a snail. Poorly managed water resource development projects, as well as the impact of urbanization on aquatic habitats and water quality, contribute to the spread of all these diseases. Diseases typical of waste water contaminated by human faeces—cholera, typhoid fever, amoebic infections and bacillary dysentery—can become problems anywhere in the world. In LDC countries today almost 1.5 billion persons are exposed to these diseases for lack of safe water supplies and human waste disposal facilities. Largely for this reason infant deaths resulting from diarrhoea continue at a high rate. Every day 35,000 infants and children under five years of age die throughout the world; most of these deaths occur in LDC countries. Schistosomiasis afflicts 200 million people in 70 countries and elephantiasis is estimated to cripple 250 million more" (*The Global 2000 Report* . . . (op. cit.), p. 343).

<sup>511</sup> Part II of the Programme of Action, title I, chap. 1, sect. A ("Reasons") (*Official Journal of the European Communities* (Luxembourg), vol. 16, No. C 112, 20 Dec. 1973, p. 12).

<sup>512</sup> Chap. 1, sect. B ("Aims and content") (*ibid.*, pp. 12–13). Pollutants in the first category are listed under the headings "Air", "Noise pollution" and "Water"; those in the second category under the headings "Air" and "Water". Also: "Transport of pollutants over long distances and the harmful effects of their accumulation and their combination necessitate surveillance of the state of environmental pollution at the regional, national and international levels" (chap. 3, sect. 1, A) (*ibid.*, p. 15).

A single watercourse, especially if it flows through two or more countries, must simultaneously satisfy numerous different needs in neighbouring areas. Apart from technical measures to reduce consumption, to increase recycling, to combat pollution and to increase water supplies, strict planning is necessary to ensure supplies of this unique asset, which cannot be replaced by any other natural or artificial substance . . .<sup>513</sup>

## 9. GLOBAL SCOPE OF THE PROBLEM

290. It is now realized that the problems of environmental protection are not limited to the highly industrialized regions of the world. In a report discussing, among other things, aquatic biota and water-related terrestrial biota, the Interim Committee for Co-ordination of Investigations of the Lower Mekong Basin, composed of the Lao People's Democratic Republic, Thailand and Viet Nam, points out:

Changes in the morpho-ecological nature of a river basin, brought about by the impact of development upon the physical and chemical characteristics of water, profoundly influence the biology of the water and its biota. The resultant biological environment, in turn, influences the physical and chemical factors which, in the first instance, have been responsible for remoulding it.<sup>514</sup>

291. During the consideration of the topic "Pollution of rivers and lakes and international law" by the Institute of International Law, one member laid particular emphasis on the importance of this problem area:

. . . It is agreed that water pollution, whether affecting inland waters or the high seas, has terrible effects on human, animal and plant health (cf. *Encyclopaedia universalis*, vol. 13, p. 256). For example, it is agreed that in industrial areas chemical water pollutants, including pesticides and herbicides, create great risks for the health of the population. At the head of the list of diseases which can be transmitted by polluted waters are typhoid fever, bacillary dysentery, infectious hepatitis and cholera (*loc. cit.* p. 257). The danger to health is particularly serious in that fish and shellfish can accumulate toxic substances in sufficiently high concentrations to affect human beings. This danger is far from hypothetical . . .

In the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly on 16 December 1966 (resolution 2200 A (XXI)), the States parties recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (art. 12, para. 1). Furthermore, among the steps to be taken by the States parties to the Covenant paragraph

<sup>513</sup> Chap. 3, sect. 2, B (*ibid.*, pp. 16-17). "Accordingly, the methodology to be used for the definition of quality objectives for water should aim to reconcile all the requirements listed . . . and to ensure an equitable allocation of water, in the necessary quantities and appropriate qualities, among present and future users."

<sup>514</sup> "Role of environmental factors in internationally shared water resources", paper prepared by V. R. Pantulu, Mekong Secretariat, for the 1981 Dakar Interregional Meeting, p. 24 (mimeo.). See especially the discussion of disease vectors and parasites (*ibid.*, pp. 26-28), fish (*ibid.*, pp. 28-32), estuarine biota (*ibid.*, pp. 32-36), and wildlife (*ibid.*, pp. 38-39).

Schistosomiasis is a special problem in the Nile Valley. See UNESCO, *Environmental Effects of Arid Land Irrigation in Developing Countries*, prepared in co-operation with UNEP and SCOPE (Paris, 1978). See also Smithsonian Institution, *Snail Transmission of Schistosomiasis in the Lower Mekong Basin, with Observations on Other Waterborne Diseases*, report submitted to the Mekong Committee (Washington, D.C., 1974); "Fisheries and integrated Mekong River Basin development", report prepared for the Mekong Committee by the University of Michigan (Bangkok, 1976); Pantulu, "Environmental aspects of river development in tropical Asia, with particular reference to the Mekong Basin" (International Water Resources Association, *Proceedings of the Second World Congress on Water Resources*, New Delhi, 12-16 Dec. 1975 (New Delhi, 1975), vol. V, pp. 349); Hayton, "Progress in co-operative arrangements", sect. A (a) ("Pollution control and health management"), *loc. cit.*, pp. 70-71, and works and examples there cited.

2 (b) specifies, "the improvement of all aspects of environmental and industrial hygiene".<sup>515</sup>

292. Relevant international principles received major affirmation in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).<sup>516</sup> Principle 2 emphasizes that the earth's natural resources, including water, "must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate". With relevance to watercourses, principle 6 becomes more specific:

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems . . .

Principle 8, among several other principles, entails affirmative improvement and control:

Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 14 declares:

Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

The two principles most often quoted by students of the law of international watercourses are the following:

### Principle 21

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.

### Principle 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.<sup>517</sup>

<sup>515</sup> *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, pp. 379-380, observations of J. Zourek.

<sup>516</sup> *Report of the United Nations Conference on the Human Environment* . . . , pp. 4-6, chap. I, sect. II.

<sup>517</sup> Principles 21 and 22 are quoted here because of their relevance, although the aspect of responsibility for harm has been dealt with earlier (see sect. D above). Recommendation 51 of the Action Plan adopted at the United Nations Conference on the Human Environment provides that the "creation of river-basin commissions or other appropriate machinery for co-operation" for shared water resources be considered by the Governments concerned". It goes on to recommend that the following principles be considered:

"(i) 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;

"(ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;

"(iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;"

The recommendation then lists the undertakings that such "arrangements" will permit on a regional basis:

"(i) Collection, analysis and exchange of hydrologic data . . . ;

"(ii) Joint data-collection programmes to serve planning needs;



The General Assembly subsequently amplified and affirmed these two principles, providing for the giving, in a co-operative spirit, of technical data on national works as a means of avoiding environmental harm and taking into account that principles 21 and 22 contained the basic norms on the subject.<sup>518</sup>

293. The United Nations Environment Programme, established on the basis of the report of the Stockholm Conference, itself formed an Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States. The final report of that Group, filed in 1978, contains a series of 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.<sup>519</sup> Although not limited in their application to international watercourses, protection of the fresh water environment figured prominently in the discussions.

While set forth in the Special Rapporteur's second report, at least some of the text of these principles should not be omitted from this report.<sup>520</sup>

- “(iii) Assessment of environmental effects of existing water uses;
- “(iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic, and social considerations of water quality control;
- “(v) Rational use, including a programme of quality control, of the water resource as an environmental asset;
- “(vi) Provision for the judicial and administrative protection of water rights and claims;
- “(vii) Prevention and settlement of disputes with reference to the management and conservation of water resources;
- “(viii) Financial and technical co-operation of a shared resource . . .”

<sup>518</sup> General Assembly resolutions 2995 (XXVII) and 2996 (XXVII) of 15 December 1972. See also *Official Records of the General Assembly, Twenty-seventh Session, Annexes*, agenda item 47, document A/8901 (report of the Second Committee); J. Beesley, “The Canadian approach to international environmental law”, *The Canadian Yearbook of International Law* (Vancouver), vol. XI, 1973, pp. 9–11; Sohn, *loc. cit.*; and the statement of the representative of Australia in the Second Committee to the effect that the Stockholm Declaration “represented the first comprehensive international political consensus on environmental issues and, although it was not legally binding, it had been the subject of intensive negotiations and should thus be generally acceptable” (*Official Records of the General Assembly, Twenty-seventh Session, Second Committee*, 1468th meeting, para. 27). It should be noted that the General Assembly, in its resolution 3129 (XXVIII) of 13 December 1973 on environmental co-operation with respect to shared natural resources, regarded efficacious co-operation between States necessary (by means of adequate international norms) and also considered that such co-operation should be based on prior information and consultation. For an examination of the arduous evolution of the prior consultation rule in connection with the Stockholm Conference and subsequently in the General Assembly, see Barberis, *Los recursos* . . . , *op. cit.*, pp. 157–164. The need for and acceptance of such obligations is not limited to the field of international watercourses: “Consultations, including a system of prior notification” are required in the Convention on the Law of the Sea “with a view to avoiding infringement of . . . rights and interests” of coastal States where activities with respect to resource deposits in “the Area” “lie across the limits of national jurisdiction” (art. 142, paras. 2 and 1) (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF.62/122).

<sup>519</sup> UNEP/IG.12/2, annexed to document UNEP/GC.6/17. See UNEP Governing Council decision 6/14 of 19 May 1978, “Co-operation in the field of the environment concerning natural resources shared by two or more States”, expressing satisfaction with the work done by the Group of Experts, approving the report and authorizing the Executive Director to transmit the report to the General Assembly (*Official Records of the General Assembly, Thirty-third Session, Supplement No. 25* (A/33/25), pp. 154–155).

<sup>520</sup> The principles are accompanied by an “explanatory note” to the effect that the principles have been drawn up for the “guidance of

#### Principle 1

It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that . . . States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources . . .

#### Principle 2

In order to ensure effective international co-operation . . . , States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct . . . In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems . . .

#### Principle 3

3. . . . it is necessary for each State to avoid to the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource . . . , in particular when such utilization might:

- (a) Cause damage to the environment which could have repercussions of the utilization of the resource by another sharing State;
- (b) Threaten the conservation of a shared renewable resource;
- (c) Endanger the health of the population of another State.

Without prejudice to the generality of the above principle, it should be interpreted taking into account, where appropriate, the practical capabilities of States sharing the natural resource.

#### Principle 4

States should make environmental assessments before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.

#### Principle 5

States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects.

#### Principle 6

1. It is necessary for every State sharing a natural resource with one or more other States:

- (a) To notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment in the territory of the other State or States; and
- (b) Upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and
- (c) To provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans;

States” with a view to the attainment of the desired objective “in a manner which does not adversely affect the environment”, and to “encourage States sharing a natural resource, to co-operate in the field of environment”. The Group had attempted to avoid “language which might create the impression of intending to refer to . . . either a specific legal obligation under international law, or to the absence of such obligation”. Moreover, the “language used throughout does not seek to prejudice whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law”, nor was it intended “to express an opinion as to whether or to what extent and in what manner the principles—as far as they do not reflect already existing rules of general international law—should be incorporated in the body of general international law”.



2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith in the spirit of good neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

#### Principle 7

Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects.

#### Principle 8

When it would be useful to clarify environmental problems relating to a shared natural resource, States should engage in joint scientific studies and assessments, with a view to facilitating the finding of appropriate and satisfactory solutions to such problems on the basis of agreed data.

#### Principle 13

It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it.

#### Principle 15

The present principles should be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of the developing countries.

294. As the Special Rapporteur's second report described in detail, the Sixth Committee of the General Assembly proved willing to do not much more than to take note of these principles.<sup>521</sup> Nevertheless, elements of the report of the UNEP Intergovernmental Group which, it should be emphasized, are encountered in numerous other sources as well, have found their way into the proposed articles on the law of the non-navigational uses of international watercourses, among them the articles on water as a shared natural resource, responsibility for appreciable harm, and information and data sharing, as well as the article about to be proposed on pollution and environmental protection.

295. The United Nations Water Conference had earlier addressed itself to "codes of conduct" with respect to shared water resources. At the Conference, some representatives considered it "most important to define" such codes, which

could also be framed in such a manner as to allow proper evolution and should be flexible enough to govern the administration of shared water resources during the various stages of socio-economic as well as political development. The basic principles could include free exchange of information among co-riparian States and development of procedures for joint evaluation of factual information.<sup>522</sup>

<sup>521</sup> *Yearbook . . . 1980*, vol. II (Part One), pp. 185-188, document A/CN.4/332 and Add. 1, paras. 163-185.

<sup>522</sup> *Report of the United Nations Water Conference . . .*, p. 115, para. 114. Many of the pertinent recommendations and resolutions of the Conference have been taken up in more detail in previous sections of this report. See also Utton, "International environmental law and consultation mechanisms", *Columbia Journal of Transnational Law* (New York), vol. 12, 1973, p. 56.

## 10. SCIENTIFIC STUDIES ON ENVIRONMENTAL QUESTIONS

296. With respect to environmental protection, even as limited to applications involving international watercourses, a considerable body of professional literature has already appeared.<sup>523</sup> The United States Council on Environment Quality and the Department of State undertook in 1977 at presidential request a world-wide appraisal of each major factor making up the environment, followed by an assessment of environmental ramifications and projections to the year 2000.<sup>524</sup> Separate sections deal with climate, technology, food, fisheries, forestry, water, energy, etc., and the dependent relationships between and among these components are emphasized; major attention is paid to developing countries. With respect to the projections for fresh water quality problems, based on FAO projections, the *Global 2000 Report* takes up salinity, water-

<sup>523</sup> In addition to the many works cited in prior portions of this section devoted to water pollution, see especially Bilder, "The settlement of disputes in the field of international law of the environment", *Recueil des cours . . . 1975-I* (Leyden, Sijthoff, 1976), vol. 144, p. 139, and by the same author, "Controlling Great Lakes pollution: a study of United States-Canadian environmental co-operation", *Michigan Law Review* (Ann Arbor, Mich.), vol. 70, 1972, p. 469; Arnaud, *op. cit.*, and works and practice there cited; F. Florio, "Nota sull'inquinamento delle acque non marittime nel diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. XLVI, 1963, p. 588; M. Despax, *La pollution des eaux et ses problèmes juridiques* (Paris, Librairies techniques, 1968); Bourne, "International law and pollution of international rivers and lakes", *University of Toronto Law Journal*, vol. 21, 1971, p. 193, and by the same author, "The avoidance and adjustment of international disputes concerning the environment: the waters of international drainage basins", paper prepared for the Conference on the Avoidance and Adjustment of Environmental Disputes (Bellagio, Italy, July 1974); J. Barros and D. Johnston, *The International Law of Pollution* (New York, Free Press, 1974); D. Livingston, "Science, technology and international law: present trends and future developments", *The Future of the International Legal Order* (*op. cit.*), p. 104; Barberis, "La regla del intercambio de información o de consulta en el derecho internacional fluvial", *Primeras jornadas argentinas de derecho y administración ambientales* (Buenos Aires, Asociación para la protección del ambiente, 1974); S. Bleicher, "An overview of international environmental regulation", *Ecology Law Quarterly* (Berkeley, Calif.), vol. 2, No. 1, 1972, p. 1; L. A. Teclaff, "The impact of environmental concern on the development of international law", *Natural Resources Journal*, vol. 13, 1973, p. 357, and "Harmonizing water use and development with environmental protection", *ibid.*, vol. 16, 1976, p. 807; L. A. and E. Teclaff, "Transboundary ground water pollution: survey and trends in treaty law", *ibid.*, vol. 19, 1979, p. 629; P. Contini and P. Sand, "Methods to expedite environment protection: international ecostandards", *American Journal of International Law*, vol. 66, 1972, p. 37; P. Gieseke, "Verunreinigung von Binnengewässern als völkerrechtliches Problem", *Zeitschrift für Wasserrecht* (Cologne), vol. 3, 1965, p. 113; G. Guarneri, "Certains aspects juridiques internationaux d'un des problèmes de l'environnement: la lutte contre la pollution des eaux douces", *Rivista di diritto europeo* (Rome), vol. X, 1970, p. 285; F. Jordan, "Recent developments in international environmental pollution control", *McGill Law Journal* (Montreal), vol. 15, No. 2, 1969, p. 279; R. Vander Elst, "Le projet de convention européenne relative à la protection des eaux douces contre la pollution", *Belgian Review of International Law* (Brussels), vol. VI, 1970-1, p. 79; R. d'Arge and A. Kneese, "State liability for international environmental degradation: an economic perspective", *Natural Resources Journal*, vol. 20, 1980, p. 427; G. White, ed., *Environmental Effects of Complex River Development* (Boulder, Colo., Westview Press, 1977); G. Cano, *Derecho, política y administración ambientales* (Buenos Aires, Depalma, 1978); Centro Interamericano para el Desarrollo Integral de Aguas y Tierras, *Conclusiones del seminario interamericano sobre el manejo ambiental y el planeamiento del desarrollo de cuencas hidrologicas* (Merida, Venezuela, 1978); UNITAR, "Protecting the human environment: procedures and principles for preventing and resolving international controversies" (E.75.XV.PS/9).

<sup>524</sup> *The Global 2000 Report . . .* (*op. cit.*), especially pp. 431-499. For praise of the study by the Executive Director of UNEP, see *Uniterra* (Nairobi), vol. 5, No. 8, 1980, pp. 1 and 5-6.

logging (drainage) and disease transmission by streams, lakes and aquifers.<sup>525</sup> Selected summary statements from the report can serve to bring home the increasingly critical state of earth's water resources,<sup>526</sup> for example, the following:

Existing trends indicate that the problems of air and water pollution can be expected to worsen, and the spread of water-borne diseases . . . will present increasing threats to human health.<sup>527</sup>

Water problems resulting from deforestation have appeared in 16 countries in the form of critical water shortages, and in 10 countries in the form of increased flooding. Some countries shared both drought and flooding.<sup>528</sup>

Consequences of increased fertilizer use for aquatic systems are more serious than terrestrial effects and include eutrophication and nitrate contamination of drinking water supplies.<sup>529</sup>

The disruption of water systems is the most certain environmental consequence of forest elimination. Deforestation is most rapid in the very region where water systems are most vulnerable: the equatorial (tropical) belt, . . . The equatorial belt receives almost half the globe's total terrestrial rainfall . . . and the rain is substantially more erosive than elsewhere in the world . . . Deforestation of this belt will have serious effects on the flows in the major river systems such as the Mekong, the Ganges, the Amazon, the Congo, and their tributaries; . . . Effects range from landslides in the mountains and siltation of reservoirs and irrigation areas to the smothering of marine life with silt in coastal areas.<sup>530</sup>

Just one example of the deforestation mentioned, the steady acceleration of which is fully documented, may be cited:

Should population pressures lead to large-scale removal of forest cover in Nepal and Assam, Bangladesh as a whole would be adversely affected by the increased runoff. Under present conditions the country is subject to periodic severe flooding, and the prospect of more frequent and damaging floods would threaten both the productivity of the land and large portions of the population. This may be the most significant environmental problem facing Bangladesh by the year 2000.<sup>531</sup>

Moreover,

even outside of Asia deforestation of watersheds will affect not only natural systems but also the downstream reservoirs, ports, cities, and transportation facilities, all of which will suffer from flooding, sedimentation, and decreased dry-season water levels.<sup>532</sup>

Other conditions are also increasingly causing environmental deterioration:

Burning, overgrazing, and cultivation practices that expose the soil for long periods . . . intensify the extremes of flooding and aridity by reducing soil porosity and water storage capacity, by reducing organic matter, and by increasing compaction.<sup>533</sup>

297. The environmental impacts of large river basin

<sup>525</sup> *The Global 2000 Report* . . . (op. cit.), pp. 137 et seq., especially pp. 150–152, 159, 242–243.

<sup>526</sup> Details, including examples involving international watercourses, may be found in the study.

<sup>527</sup> *Ibid.*, p. 244.

<sup>528</sup> *Ibid.*, p. 274. Also, as a result of improper farming and watershed practices, "hydrologic destabilization will increase rates of erosion and loss of soil organic matter through the year 2000" (*ibid.*, p. 280).

<sup>529</sup> *Ibid.*, p. 284.

<sup>530</sup> *Ibid.*, p. 320.

<sup>531</sup> *Ibid.*, p. 321.

<sup>532</sup> *Ibid.* "From the standpoint of both water supply and water quality, the condition of a catchment or river basin is determined largely by the flora on the upper portions of the basin. The high, often steep portions of the basin usually receive a large proportion of the rainfall, and the flora on these slopes are critically important in determining the quality and flows of water throughout the basin" (*ibid.*, p. 334).

<sup>533</sup> *Ibid.*, p. 335.

development schemes are often great. Large dams involve these impacts, for example:

The inundation of farmland, settlements, roads, railroads, forests, historic and archeological sites, and mineral deposits;

The creation of artificial lakes, which often become habitats for disease vectors such as the mosquitoes that transmit malaria and the snails which transmit schistosomiasis;

The alteration of river régimes downstream of dams, ending the biologically significant annual flood cycle, increasing water temperature, and sometimes triggering river bank erosion as a result of an increased sediment-carrying capacity of the water;

The interruption of upstream spawning migrations of fish; and

Water quality deterioration.<sup>534</sup>

Irrigation systems have their own environmental problems:

Danger of soil salinization and waterlogging in perennially irrigated areas;

Water weeds, mosquitoes, and snail infestation of drainage canals, with the danger of malarial and schistosomiasis infections spreading . . . especially in parts of Africa and Latin America; and

Pollution of irrigation return water by a variety of agricultural chemicals, with negative consequences for aquatic life and for the human use of downstream waters.<sup>535</sup>

Thus

While the benefits of dams and irrigation development may outweigh the costs, environmental impacts have a definite bearing on the benefit/cost ratios . . .<sup>536</sup>

298. The projections in the report

point to world-wide increases in urbanization and industrial growth in the intensification of agriculture—trends that, in turn, imply large increases in water pollution in many areas . . .

Urban and industrial effluent will be concentrated in the rivers, bays, and coastal zones near the world's largest urban-industrial agglomerations. In the developing world—where 2 billion additional persons are projected to be living by 2000 and where rapid rates of urbanization continue—urban and industrial water pollution will become ever more serious because many developing economies will be unable or unwilling to afford the additional cost of water treatment.<sup>537</sup>

Urban and industrial growth also increases consumptive uses of water, one of the fastest growing of which is the consumptive use of evaporative cooling for thermal-electric generating facilities.

Thermal pollution impacts are numerous and generally deleterious in mid to low latitudes. . . . In the tropics, . . . where . . . many species live near their upper temperature tolerance, thermal discharges are often lethal. At all latitudes increased temperature reduces the dissolved oxygen in the water, stressing aquatic fauna by speeding metabolic rates while at the same time depleting oxygen supplies.<sup>538</sup>

<sup>534</sup> *Ibid.*, p. 339.

<sup>535</sup> *Ibid.* In addition to malaria and schistosomiasis, there are numerous other serious water-related diseases.

<sup>536</sup> *Ibid.* p. 339.

"The situation in the Mekong River Basin happens to be relatively well understood because 20 years of internationally co-ordinated studies have examined the entire river basin as a single planning unit. Other densely populated river basins in Asia, Africa and Latin America are the focus of similarly ambitious schemes, but in most cases there are no co-ordinated studies or even adequate data. Consequently the full social and economic costs of these proposed projects can scarcely be estimated."

"A considerable list of costly impacts are associated with the High Aswan Dam and the irrigation development that has subsequently taken place in the Nile Delta."

<sup>537</sup> *Ibid.*, p. 340.

<sup>538</sup> *Ibid.*, p. 341. Other impacts include the destruction of small organisms such as fish larvae (often poisoned by antifouling

(Continued on next page)

299. According to the study, perhaps the most under-rated aspect of freshwater systems throughout the world is their function as aquatic habitat.

At some point, high social and economic costs will follow the continued neglect of the water quality needed to maintain ecosystem health. . . . since aquatic habitats are much more difficult to know and monitor than terrestrial ones, it is in serious doubt.<sup>539</sup>

300. Man's heightened exploration for and exploitation of mineral resources also have negative consequences for the freshwater environment: "The wastes from mining and the early stages of refining are . . . sometimes toxic . . ."; in this connection, "the mining and cleaning of coal produces more waste than the extraction of any nonfuel mineral. . . . Uranium is also responsible for large amounts of mining waste . . . several countries are now seeking ways to protect agricultural land, forests and waterways from pollution from mine wastes."<sup>540</sup>

301. If the forecasts arrived at in the *Global 2000* study are actually allowed to befall mankind, the prospects for improving, or even retaining, the quality of life on earth are problematical. Both intensified national efforts and vigorous multilateral co-operation are prerequisites to forestalling this multifaceted pattern of environmental degradation.<sup>541</sup>

(Footnote 538 continued)

biocides); reduction of fish abundance, biomass and species diversity; exacerbation of synergistic stresses; shifting of the balance among algae species, creating odour and taste problems; death of many sensitive species from sudden temperature changes during startups and shutdowns.

<sup>539</sup> *Ibid.*, p. 345. In addition to toxic wastes from petrochemical, metallurgical and other industries, the projected quadruplication in pesticide use on crops in developing countries will lead to increased poisonings (*ibid.*, pp. 397, 426).

<sup>540</sup> *Ibid.*, p. 385. "Surface and underground water is frequently polluted by effluents of mining and milling operations and by rainfall or stream action on solid mine and mill wastes" (*ibid.*, p. 387). Examples include acid mine drainage from sulphur-bearing mineral mines and dumps, killing many forms of life by lowering the pH, and salt wastes from potash mining; besides the famous case of the Rhine, the problem is acute in the Werra River waters shared by the German Democratic Republic and the Federal Republic of Germany, part of the Weser River system, with the result that Bremen can now take from the Weser only 20 per cent of its water supply (*ibid.*, pp. 387-388). Nuclear seepage underground has also become a threat to be reckoned with; see *Newsweek*, 20 Aug. 1973, pp. 79-80, and generally, Ford Foundation Nuclear Study Group, *Nuclear Power Issues and Choices* (Cambridge, Mass., 1977); L. Emmelin and B. Wiman, *The Environmental Problems of Energy Production* (Stockholm, 1978).

<sup>541</sup> See *The Global 2000 Report* . . . (*op. cit.*), pp. 406-409 and 427-431. "Water management could become the single most important constraint on increasing [crop] yields in the developing world" (*ibid.*, p. 100). On these matters, consult also, *inter alia*, R. Dasman et al., *Ecological Principles for Economic Development* (London, Wiley, 1974); H. E. Dregne, ed., *Arid Lands in Transition* (Washington, D.C., American Society for the Advancement of Science, 1970); FAO *The State of Food and Agriculture* (Rome, 1977), and *Guidelines for Watershed Management* (Rome, 1977); United States Agency for International Development, *Proceedings of the U.S. Strategy Conference on Tropical Deforestation* (Washington, D.C., 1978); E. P. Eckholm, *Losing Ground: Environmental Stress and World Food Prospects* (New York, Norton, 1976); J. Simpson and R. Bradley, "The Environmental impact of water reclamation in overseas countries", *Water Pollution Control* (Maidstone, Kent), vol. 77, part 2, 1978, p. 222; "Community water supply and wastewater disposal", *WHO Chronicle* (Geneva), vol. 30, No. 8, 1976, p. 329; UNESCO, *Tropical Forest Ecosystems*, a "state of knowledge" report prepared in collaboration with UNEP and FAO (Paris, 1978); OECD, *Anticipating the Effects from Chemicals in the Environment* (Paris, 1978), and *Interfutures* (Paris, 1979); P. Ehrlich et al., *Ecoscience: Population, Resources, Environment* (San Francisco, Calif., Freeman, 1977); N. Myers, *The Sinking Ark* (Oxford, Pergamon Press, 1979);

## 11. THE SPECIAL ISSUE OF THE MARITIME INTERFACE

302. The technical and scientific communities study the interactions that take place where fresh water meets the sea, but water resources lawyers and international lawyers have not adequately stressed the importance of this dimension of the law of international watercourses.<sup>542</sup> Developments with respect to the marine environment demand attention. The concern for river groundwater system quality has, to be sure, long included saltwater intrusion—an environmental impact of the oceans upon the fresh water system—but serious attention must also be paid to the outpourings from streams and from aquifers into the sea, where the environmental impact has been serious. Much of the detrimental alteration is caused by watercourses, including international watercourses.

303. The problem is concentrated at the deltas and in the estuaries, but in addition effects are usually transmitted along the coasts and sometimes far out to sea.<sup>543</sup> Treaties have been concluded by the littoral States of several seas that include provisions relating to river-borne pollution.<sup>544</sup> Thus far, although these relationships are obviously of increasing importance, it seems that co-operation between marine resources managers and their opposite numbers dealing with international watercourses is rare. The 1980 Protocol for the protection of the Mediterranean Sea against pollution from land-based sources nonetheless provides especially for the international watercourse situation:

E. Salati et al., "Origem e distribuição das chuvas na Amazônia, *Interciencia* (Caracas), vol. 3, No. 4, 1978, p. 200; Brazil, Secretarias de Estado de Planejamento e Coordenação, de Agricultura et de Ciencia e Tecnologia, *Planoroeste II* (Belo Horizonte, 1978); M. I. L'vovich, *Mirovye vodnye resursy i ikh budushchee* (Global water resources and their future) (Moscow, Mysl, 1974); R. Persson, *Forest Resources of Africa* (Stockholm, Royal College of Forestry, 1977); H. Anderson et al., *Forests and Water* (Washington, D.C., U.S. Forest Service, 1976); Committee for Co-ordination of Investigations of the Lower Mekong Basin, *Pa Mong Optimization and Downstream Effects Study: Environmental Effects* (Bangkok, 1976); L. Obeng, "Water and health", *Clean Water for All* (Washington, D.C., 1976); International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy* (Morges, Switzerland, 1978).

<sup>542</sup> But see S. Burchi, "International legal aspects of pollution of the sea from rivers", *The Italian Yearbook of International Law*, 1977 (Naples), vol. III, 1978, p. 115; Hayton, "Progress in co-operative arrangements", *loc. cit.* p. 73; Manner, "Water pollution in international law", *loc. cit.* p. 70.

<sup>543</sup> The physical and biological relationships are complex. See e.g. "River discharge and marine pollution" (E/C.7/2/Add.8/Rev.1); O. Schachter and D. Serwer, "Marine pollution problems and remedies", *American Journal of International Law*, vol. 65, 1971, p. 84; J. L. Hargrove, *Who Protects the Ocean?* (St. Paul, Minn., West Publishing Co., 1975).

<sup>544</sup> Convention on the prevention of marine pollution from land-based sources (Paris, 1974) (*International Legal Materials*, vol. XIII, No. 2, March 1974, p. 352); Convention on the protection of the marine environment of the Baltic Sea area (Helsinki, 1974) (*ibid.*, vol. XIII, No. 3, 1974, p. 546); Convention on the protection of the Mediterranean Sea against pollution (Barcelona, 1976) (*ibid.*, vol. XV, No. 2, 1976, p. 290, to be issued as No. 16908 in the United Nations *Treaty Series*); Kuwait Regional Convention for co-operation in the protection of the marine environment from pollution, 1978, (*ibid.*, vol. XVII, No. 3, 1978, p. 511, see also pp. 501-511). On 23 March 1981, at a Conference of Plenipotentiaries of the States concerned (Abidjan, 16-23 March 1981), a Convention on co-operation in the protection and development of the marine and coastal environment of the West and Central African region was adopted, together with a Protocol on co-operation in combating pollution in cases of emergency, dealing with the question of wastes carried to the coasts by rivers (see Final Act of the Conference (UNEP/IG.22/7)).

## Article 11

1. If discharges from a watercourse which flows through the territories of two or more parties or forms a boundary between them are likely to cause pollution of the marine environment of the Protocol area, the parties in question . . . are called upon to co-operate with a view to ensuring [the Protocol's] full application.

2. A party shall not be responsible for any pollution originating on the territory of a non-contracting State. However, the said party shall endeavour to co-operate with the said State so as to make possible full application of the Protocol.<sup>545</sup>

Within the international watercourse system, however, and aside from contractual duties, a collective obligation of the system States may be said to prevail for working out measures on an equitable basis to reduce or eliminate pollution causing appreciable harm to the marine environment, at least where the pollution originates in more than one system State.

304. Most significant is the United Nations Convention on the Law of the Sea, which consistently recognizes the problem, particularly in part XII, section 5, "International rules and national legislation to prevent, reduce and control pollution of the marine environment". The Convention has 14 articles directly bearing on the responsibilities of States with respect to international watercourses.<sup>546</sup> For example, article 207, "Pollution from land-based sources", stipulates in paragraph 1:

States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers [and] estuaries . . . , taking into account internationally agreed rules, standards and recommended practices and procedures.

<sup>545</sup> *International Legal Materials*, vol. XX, No. 4, 1980, p. 873. "In conformity with article 11 . . . , the parties shall co-operate . . . in scientific and technological fields related to pollution from land-based sources, particularly research on inputs, pathways and effects of pollutants and on the development of new methods for their treatment, reduction or elimination. To this end the parties shall, in particular, endeavour to: (a) exchange scientific and technical information; (b) co-ordinate their research programmes" (art. 9) (*ibid.*, p. 872).

The Protocol applies "to polluting discharges . . . from land-based sources within the territories of the parties, in particular: . . . indirectly, through rivers, canals or other watercourses, including underground watercourses, or through run-off; . . ." (art. 4, para. 1 (a)) (*ibid.*, p. 870); "the danger posed to the marine environment and to human health by pollution from land-based sources and the serious problems resulting therefrom in many coastal waters and river estuaries" are recognized as "primarily due to the release of untreated, insufficiently treated or inadequately disposed domestic or industrial discharges, . . ." (*ibid.*, preamble, p. 869); the parties are to carry out "at the earliest possible date monitoring activities in order: (a) systematically to assess . . . the levels of pollution along their coasts, in particular with regard to the substances or sources listed in annexes I and II, and periodically to provide information in this respect; . . ." (art. 8) (*ibid.*, p. 872); ". . . when land-based pollution originating from the territory of one party is likely to prejudice directly the interests of one or more of the other parties, the parties concerned shall, at the request of one or more of them, undertake to enter into consultation with a view to seeking a satisfactory solution" (art. 12, para. 1) (*ibid.*, p. 873).

See also annex I (*ibid.*, pp. 875-876), annex II (*ibid.*, pp. 876-877), and annex III (factors to be taken into account in issuance of authorizations for discharge of wastes containing controlled substances) (*ibid.*, pp. 877-878). Art. 8 of the 1976 Barcelona Convention requires the parties to take "all appropriate measures to prevent, abate and combat pollution of the Mediterranean Sea area caused by discharge from rivers . . ." (*ibid.*, vol. XV, No. 2, 1976, pp. 291-292).

<sup>546</sup> Arts. 66, 67, 194, 197-202, 204, 206, 207, 213 and 235 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF. 62/122).

Also relevant is the provision in paragraph 3 of article 7: "States shall endeavour to harmonize their policies in this connection at the appropriate regional level"; paragraph 4 obliges States to endeavour to establish regional rules, standards and recommended practices and procedures, as well as global ones, "acting especially through competent international organizations or diplomatic conferences"; paragraph 5 requires the said laws, regulations, measures, rules, standards and recommended practices and procedures to include "those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment".<sup>547</sup>

305. It would be difficult to maintain that domestic legislation and machinery for regulation, investigation, determination of fault and damage assessment would be sufficient where the source of the pollution is an international watercourse. Article 235 of the Convention, "Responsibility and liability", emphasizes compensation in respect of "all damage caused by pollution of the marine environment" and requires States to co-operate in "implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes" (para. 3). Under these terms, the system States of an international watercourse that flows to the sea will be called upon to prepare standards and procedures to meet this obligation.

306. In section 4, "Monitoring and environmental assessment", the Convention provides:

States shall, consistent with the rights of other States, endeavour . . . directly, or through the competent international organizations, to observe, measure, evaluate and analyse . . . the risks or effects of pollution of the marine environment. (Art. 204, para. 1.)<sup>548</sup>

When States have "reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall . . . assess the potential effects of such activities . . . and shall communicate reports of the results" (art. 206). Reports must be published or provided "to the competent international organizations" (art. 205). Also mandated is co-operation "for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment" (art. 200).<sup>549</sup>

307. "When a State becomes aware of cases in which the marine environment is in imminent danger of being

<sup>547</sup> These rules, standards, etc. are to be re-examined from time to time (art. 207, para. 4). The Convention also dedicates the first article in part XII, sect. 6, "Enforcement", to this point: with respect to land-based sources of pollution, States shall, among other things, take "measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conferences . . ." (art. 213).

<sup>548</sup> "In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage to determine whether these activities are likely to pollute the marine environment" (art. 204, para. 2).

<sup>549</sup> Moreover, States "shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, the exposure to it, and its pathways, risks and remedies".

damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations" (art. 198). States in such an affected area "and the competent international organizations"—which might include river commissions or similar joint institutions created by system States—are required to co-operate "in eliminating the effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents . . ." (art. 199).

308. Assuming that the Convention enters into force, or that the foregoing provisions represent or otherwise become general international law, the question will arise whether and to what extent system States will need to join forces to meet these obligations as applied to their international watercourses, quite apart from the disposition and effect of the draft articles on the law of the non-navigational uses of international watercourses.

309. Article 193 of the Convention qualifies the right of States to exploit their natural resources, requiring its exercise to be "pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment". States are obliged, under article 194, paragraph 1, to "take all measures . . . that are necessary to prevent, reduce and control pollution of the marine environment from any source, . . . individually or jointly as appropriate, and they shall endeavour to harmonize their policies in this connection". Land-based sources are expressly listed in paragraph 3 of the article. In addition, paragraph 2 provides that States must "ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . .".

310. Finally, separate articles are devoted to interest in and responsibility for fisheries involving diadromous fish stocks and species. The use of international rivers by such fish in the completion of their life cycles engages the collective responsibility of system States.<sup>550</sup>

311. Although existing treaties and institutions calculated to deal with the protection of an international watercourse from pollution disregard what happens after the waters pass beyond the river mouth or delta,<sup>551</sup> system States presumably will become, where

they have not already become, responsible for protecting the maritime waters reached by their rivers' effluents. The Convention on the Law of the Sea is considerable if not yet conclusive evidence of the growth and acceptance of such international obligations.<sup>552</sup> An international watercourse is, after all, part of a larger interdependent system.<sup>553</sup> The consequences of this interdependence require a broad approach to the rational management of international water resources; general rules of international law should foster the essential co-operation called for. Indeed, "equitable participation" for particular international watercourse systems may very well need to be recalculated in the light of maritime water quality and responsibilities for environmental protection. The considerable pollution and extra-watercourse environmental impact that may have been permitted previously by one or more system States may have to be abated because of obligations to protect and preserve the marine environment. For example, a decrease in coastal waters fish catches as a result of pollution introduced from an international watercourse may become the basis for complaint by an adjacent coastal State, or by a landlocked State with fishing rights, which State may or may not be a system State of the international watercourse.<sup>554</sup>

## 12. THE PROPOSED ARTICLE

312. Based on existing and evolving State practice and the prevailing awareness of the fragility of the interdependent systems of the biosphere, as well as the noxious condition of so many of the world's international watercourses, the following draft article is proposed for the consideration of a successor Special Rapporteur and of the Commission:

### *Article 10. Environmental protection and pollution*

**1. For the purposes of this article, "pollution" means any introduction by man, directly or indirectly, of substances, species or energy into the waters of an international watercourse system which results in 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.**

<sup>550</sup> Art. 66, "Anadromous stocks", and art. 67, "Catadromous species".

<sup>551</sup> With but apparently two known exceptions: the 1976 Convention on the protection of the Rhine against chemical pollution, which in art. 1, para. 2 (g) provides that the need "to preserve an acceptable quality of sea water" must be taken into account (*Official Journal of the European Communities* (Luxembourg), vol. 20, No. L 240 (19 September 1977), p. 38; to be issued as No. 17511 in the *United Nations Treaty Series*), and the 1971 Agreement between Finland and Sweden concerning frontier rivers, which is applicable to "the special effluents formed by the various branches at the mouth of the River Torne" and "the part of the Gulf of Bothnia lying between the Finnish and Swedish parishes of lower Torne" (art. 1) (*United Nations Treaty Series*, vol. 825, p. 272). For their zones of common interest seaward from the River Plate, Argentina and Uruguay, under their 1973 Treaty, formed a Mixed Technical Commission (with headquarters in Montevideo), and created an entirely separate River Plate Administrative Commission (sited on Martin García Island) (*International Legal Materials*, vol. XIII, No. 2, 1974, pp. 261-262 and 265-266; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 298-300, document A/CN.4/274, paras. 115-130).

<sup>552</sup> To supplement the Helsinki Rules, the International Law Association adopted six articles on "Marine pollution of continental origin" (ILA, *Report of the Fifty-fifth Conference . . .*, pp. xviii-xviii and 97-106 (Rapporteur: K. Cuperus). See also "Resolution on measures concerning accidental pollution of the seas" of the Institute of International Law (*Annuaire de l'Institut de droit international*, 1969, vol. 53, Part Two, pp. 380-385).

In the course of the work of the Fifteenth Commission of the Institute on pollution of international rivers and lakes, the Rapporteur, J. J. A. Salmon, said that

"it had become clear that pollution of the sea from sources on land was also transboundary pollution caused by rivers and lakes which it would be quite arbitrary not to deal with. Furthermore, the concern for protection of the environment as such—truly the heritage of mankind—which was now predominant throughout the world had even led the Commission to wonder whether States should not be required to see to the protection of the waters in their own territories" (*ibid.*, 1979, vol. 58, Part Two, p. 107).

<sup>553</sup> See Burchi, *loc. cit.*, p. 131.

<sup>554</sup> See Convention on the Law of the Sea, part V in general, and in particular art. 56, paras. 1 (b) (iii) and 2, and arts. 59, 60 and 69 (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/Conf. 62/122).

2. For the purposes of this article, "environmental protection" means safeguarding the fauna, flora and other natural resources of the earth from destruction, impairment or degradation and the preservation of the quality of life and of its amenities.

3. Consistent with article 6 on "Equitable participation", article 7 on "Equitable use determinations" and article 8 on "Responsibility for appreciable harm" of these articles, a system State is under a duty to maintain pollution of shared water resources at levels sufficiently low that no appreciable harm is caused in the territory of any other system State, provided that a system State is under no duty to abate pollution emanating from another system State in order to avoid causing appreciable harm to a third system State as a result of such pollution, except in concert on an equitable basis with other system States.

4. At the request of a co-system State, a system State from whose territory pollution is emanating that causes harm, but not appreciable harm, in the territory of the co-system State by means of the waters of an international watercourse shall take all reasonable measures to abate the said pollution, provided that the co-system State defrays the reasonable costs, direct and indirect, of the appropriate abatement measures if so requested by the system State causing the harm.

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

6. Unless otherwise provided by agreement among the system States concerned, no State may pollute or permit the pollution of the waters of an international watercourse system in concentrations or combinations that result in loss of human life, or debilitating or disfiguring illness, in the territory of a co-system State. Without prejudice to its responsibility for appreciable harm under article 8 of these articles, in the event that such pollution none the less occurs, the polluting system State shall with all deliberate speed abate the pollution to the level necessary to avert the said result.

7. System States shall establish, individually or jointly, régimes to ensure that their activities and activities under their jurisdiction or control cause no appreciable or irreversible environmental degradation in or by means of the international watercourse system.

8. Where an international watercourse system discharges into maritime waters or an enclosed sea, the system States are under a duty individually and jointly and on an equitable basis to take the measures necessary to fulfil their obligations, customary and conventional, including those derived from the law of the sea, to protect the maritime environment, including preventive, corrective and control measures.

9. In the event of a pollution or environmental emergency, the system State or States within whose jurisdiction the emergency has been precipitated, the system State or States within whose jurisdiction the impact of the emergency occurs, and any system State or States having knowledge of the occurrence shall communicate by the most rapid means available to all system States that may possibly be affected all available relevant information and data and shall take immediate

action to neutralize or mitigate the danger or the damage, individually or jointly with other system States.

10. The system States of an international watercourse system shall consult, either through their competent joint or international institutions or by recurrent meetings, with a view to the adoption of a pollution control and environmental protection régime for the system sufficient to meet their responsibilities in that regard under international law, including the present articles.

11. In the event that abatement or mitigation of specific pollution, or a particular programme for the protection of the environment, is required by one or more system States in order to achieve compliance with the provisions of this article, the system States concerned shall negotiate with a view to arriving at an agreed timetable and efficacious measures for the accomplishment of the abatement, mitigation or programme, or at alternative arrangements sufficient for the purpose, as appropriate.

12. In addition to the rights and duties described in article 8, on "Responsibility for appreciable harm", and article 9, on "Information and data sharing", of these articles, system States are under a duty to share with one another the available physical, chemical and biological data on pollutants and environmental protection factors, and the effects of pollution and environmental harm, related to their international watercourse systems, in order that individually and jointly the fullest practicable technical understanding of any pollution or environmental protection problem involving the international watercourse may be attained. Environmental impact assessments shall be prepared by the system States concerned, where one of them so requests and offers to defray the reasonable costs on an equitable basis.

13. In fulfilment of its obligations under this article, a system State may require contribution on a equitable basis from other system States benefited by the pollution control or environmental protection-related measures or programmes called for under the circumstances and, if the system State's resources are still insufficient, shall avail itself of available technical and other assistance from Governments and from intergovernmental organizations of which it is a member.

14. The provisions of this article are without prejudice to any duty owed by a system State or by the system States collectively to non-system States for harm caused to rights or interests of non-system States.

313. The proposed text begins with definitions of pollution and environmental protection, building on the several definitions found in the studies approved and published by non-governmental professional organizations and in State practice.<sup>555</sup> The definition in paragraph 1 of the suggested draft article excludes harmful changes in the quality or composition of the waters brought about by nature alone. That is, even though the agency may be indirect, human action or inaction is a prerequisite.<sup>556</sup> It should be noted that the

<sup>555</sup> All definitions will presumably be refined and collected in a separate article on definitions once the work of the Commission on this topic nears conclusion.

<sup>556</sup> Natural change, however, might very well result in environmental damage. As pointed out in the commentary to art. IX of the



definition is a "physical" one, not one defining pollution in terms of what is detrimental to the legally protected interests of States. The definition thus imports no notion or condition of legal injury. Pollution as here defined is, in brief, the fact of qualitative alteration directly or indirectly by human agency and adversely affecting, in the objective sense, water use, human health or safety, or the environment. Whether the consequences of such alteration require any degree of abatement as a matter of law is a separate question dealt with in other provisions of the article.<sup>557</sup>

314. Some of the leading prior definitions consulted provide useful comparison with the proposed text. The definition of the Institute of International Law is the one most recently adopted:

... "pollution" means any physical, chemical or biological alteration in the composition or quality of waters which results directly or indirectly from human action and affects the legitimate uses of such waters, thereby causing injury.<sup>558</sup>

(Footnote 556 continued.)

Helsinki Rules, defining pollution: "Of course, . . . 'human conduct' refers to failure to act as well as to affirmative action" (ILA, *Report of the Fifty-second Conference* . . . , p. 496). For example, failure to act to prevent the leaching of contaminants from mine tailings in the international watercourse would constitute "human conduct" in terms of the Helsinki Rules and introduction "indirectly" by man in terms of the definition here proposed.

<sup>557</sup>UNITAR, *International Co-operation for Pollution Control*, paper prepared by D. Serwer, Research Reports No. 9, Feb. 1972, p. 1.

A reading at this juncture of the classes of water pollution, as listed by WHO, may prove useful:

"(a) Pollution by bacteria, viruses and other organisms that can cause disease;

"(b) Pollution by decomposable organic matter, which by absorbing the oxygen in the water, kills fish, produces offensive smells and gives rise to general unsightliness; . . .

"(c) Pollution by inorganic salts, the characteristic of which is that they cannot be removed by any simple conventional treatment process; they may make the water quite unsuitable for drinking, for irrigation and for many industries;

"(d) Pollution by plant nutrients—potash, phosphates, nitrates, etc.—which are also largely inorganic salts but which have the added property of increasing weed growth, promoting algal 'blooms' and producing, by photosynthesis, organic matter that may settle on the bottom of a lake . . . ;

"(e) Pollution by oily materials, which may be inimical to fish life, cause unsightliness, screen the river surface from the air thus reducing reoxygenation, accumulate in troublesome quantities . . . and have a high oxygen demand;

"(f) Pollution by specific toxic agents, ranging from metal salts to complex synthetic chemicals.

"Also worthy of mention are: waste heat, . . . ; silt, . . . ; and radioactive substances" (WHO, *Water Pollution Control* (Geneva, 1966), Technical Report Series No. 318, p. 6).

<sup>558</sup>Resolution on "the pollution of rivers and lakes and international law", art. I, para. 1 (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 197). The OECD definition, developed through extended consultation, reads:

"Pollution" means any introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, impair amenities or interfere with other legitimate uses of the environment"; and

"Transfrontier pollution" means any intentional or unintentional pollution whose physical origin is subject to and situated wholly or in part within the area under the national jurisdiction of one country and which has effects in the area under the national jurisdiction of another country" (OECD, *OECD and the Environment* (op. cit.), p. 116 (annex to recommendation C(77)28(Final), paras. (a) and (c)). The Intergovernmental Oceanographic Commission of UNESCO, in its "Comprehensive outline of the scope of the long-term and expanded programme of oceanic exploration

315. Still another definition is that of the Helsinki Rules:

... the term "water pollution" refers to any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin.<sup>559</sup>

As the commentary to this definition states, the concern "is not with changes that improve the content or quality of water"; it is with "changes that render the water either unusable or less usable for a beneficial use or other changes that are of a deleterious nature".<sup>560</sup> Thus as early as the adoption of the Helsinki Rules (1966), the harmful effects of water pollution were seen as not restricted to impairment of a use of the waters. For example, water-borne or water-related disease may be contracted without going near the water, but the international watercourse system was the medium through which transmission was effected; creation of the conditions which facilitate the establishment of disease vectors is indirect human intervention. And, because

the nature and effect of pollutants are in such a state of change, it is advisable to adopt a definition of pollution comprehending any detrimental alteration in the natural composition or quality of the water irrespective of its effects on subsequent users.<sup>561</sup>

316. The Secretary-General of the United Nations, in his report on "Prevention and control of marine pollution", used the following definition:

Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairing of quality for use of seawater and reduction of amenities.<sup>562</sup>

and research", proposed the following definition of marine pollution:

"Introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to human health, hindrance to marine activities including fishing, impairing of quality for use of seawater and reduction of amenities" (A/7750, para. 2).

Art. 40 of the Statute for the Uruguay River, adopted by Uruguay and Argentina in 1975, defines "contaminación" as "la introducción directa o indirecta, por el hombre, en el medio acuático, de sustancias o energía de las que resulten efectos nocivos" (*Actos internacionales Uruguay-Argentina 1830-1980* (op. cit.), p. 601). See also the discussion of definitions of pollution in *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part One, pp. 268-272.

<sup>559</sup>Art. IX (ILA, *Report of the Fifty-second Conference* . . . ), p. 494).

<sup>560</sup>*Ibid.*, p. 495.

<sup>561</sup>*Ibid.*, p. 496. "A river is considered polluted when the water in it is altered in composition or condition directly or indirectly as a result of the activities of man so that it is less suitable for any or all of the purposes for which it would be suitable in its natural state" (IAEA, *Disposal of Radioactive Wastes into Rivers, Lakes and Estuaries*, Report of a panel of experts sponsored by IAEA and WHO, Safety Series No. 36 (Vienna, 1971), p. 1, footnote 1). The Sub-Committee of the Asian-African Legal Consultative Committee appointed to prepare draft articles on the law of international rivers, proposed this definition: "Water pollution, as used in this proposition, refers to any detrimental change resulting from human conduct in the natural composition, content or quality of the waters of an international drainage basin" (proposition VIII, para. 2) (Asian-African Legal Consultative Committee, *Report of the Fourteenth Session* . . . (op. cit.), p. 105).

<sup>562</sup>E/5003, para. 2. Principle 7 of the Stockholm Declaration also includes "amenities":

"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to



Reviewing that widely accepted definition, a UNITAR study observes:

Pollution is viewed as that part of the flow of materials and energy from man's activities to the environment that may cause undesirable effects. The choice of what is undesirable may vary with the physical, legal, economic, social and cultural context. Pollution control is viewed as the management of this flow in order to achieve objectives such as the protection of human health, the protection of organisms or populations other than man or the protection of other resources, including the stability of the environment itself.<sup>563</sup>

317. In the 1979 Convention on long-range transboundary air pollution, this definition appears:

(a) "Air pollution" means the introduction by man, directly or indirectly, of substances or energy into the air resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems and material property and impair or interfere with amenities and other legitimate uses of the environment, and "air pollution" shall be construed accordingly;

(b) "Long-range transboundary air pollution" means air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State at such a distance that it is not generally possible to distinguish the contribution of individual emission sources or groups of sources.<sup>564</sup>

Showing similarities, article 1, paragraph 4 of the Convention on the Law of the Sea carries the following definition:

"Pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.<sup>565</sup>

318. The 1969 draft European convention on the protection of fresh water against pollution adopted by the Consultative Assembly of the Council of Europe contains the definition:

"water pollution" means any detrimental change directly or indirectly resulting from the activities of man in the natural composition, content or quality of the waters;<sup>566</sup>

the 1974 draft, however, extends the definition thus:

"Water pollution" means any impairment of the composition or state of water, resulting directly or indirectly from human agency, in particular to the detriment of:

Its use for human and animal consumption;

Its use in industry and agriculture;

The conservation of the natural environment, particularly of aquatic flora and fauna.<sup>567</sup>

harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea" (*Report of the United Nations Conference on the Human Environment* . . . , p. 4).

<sup>563</sup> UNITAR, *International Co-operation for Pollution Control* . . . , p. 1.

<sup>564</sup> Art. 1 (E/ECE/1010).

<sup>565</sup> For similar language, see also the 1978 Kuwait Regional Convention for co-operation in the protection of the marine environment from pollution, art 1, para. (a) (*International Legal Materials*, vol. XVII, No. 3, 1978, p. 512); the 1974 Convention on the protection of the marine environment of the Baltic Sea area, art. 2, para. 1 (*ibid.*, vol. XIII, No. 3, 1974, p. 547); the 1976 Barcelona Convention for the protection of the Mediterranean Sea against pollution, art. 2, para. (a) (*ibid.*, vol. XV, No. 2, 1976, p. 290, to be issued as No. 16908 in the United Nations *Treaty Series*).

<sup>566</sup> Art. 1, para. (c) (Council of Europe, Consultative Assembly, recommendation 555 (1969) (doc. 2561) of 12 May 1969, reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 344, document A/CN.4/274, para. 374).

<sup>567</sup> Art. 1, para. (d), of the draft European convention for the protection of international watercourses against pollution (Council of

In this connection it should be noted that the frequent and persistent problem of the intrusion of salt water into fresh water, surface and underground, is within the definition of pollution to the extent that human intervention has induced the salt water invasion, initially or to an increased degree or reach.

319. Since "substances" in the definition might not be interpreted to include plants, animals (for example, varieties of fish) and other living organisms including parasites, predators and vectors, "species" has been added to the definition. "Substances" may connote things inert, at least not alive. The introduction of various species can, for example, accelerate eutrophication, clog intakes and machinery, damage fisheries and aquacultures, reduce available oxygen, spoil recreation or transmit disease. The effects of such introduction can in some watercourses be as serious as, if not more so than, many contaminating substances (non-living) and be highly difficult to eradicate once introduced and established.<sup>568</sup>

320. Most countries have now adopted rather comprehensive anti-water pollution legislation for national application. The definitions found in these acts vary quite widely, but the basic sense is similar to what has evolved at the international level, though often more comprehensive or detailed. A French statute will serve to illustrate the point:

The provisions . . . shall apply to direct and indirect discharge, drainage, disposal and deposit of waste matter of any kind, and more generally to anything liable to cause or increase a deterioration in the quality of waters, including surface waters, groundwaters, and maritime territorial waters, by changing their physical, chemical, biological or bacteriological characteristics.<sup>569</sup>

The corresponding definition in, for example, Romanian law reads:

Europe, Consultative Assembly, (doc. 3417, 4 April 1974, reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 346, document A/CN.4/274, para. 377).

" . . . the waters below many LDC cities are often thick with sewage sludge and wastes from pulp and paper factories, tanneries, slaughterhouses, oil refineries, chemical plants, and other industries. One consequence of this pollution is declining fishing yields downstream from LDC cities";

"Moreover, declines have occurred around the world in freshwater systems, and in bays, lagoons, and estuaries. Frequently the changes . . . become apparent with the appearance of eutrophication, poisonous red tides, and the decline of inland fishing occupations." (*The Global 2000 Report* . . . (op. cit.), p. 340).

<sup>568</sup> "A less widely recognized problem is 'biological pollution', the introduction of non-native species into coastal ecosystems. Newly introduced species, freed of their natural predators, parasites, and competitors, can severely disrupt food webs, diversity, and stability and may effectively eliminate valuable native living marine resources" (*The Global 2000 Report* . . . (op. cit.), p. 302).

See also W. Courtenay, Jr. and C. Robins, "Exotic organisms: an unsolved complex problem", *BioScience* (Arlington, Va.), vol. 25, 1975, p. 306. Art. 196, para. 1, of the Convention of the Law of the Sea provides:

"States shall take all measures to prevent, reduce and control pollution of the marine environment resulting from . . . the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto" (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII, document A/CONF. 62/122).

<sup>569</sup> Act No. 64-1245 of 16 Dec. 1964 on the administration and classification of waters and the control of water pollution, part I, "Control of water pollution and restoration of the purity of water", art. 1, last para. (France, *Journal officiel de la République française, lois et décrets* (Paris), 96th year, 18 Dec. 1964, No. 295, p. 11258, reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 280, document A/CN.4/274, para. 30.)

The term "water pollution" shall be understood to mean alteration of the physical, chemical or biological properties of water, caused directly or indirectly by human activities, whereby the water becomes unfit for normal use for the purposes for which such use was possible before the alteration took place.<sup>570</sup>

321. The definitions of pollution often make reference to deleterious impact upon the environment, as does the one here proposed, but the larger scope of water-related environmental damage calls for a separate, if complementary, definition.<sup>571</sup> The concept of pollution is inherently qualitative. It deals not with flooding, impediments to fish migration, or water level changes *per se*. The environment, on the other hand, may be seriously damaged by these and many other non-"polluting" phenomena.

322. The amenities, mentioned in several previously cited definitions of pollution, are recognized in the proposed definition of "environmental protection" as worthy of safeguarding. Conservation, in the traditionally more limited sense of that term, is intended to be comprehended within "protection"—the larger, contemporary concept.<sup>572</sup> And the preservation of the quality of life, used in the Stockholm Declaration in the ample sense and emphasizing benefits to mankind,<sup>573</sup> is expressly included in so far as it may involve international watercourses. Improvement of the quality of life, an aim articulated especially with respect to developing countries, is not expressly provided for in this article, although all efforts in that direction naturally are allowable and commendable, consistently with the rules concerning protection of the environment that follow.<sup>574</sup>

<sup>570</sup> Act of 20 April 1973 concerning water management, art. 43 (*Yearbook* . . . 1974, vol. II (Part Two) p. 288, para. 35).

<sup>571</sup> The predominant role of water even in overall environmental protection can readily be seen from the following definition in art. 1, first para., of the 1974 Convention between Denmark, Finland, Norway and Sweden on protection of the environment:

"For the purpose of this Convention, environmentally harmful activities shall mean discharge from the soil or from buildings or installations of solid or liquid waste, gas or any other substance into watercourses, lakes or the sea and the use of land, the seabed, buildings or installations in any other way which entails, or may entail environmental nuisance by water pollution or any other effect on water conditions, sand drift, air pollution, noise, vibration, changes in temperature, ionizing radiation, light, etc." (*International Legal Materials*, vol. XIII, No. 3, 1974, p. 591).

<sup>572</sup> The Stockholm Declaration lacks a definition of environmental degradation or damage; however, several of the principles are instructive:

"The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded . . ." (principle 2);

"Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat . . ." (principle 4);

"The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems . . ." (principle 6) (*Report of the United Nations Conference on the Human Environment* . . . , p. 4).

<sup>573</sup> "Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life" (principle 8). See also principles 11, 13 and 15. And see United States Agency for International Development, *Report on Environment and Natural Resource Management in Developing Countries* (Washington, D.C., 1979) vol. I.

<sup>574</sup> Special permissiveness in connection with safeguarding the fauna, flora and other natural resources of developing countries is not recommended. Technical and development assistance to developing countries with respect to environmental protection may indeed be

323. Paragraph 3 of the proposed article ties the operation of the provisions concerning pollution to the previous articles on equitable participation, determination of the equitableness of uses and responsibility. The provisions on equitable participation (art. 6) correlate the right to use, on an equitable basis, with adequate protection and control of the components of the international watercourse system (paras. 1 and 3). The provisions guiding equitable use determinations (art. 7) make, as factors to be taken into account, *inter alia*, conservation of the water resources of the system, any interference by a use in the protection and control measures of other system States, the quality of alternative water supplies, pollution of the waters generally, and the willingness of system States to co-operate in protection and control measures (paras. 1 (a), (b), (d)). And the provisions on responsibility for appreciable harm (art. 8) condition the system State's right to use by proscribing appreciable harm (para. 1); however, that restriction is itself lifted where it is determined that the particular harm, even though appreciable, is permitted as part of the system State's equitable participation.

324. In the article here proposed on pollution and environmental protection, the aspects addressed in articles 6, 7 and 8 are not dealt with directly but are imported by reference ("consistent with" arts. 6, 7 and 8). The rule contained in paragraph 3 is not in the first instance couched negatively ("thou shalt not" cause appreciable harm to other system States) but states an affirmative duty to keep pollution below certain levels.<sup>575</sup> Moreover, a system State does not "inherit" the pollution abatement obligations of a co-system State vis-à-vis a third system State in which appreciable

called for in increased measure; however, departure from the equality of States may well produce a perverse result in this case. Opposing a double standard, see e.g. the observations of Messrs Oda, Ago, Suy, do Nascimento e Silva, Yasseen and Mosler on the draft resolution on pollution of rivers and lakes and international law considered at the Athens session of the Institute of International Law (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, pp. 127-128 and 130-133). For the contrary persuasion, see e.g. the observations of Messrs Jiménez de Aréchaga and Sette Câmara (*ibid.*, pp. 130-131). The resolution as adopted provides only, in art. VIII, for the desirability of appropriate technical and other assistance to developing States in order to assist them to fulfil the obligations and implement the recommendations of the resolution (*ibid.*, p. 201).

<sup>575</sup> As presented in the proposed article, the duty is predicated upon the objective condition of the waters and is not satisfied simply by "reasonable diligence" on the part of the polluting State; measures must be effectively implemented and the required level in fact achieved. Therefore it is an obligation to render a certain result and not to engage in a certain "amount" of conduct. However, State responsibility under these articles (and presumably liability for fault) would attach only if appreciable harm or the breach of another duty occurred, and the harm or other breach was not permissible within the equitable participation of the offending system State. See the note by the OECD Secretariat, "Observations on the concept of the international responsibility of States in relation to the protection of the environment" (OECD, *Legal Aspects of Transfrontier Pollution* (*op. cit.*), p. 380); "... the factor taken into consideration is not the (subjective) behaviour of a State, but the (objective) occurrence of damage outside the area under its jurisdiction" (*ibid.*, p. 386). On the thorny question of conduct versus result with respect to pollution of international rivers and lakes, see *inter alia* the discussion reported in *Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, pp. 108 *et seq.*, Handl, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law*, vol. 74, No. 3, 1980, especially pp. 540-553, and works and practice there cited; Dupuy, "Due diligence in the international law of liability" (OECD, *Legal Aspects of Transfrontier Pollution* (*op. cit.*), p. 369); Jiménez de Aréchaga, "International law in the past third of a century", *loc. cit.*, pp. 267-273.

harm has been or is being caused; in turn, this exemption has a limitation: the intermediary system State is under a duty to work in concert with other system States to avoid the appreciable harm to a sister system State from pollution originating in another system State. Such "in concert" co-operation might involve, for example, monitoring or control measures on the territory of the exempt system State, or a combination of efforts as part of a joint programme to control pollution of various kinds and origins. Here, "on an equitable basis" refers primarily to the sharing of costs, or making contribution or compensation with respect to benefits to other system States and adverse effects in the territory of, or the sacrifice of beneficial uses in whole or in part by, the exempt system State.

325. The principle of compensation is also central to paragraph 4 of the article. A system State may suffer harm to its industry or agriculture that from a legal point of view does not rise to the threshold level of "appreciable" harm. Elimination or diminution of the harm-causing pollution, if deemed worth while by the affected system State, may be most effectively or economically undertaken on the territory of the system State in which the pollution originates. According to this provision, a system State causing such pollution is under a duty, on request, to institute abatement measures, but only reasonable measures, on condition that the benefiting system State or States pay the reasonable costs thereof. As part of a larger international watercourse system management, or regional development plan, specific payment might not be exacted and the abatement measures of the polluting State may result from a total benefit/cost analysis undertaken by the system States collectively; therefore a requesting system State is under a duty to pay for the "reasonable measures" only if the system State or States taking the measures demand compensation for the measures as such. In all likelihood, this rule would normally result in consultations that would generate a "package" of co-operative measures of some benefit and of some cost to each co-operating system State.

326. As was manifest from the summarized technical information presented earlier in this section, undifferentiated generalities on prevention or abatement of pollution are not satisfactory with respect to any international watercourse system currently or prospectively subjected to intensive or multiple use. The practical requirement of lists of discrete substances, founded upon the conditions of the particular watercourse, cannot in a residual rule be made absolute. Nonetheless, it is timely and necessary to impose a duty to consult in this regard in the light of what we know about the many substances and species that have an adverse impact upon water quality and the environment. It may be that system States first need to assess the state of the waters, measuring and studying a number of known or suspected pollutants; on the other hand, or at least in due course, agreed prohibitions on the introduction of designated substances or species, and also agreed quantitative limitations with respect to other items, may be called for. The lists and standards will be subject to revision in the light of experience and further studies. Paragraph 5 reflects the current pressing need for such agreed differentiations, already completed for a number of important international watercourses.

327. Paragraph 6 expresses the extraordinary concern for the protection of human life and health by proscription of pollution that results in loss of life or health. The paragraph is cast in objective terms. This rule could not be invoked on the basis of speculation that a certain pollution *may* cause such hazards. On the other hand, it is not necessary that one or more persons die or be beset by disfigurement or debilitating illness. It is intended that it would suffice to show that the kind and rate of the given pollution has caused or will in fact cause the proscribed result, even elsewhere. The paragraph also anticipates that, despite the prohibition (failing an agreement among the States concerned), pollution seriously hazardous to human health and life may occur. Once the deed is done, and above and beyond the question of international responsibility for the harm caused, the polluting State must take speedy action to put an end to the hazard-causing pollution.

328. Today and in the future, effective pollution control and environmental protection is and will increasingly be a matter of quite technical and complex tasks rather than of abstract principles. Paragraph 7 endeavours to foster the elaboration and implementation of particularized programmes to avert environmental damage of an appreciable or irreversible nature, involving the international watercourse system, by affirmatively requiring the system States to establish the necessary régimes for the purpose. The system States have a choice. They may individually pursue the goal or they may join forces. The actual requirement is only that the régime be such that the specified environmental degradation will not occur.<sup>576</sup>

329. In the preceding presentation on this subtopic, the impact of river-caused pollution on the marine environment was shown to be a major concern of the international community. Because the pollution or other damage-causing activity may originate far upstream, or result from a toxic combination of pollutants introduced in the territories of two or more system States, and because the damage is not limited to the freshwater system, a separate provision is called for. Indeed, omission in the Commission's articles of a rule encompassing the freshwater/maritime water interface would only perpetuate the gap that has appeared as the result of inattention by many of the jurists specialized in the law of international watercourses and many of the jurists specialized in the law of the sea.<sup>577</sup> Paragraph 8 of the proposed article is declaratory of a joint

<sup>576</sup> "The discharge into the aquatic environment of dangerous substances that are toxic, persistent and bio-accumulative should be gradually eliminated" (*Report of the United Nations Water Conference* . . . , p. 28 (recommendation 39 (d)).)

<sup>577</sup> "It is estimated that 60-80 per cent of the commercial marine fisheries species are dependent upon estuarine ecosystems during part or all of their life cycles" (*The Global 2000 Report (op. cit.)*, p. 303). See also "River discharge and marine pollution", report of the Secretary-General to the Committee on Natural Resources (E/C.7/2/Add.8/Rev. 1), especially paras. 21-23 and 25-26. It may merit mention that some scientists, including some of those who struggled for years to gain recognition of the vulnerability of the maritime environment, are now concerned that the present "preferential status" of oceans is misplaced. Protection of the enormous volume of saltwater resources (compared with the earth's freshwater resources) may lead to even more critical endangerment of our watercourses; waste disposal options, for example, ought to be broadly reviewed, not excluding consideration and evaluation of either oceanic or terrestrial disposition where full treatment cannot or will not be undertaken. The long-term consequences of contamination of groundwater are of particular concern.

responsibility of the system States. As in other respects, the measures to be taken are to be on an equitable basis.

330. A system State is not held responsible *per se* for the damage caused to the marine environment by pollution originating in another system State; however, the littoral States of the affected sea, and the international community as a whole, have a right to look to the system States of an international watercourse collectively for the precautionary and the corrective measures necessary to achieve compliance with the duty to protect the marine environment, as found in the applicable treaties and in general international law.<sup>578</sup> The system States of an international watercourse system, in this instance at least, are not free to agree to standards or measures that do not avoid legally impermissible harm to the marine environment. It is, as intended by this paragraph, incumbent upon the system States as a whole to work out adequate arrangements among themselves and see to their enforcement. It would not be practicable, technically or juridically, to require or empower the maritime littoral States concerned to determine in whose jurisdiction a pollution damaging to the marine environment originated, and therefore (in some cases) who is solely responsible, or to prescribe the preventive or corrective measures, progressive or absolute, that one or more system States must undertake. The coastal States concerned should of course inform and conduct consultations with the system States. Above all, the ultimate downstream State, or States, where the international watercourse enters the sea, cannot singly shoulder the responsibility for cleaning up system waters so that they flow into and interact with maritime waters without causing actionable harm.

331. Paragraph 9 treats the extremely hazardous, costly and no longer infrequent occurrence of an "emergency" situation following upon a pollution or environmental "incident", such as a toxic chemical spill or the sudden spread or escape of a water-borne disease or its vector. In order to be able to know what defensive actions to take, and how drastic these must be, system States that will be or are being affected require a full understanding of the hazardous agent, the circumstances of the "incident", and the measures already taken or planned by other system States. In such perilous circumstances, there is no time to "negotiate" an accommodation or common programme. That may need to be done later, but the immediate danger must be confronted without delay.<sup>579</sup> The proposed provision for such emergencies requires transmis-

sion by the speediest means at hand of the pertinent information and data and the taking of counter-action by all concerned on an emergency basis. The risks are deemed to be so high and the exigencies such that even a system State that did not cause the incident, but acquiring knowledge of it, is also placed under a duty to communicate that knowledge and to take whatever action it can under the circumstances. Action may be on a joint basis, immediately or as soon as the total response can be concerted. The system States would be well advised to set up in advance machinery for communication with respect to such emergencies, including impending emergencies, and their consultations or negotiations under paragraph 7 of this article may result in a warning system being in place when any emergency or threat is discovered. The clauses here, however, set out a residual rule obliging a best-effort response to imminent situations with a view to averting unacceptable damage or catastrophe.

332. Paragraph 10 makes general and broader the duty of system states to consult that is either express or implicit in other provisions of the article. Arrangements for pollution control and for environmental protection, adequate to achieve compliance with their international law obligations in these fields, are the subject matter of the mandated consultations.<sup>580</sup>

333. Pollution accidents and environmental emergencies call for *ad hoc* responses at once; system-wide pollution and environmental management programmes call for intricate, long-range planning on a broad basis. There are situations that fall in between these two extremes, such as a system State's need to take action in order to avoid breach, or continued breach, of its international duties with respect to pollution control or environmental protection and focusing on a special problem. Paragraph 11 of the proposed article makes it a duty of all system States concerned to negotiate for the purpose of solving the problem at hand.

334. It is now so well accepted that pollution control and environmental protection cannot, in an international watercourse system, be treated rationally without the benefit of pertinent information and data on the various components of the system appertaining to water quality and environmental conditions, that a separate provision is here included, paragraph 12, governing data sharing as it relates to these matters. Whether the system States carry out their studies and devise their programmes separately, or jointly undertake assessments and measures, rather extensive data bases are essential. Article 9, proposed above, imposes a general duty of limited scope. Where pollution or

<sup>578</sup> "Protection of the environment is now a world-wide issue calling for world-wide solidarity" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 109 (statement by the Rapporteur, J. J. A. Salmon)).

<sup>579</sup> The ECE Committee on Water Problems approved in 1970 recommendations to the Governments of ECE member States concerning the protection of ground and surface waters against pollution by oil, in which the emergency situation is contemplated; Governments should: "render compulsory the immediate reporting . . . of all spillages of oil and oil products likely to contaminate either ground or surface waters; . . . set up systems which in the event of oil accidents would immediately warn water users likely to be affected; . . . arrange with neighbouring countries for joint or co-ordinated action which should usefully be taken with respect to common boundary waters (ground as well as surface) in case of oil accidents and for the prevention of pollution by oil" (E/ECE/WATER/7, annex I, para. 3, subparas. (c), (e) and (k)).

<sup>580</sup> In 1971, in an address entitled "U.S. foreign policy in a technological age", the United States Secretary of State, W. Rogers, said that "perhaps it is time for the international community to begin moving towards a consensus that nations have a right to be consulted before actions are taken which could affect their environment or the international environment at large. This implies, of course, that nations contemplating such actions would be expected to consult in advance other States which could be affected" (*The Department of State Bulletin*, vol. LXIV, No. 1651, 15 Feb. 1971, p. 198). Jiménez de Aréchaga, discussing utilization of international watercourses, finds that an aspect of the general principle of good neighbourliness "is the duty to prevent damage and to agree upon adequate measures before\* the damage is caused. Subsequent liability in the form of monetary compensation is not an adequate solution for any of the parties involved . . . . It is in the interest of both parties to come to a prior agreement . . ." ("International law in the past third of a century", *loc. cit.*, p. 195).

degradation of the environment has become a problem, additional and more task-specific data are required. Many States have adopted the approach of the environmental impact or assessment study as the device to apprise themselves in a systematic fashion of the factual situation in each case. Most writers on the topic endorse that mechanism, though it may bear a variety of names. In the proposed provision, a duty to make such assessments arises only if a system State communicates its desire to make such a study and its willingness to bear its equitable share of the costs thereof. The environmental impact studies here contemplated are to be prepared on a joint basis, with contributions from, and benefits to, each of the participating system States presumed.<sup>581</sup>

335. Paragraph 13 makes express on a general level the right of a system State to call for contributions in cash or in kind when it undertakes or is persuaded to undertake often costly and burdensome actions to control pollution or protect the environment and other system States are beneficiaries of its actions. This is not to say that the system State's measures to prevent appreciable harm need be underwritten by the system State or States whose *rights* are thus protected. Contribution, as a matter of right, is always on an equitable basis. However, an affected system State may of course choose so to assist a co-system State with limited resources and capability in preference to seeking damages for any appreciable harm caused by insufficient or inappropriate measures. It is here provided that a system State lacking resources adequate to control the pollution or protect the environment, after receiving any contribution commitments from co-system States to which it may be entitled, may not throw up its hands or claim that it has done all it can do. It is under a further duty to take advantage of bilateral and multilateral assistance, which can be considerable, in fulfilling its international duties in this area.

336. Finally, paragraph 14 makes it clear that there is no refuge in this article from the duties a system State, or the several system States jointly, may owe to other States with respect to pollution abatement or environmental protection.

#### G. Prevention and control of water-related hazards

337. Even though some aspects of water-related hazards are governed by the proposed articles 10 and 8 on "Environmental protection and pollution" and "Responsibility for appreciable harm", under this important rubric, often termed "harmful effects of water", specialists traditionally have grouped additional phenomena such as the problem of floods and other natural hazards and conditions.<sup>582</sup> These aspects do not, for their legal significance, depend upon the intervention

of man. Use of the water in the ordinary sense may be only partially involved, or not at all. Nonetheless, human activities can, in all probability inadvertently, aggravate or moderate the conditions, and therefore the harm caused. Besides flooding, such hazards and harmful effects include erosion, siltation, avulsion, the break-up of logjams and icejams, flow obstruction, waterlogging, and salt-water intrusion. Often the propagation and diffusion of disease vectors are considered "harmful effects" of water.<sup>583</sup> More recently, the lack of water—drought—has also been placed under this heading; desertification, a more complex and prolonged process, now frequently precipitated and expanded by man's land use practices but associated with protracted if not perennial water shortage, may similarly be so classified.

338. In some cases effects embraced in this category may require centuries to reach significant levels of harm. Often, however, the impact may be swift rather than gradual. In all cases, the proper management of water resources, including international water resources, can alleviate the harm itself, or the conditions that give rise or contribute to the harmful effects; some conditions can effectively be prevented altogether by measures of water resources control. In most international watercourse systems more than one of these "harmful effects" are of social and economic significance. System States have entered into numerous international agreements for their prevention and control.

#### 1. FLOODS

339. In this section of the report, discussion will be focused, but not exclusively, on the norms of co-operation that appear with respect to flood prevention and control, since it is the most universally experienced and the most developed aspect of the category of "harmful effects".<sup>584</sup> Each of the other hazards or harmful effects is capable of inflicting costly damage to the economies or to the peoples of a region and, under some circumstances, crippling disaster. It can be predicted that increased attention will be given by system States to these water-related problems. More intensive agricultural and other land use practices can be expected to accelerate some of these harmful effects; a concomitant increase in disputes is likely.

the Arbitrator (G. Cleveland, President of the United States) in the *San Juan River Case* (1888) (Costa Rica-Nicaragua):

"The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing . . . within its own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory. . . . The Republic of Costa Rica has the right to demand indemnification . . . for any lands on the [right] bank [of the river San Juan] which may be flooded or damaged in any other way in consequence of works of improvement" (J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, vol. II (Washington, D.C., U.S. Government Printing Office, 1898), pp. 1965-1966).

<sup>583</sup>The matter of disease vectors has been treated in sect. F above, "Environmental protection and pollution".

<sup>584</sup>In an observation preliminary to this 1905 Award, the arbitrator, Colonel MacMahon, in the question of the partition of the waters of the Helmand (Afghanistan-Iran), said: "Seistan [a place on the river] suffers more from excess than deficiency of water. Far more loss is caused by damage done to land and crops year after year by floods than is caused by want of water for irrigation" (*Helmand River Delta Commission, Afghanistan and Iran* (Washington, D.C., Feb. 1951), p. 141) (the text of the award is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 189, document A/5409, para. 1036).

<sup>581</sup>Environmental assessment was supported in the Mar del Plata Water conference (see *Report of the United Nations Water Conference . . .*, pp. 108-109, paras. 78-86, and p. 25, para. 36 (b), in which the Conference recommended that countries "arrange for scientific systematic and comprehensive studies of the environmental impact of water projects . . ."). See also OECD Council recommendation C(79)116 on the assessment of projects with significant impact on the environment (OECD, *OECD and the Environment (op. cit.)*, pp. 99-100).

<sup>582</sup>United Nations, *Management of International Water Resources . . .*, p. 17, paras. 50-51. Responsibility for the flooding of a co-system State's territory was affirmed in principle in the opinion of

340. It may be noted that the Helsinki Rules as adopted by the International Law Association in 1966 did not include articles on hazards or harmful effects.<sup>585</sup> The charge to the Committee that developed the Helsinki Rules was to ascertain and restate the customary international law then governing "the uses of the waters of international rivers". The Committee appreciated that there were other, substantially unexplored aspects of the "international rivers" topic and urged the Association to create a committee to continue work on those related subjects; at Helsinki the Conference recommended reconstitution of the Committee as a Committee on International Water Resources Law, and set forth a number of "selected aspects of water resources law" as illustrative of the "programme of codification and study" the new Committee should undertake.<sup>586</sup> Among the new topics, as delineated by the Committee, were flood control and "protection against harmful effects of waters", "sea-water intrusion and salinization" in connection with pollution of underground waters, and "an obligation for a State to co-operate with other States to prevent pollution not caused by human conduct" in connection with pollution of coastal areas and enclosed seas.<sup>587</sup>

341. In 1972, the International Law Association approved articles on flood control as proposed by the Committee.<sup>588</sup> The Committee's report on this topic is valuable. Selected excerpts may be of use:

Floods and their disastrous effects upon the adjoining lands have occupied and vexed mankind since immemorial times . . . It is a probable hypothesis that the problems of control and distribution of waters which faced the early settlers in their valleys thousands of years ago, necessitated the establishment of some . . . form of State organization. Arable land had to be protected from periodic flooding as well as from a lack of water in times of drought. The peace of the community had to be preserved from being disturbed by continual disputes . . . It is significant that the Chinese word "Tschin" has the double meaning of "rule" and "to regulate water", and that the Pharaoh had the title "Guardian of the Waters" . . .

. . . Large amounts of money have to be spent every year to provide relief for flood-affected people and to repair public works. Permanent damage is done by floods when they leave behind swamps as a potential for disease and epidemics, or when stagnating flood and its subsequent evaporation during the dry season causes the accumulation of harmful salts, thus laying waste vast stretches of good land.

. . .

<sup>585</sup> These considerations, however, while collateral to the mission of the ILA Committee on the Uses of the Waters of International Rivers, were not entirely ignored in the commentary. The value of "conservation measures through the control of seasonal flooding", for example, is brought out (commentary to art. V), and "to be 'substantial' an injury in the territory of a State need not be connected with that State's use\* of the waters" (commentary to art. X). (ILA, *Report of the Fifty-second Conference* . . . pp. 489 and 500). Dealing with compensation for injury (art. XI), the ancient case is cited of serious flood damage done to Galatia and Phrygia by the blocking by the King of Cappadocia of the outlet of the Melanus river (resulting in payment of damages) (*ibid.*, p. 503). Discussing the duty to maintain the navigable course of a river or lake within a riparian State's jurisdiction in good order (art. XVIII), "maintenance" is defined as including "removal of any obstruction to navigation . . ." (*ibid.*, p. 510).

<sup>586</sup> Resolution I (*ibid.*, p. xi). The ILA Executive Council established the new Committee at its meeting of 12 November 1966; the Committee subsequently established six working groups and to date continues its work (see ILA, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 509-538).

<sup>587</sup> *Ibid.*, pp. 523, 522, 526, respectively.

<sup>588</sup> ILA, *Report of the Fifty-fifth Conference*, . . . , pp. xiv-xviii.

Of the various causes of floods, the most important are: intense and prolonged rainfall, thunderstorms, hurricanes, cyclones, snow-melts, ice jams, slips from mountain sides and overtopping and failure of tanks, reservoirs, dams, bursting of lakes causing a sudden release of large volumes of water, choking up of tributaries by the main rivers at their outfalls, . . . inadequate and inefficient drainage in low-lying and flat areas, silting of river beds due to large amounts of silts brought down by the rivers, earthquakes, land-slides and erosion, . . . and lack of proper controlling structures. . . .

Some of the usual methods which have been developed to minimize the damage created by floods are the following:

- (1) Construction of dykes, flood walls, levees, or embankments to protect lands from flood waters. . . .
- (2) Increasing the discharge capacity of the main channel by either straightening or widening or deepening or by a combination of all of the three.
- (3) Diverting part or whole of the flood waters in excess of the carrying capacity of the main channel.
- (4) Constructing reservoirs to withhold flood waters temporarily and release them later on in such quantities as the channel is capable of carrying.
- (5) Taking steps to decrease the rate of discharge by improved land use practice, e.g. afforestation, substitution of erosion-inducing crops by soil-protecting crops.
- (6) Use of flood forecasting and issue of early warnings to minimize loss to life and property.<sup>589</sup>

Without doubt, agreement upon and implementation of any of the described measures of prevention and mitigation becomes much more difficult when the watercourse is international. Detailed, uniform rules applicable to all international watercourses would be chimerical. "Besides, nearly all hydraulic works, whether they are carried out for flood-control purposes alone or combined with other purposes, produce multiple secondary effects . . ."<sup>590</sup> But the development even of general principles had been neglected by the international legal community. The Committee's articles were therefore "an effort to fill an obvious gap in international water law and thereby to contribute to the mitigation of human suffering caused by human omission to control nature".<sup>591</sup> The articles of the International Law Association constitute the only major effort at stating general rules and recommendations in this field and bear close scrutiny:

#### Article 1

In the context of the following articles,

1. "Floods" means the rising of water levels which would have detrimental effects on life and property in co-basin States.
2. "Flood control" means the taking of all appropriate steps to protect land areas from floods or to minimize damage therefrom.

#### Article 2

Basin States shall co-operate in measures of flood control in a spirit of good neighbourliness, having due regard to their interests and well-being as co-basin States.

#### Article 3

Co-operation with respect to flood control may, by agreement between basin States, include among others:

- (a) Collection and exchange of relevant data;
- (b) Preparation of surveys, investigations and studies and their mutual exchange;
- (c) Planning and designing of relevant measures;

<sup>589</sup> *Ibid.*, pp. 43-45 (Rapporteur: F. J. Berber).

<sup>590</sup> *Ibid.*, p. 46.

<sup>591</sup> *Ibid.*



- (d) Execution of flood control measures;
- (e) Operation and maintenance of works;
- (f) Flood forecasting and communication of flood warnings;
- (g) Setting up of a regular information service charged to transmit the height of water levels and the discharge quantities.

#### Article 4

1. Basin States should communicate amongst themselves as soon as possible on any occasion such as heavy rainfalls, sudden melting of snow or other events likely to create floods [or] dangerous rises of water levels in their territory.

2. Basin States should set up an effective system of transmission in order to fulfil the provisions contained in paragraph 1, and should ensure priority to the communication of flood warnings in emergency cases. If necessary a special system of translation should be built up between the basin States.

#### Article 5

1. The use of the channel of rivers and lakes for the discharge of excess waters shall be free and not subject to any limitation provided this is not incompatible with the object of flood control.

2. Basin States should maintain in good order their portions of watercourses including works for flood control.

3. No basin State shall be prevented from undertaking schemes of drainage, river draining, conservation of soil against erosion and dredging, or from removal of stones, gravel or sand from the beds of its portions of watercourses provided that, in executing any of these schemes, it avoids any unreasonable interference with the object of flood control, and provided that such schemes are not contrary to any legal restrictions which may exist otherwise.

4. Basin States should ensure the prompt execution of repairs or other emergency measures for minimization of damage by flooding during periods of high waters.

#### Article 6

1. Expenses for collection and exchange of relevant data, for preparation of surveys, investigations and studies, for flood forecasting and communication of flood warnings, as well as for the setting up of a regular information service shall be borne jointly by the basin States co-operating in such matters.

2. Expenses for special works undertaken by agreement in the territory of one basin State at the request of another basin State shall be borne by the requesting State, unless the cost is distributed otherwise under the agreement.

#### Article 7

A basin State is not liable to pay compensation for damage caused to another basin State by floods originating in that basin State unless it has acted contrary to what could be reasonably expected under the circumstances, and unless the damage caused is substantial.<sup>592</sup>

342. The articles on flood control of the International Law Association are accompanied by surveys of existing treaty obligations to consult, to inform and to exchange data, and to operate warning systems, and on the preparation of surveys and studies, on the planning and execution of flood control measures, on the operation and maintenance of works, etc.<sup>593</sup> For example, Norway and the Soviet Union have agreed to exchange "as regularly as possible such information concerning level and volume of, and ice on, frontier waters as

might avert damage or danger from flooding or ice".<sup>594</sup> Annex A to the Columbia River Basin Treaty of 1961 (Canada-United States of America) includes these pertinent provisions:

#### General

2. A hydrometeorological system, including snow courses, precipitation stations and streamflow gauges will be established and operated . . . for use in establishing data for detailed programming of flood control and power operations. Hydrometeorological information will be made available to the entities in both countries for immediate and continuing use in flood control and power operations.

3. Sufficient discharge capacity at each dam to afford the desired regulation for power and flood control will be provided through outlet works and turbine installations . . . The discharge capacity provided for flood control operations will be large enough to pass inflow plus sufficient storage releases during the evacuation period to provide the storage space required . . .

#### Flood control

5. For flood control operation, the United States entity will submit flood control operating plans which may consist of or include flood control storage reservation diagrams and associated criteria for each of the dams. The Canadian entity will operate in accordance with these diagrams or any variation which the entities agree will not derogate from the desired aim of the flood control plan. The use of these diagrams will be based on data obtained in accordance with paragraph 2. The diagrams will consist of relationships specifying the flood control storage reservations required at indicated times of the year for volumes of forecast runoff . . .<sup>595</sup>

343. The 1964 Agreement between the Soviet Union and Poland provides:

The contracting parties shall take co-ordinated action with a view to the elimination or reduction of danger resulting from floods, drifting ice and other natural phenomena and shall determine the manner in which the costs connected with the execution of joint works are to be met.<sup>596</sup>

Romania and Yugoslavia have agreed as follows in this respect:

The co-ordination of the prompt exchange of information on the occurrence of high water, ice and other dangers, of measures for protection against flooding, ice and other dangers, of the operation of water control installations, and of the maintenance of water control systems, shall be examined urgently by the Mixed Commission, which shall propose to the Governments of the contracting States in this connection joint regulations for protection against flooding or any other provision under which such co-ordination is to be effected . . .<sup>597</sup>

<sup>594</sup> Art 15 of the 1949 Agreement between Norway and the Soviet Union concerning the régime of the frontier and procedure for the settlement of frontier disputes (United Nations, *Treaty Series*, vol. 83, p. 352).

<sup>595</sup> *Ibid.*, vol. 542, p. 280.

<sup>596</sup> Art. 8, para. 2 (*ibid.*, vol. 552, p. 194).

<sup>597</sup> Art. 3 of the 1955 Agreement concerning questions of water control on water control systems and watercourses on or intersected by the State frontier, and Statute of the Yugoslav-Romanian Water Control Commission (United Nations, *Legislative Texts* . . . , pp. 929-930). Pursuant to this article, the Yugoslav-Romanian Water Control Commission adopted in 1957 "Joint regulations for flood control on watercourses and water control systems on or intersected by the Yugoslav-Romanian State frontier" (Federativne Narodne Republike Jugoslavije, *Medunarodni Ugovori*, 1958, No. 7, p. 73). Similarly, the Yugoslav-Hungarian Water Economy Commission adopted in 1958 "Regulations for flood and ice control on sectors of watercourses of common interest", in accordance with art. 4, para. 2, of the 1955 United Nations Agreement between the two Governments (*ibid.*, No. 11, p. 50, and United Nations, *Legislative Texts* . . . , p. 832).

<sup>592</sup> *Ibid.*, pp. 46-88 (including commentary). An eighth article, on settlement of disputes, is here omitted. The Institute of International Law has not developed this "hazard" aspect of the topic beyond rule II (5) included in its 1911 "Madrid resolution": "A State situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation" (*Annuaire de l'Institut de droit international*, 1911 vol. 24, p. 366). (The rules are reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 200, document A/5409, para. 1072.)

<sup>593</sup> ILA, *Report of the Fifty-fifth Conference* . . . , pp. 49-97.



344. In the 1944 Treaty between Mexico and the United States of America, it is provided that their International Boundary and Water Commission

shall study, investigate, and prepare plans for flood control works, where and when necessary, . . . on the Rio Grande (Rio Bravo) from Port Quitman, Texas, to the Gulf of Mexico. These works may include levees along the river, floodways and grade control structures, and works for the canalization, rectification and artificial channelling of reaches of the river. The Commission shall report to the two Governments the works which should be built, the estimated cost thereof, the part of the works to be constructed by each Government, and the part of the works to be operated and maintained by each section of the Commission. Each Government agrees to construct, through its section of the Commission, such works as may be recommended by the Commission and approved by the two Governments . . .<sup>598</sup>

345. In 1946, Iraq and Turkey entered into an agreement for the purpose, among others, of avoiding the danger of floods during the annual high water periods.<sup>599</sup> The 1960 Indus Waters Treaty between India and Pakistan also carries a provision concerning the execution of "any scheme of flood protection or flood control".<sup>600</sup> With respect to the Lower Mekong Basin, the delegations of Cambodia, Laos, Thailand and the Republic of Viet Nam made a joint statement expressing the wish that ECAFE continue its studies, jointly with their countries, in order to determine, *inter alia*, "in what measure the various projects concerning . . . drainage and flood control can be of use to several countries".<sup>601</sup>

346. Guatemala and Mexico agreed in 1961 to establish an International Commission on Boundaries and Waters. Included among the functions of the Commission was the study of matters relating to flood control; questions relating to flood control works, as well as utilization questions, were to be dealt with in accordance with the norms and principles recognized under international law and advocated by international organ-

izations and compatible with the best interests of their peoples.<sup>602</sup>

347. In their 1969 Convention concerning development of the Rhine, France and the Federal Republic of Germany, recognizing "the advantage for both States of undertaking the joint development of the course of the Rhine between Strasbourg/Kehl and Lauterbourg/Neuburgweier", agreed, among other things, and on the basis of the findings of the Commission to Study Flooding of the Rhine, to conclude an additional agreement as soon as possible "concerning measures to be taken for protection against flooding and apportionment of the resulting costs, taking into account the contributions of all kinds to be expected from the other State concerned".<sup>603</sup> But without waiting for that agreement to be concluded, the parties

shall immediately make all appropriate arrangements to ensure that works situated between Basel and Iffezheim are operated in such a way as to reduce, to the fullest extent possible, the cresting of floodwater downstream of the Iffezheim barrage. The competent authorities of the Contracting Parties shall co-operate directly in the establishment and application of such operating instructions as may be necessary for that purpose.<sup>604</sup>

348. The Inter-American Economic and Social Council at its fourth annual meeting in 1966 recommended:

To the member countries of the Alliance for Progress that . . . they begin or continue joint studies looking towards the control and economic utilization of the hydrographic basins and streams of the region of which they are a part, for the purpose of promoting, through multinational projects, their utilization for the common good, in transportation, the production of electric power, irrigation works, and other uses, and particularly in order to control and prevent damage such as periodically occurs as the result of rises in the level of their waters and consequent floods.<sup>605</sup>

349. Numerous other illustrations from treaty practice could be cited to support the conclusion that system States have long recognized the need for the control and prevention not only of floods but also of similar hazards.<sup>606</sup> Instances are equally frequent of provision

<sup>598</sup> Art. 6 (United Nations, *Treaty Series*, vol. 3, pp. 327-328). A similar provision (art. 13) pertains to the Lower Colorado River (*ibid.*, p. 340). France and the Federal Republic of Germany, by their Treaty of 1956 concerning the settlement of the Saar question, agreed (art. 9) to maintain a water-level reporting service; should a flood warning be given, the parties' services shall remain in constant contact until communication of the end of the alert is received from the Saarebruck station (United Nations, *Legislative Texts* . . . , p. 659). By the 1959 Agreement between Yugoslavia and Greece concerning hydro-economic questions, the contracting States agreed (art. 5) that the competent local authorities would advise each other by the most rapid means of any danger of high water, as well as of other dangers threatening the régime of waters and the operation of hydro-technical installations (United Nations, *Treaty Series*, vol. 363, p. 137).

<sup>599</sup> Protocol No. 1 relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries (*ibid.*, vol. 37, p. 287). Concerning the right of the Netherlands to close off the former mouth of the Rhine near Lobith during the high water season as a protection against floods, see art. 1 of the 1918 Treaty between the Netherlands and Germany concerning the raising of the level of the former mouth of the Old Rhine (League of Nations, *Treaty Series*, vol. XIII, p. 47).

<sup>600</sup> Art. IV, para. 2 (United Nations, *Treaty Series*, vol. 419, p. 136). See also art. IV, para. 8 (*ibid.*, p. 138). Flood control was also the first named purpose of the 1954 Agreement between India and Nepal on the Kosi project (clause 1) (United Nations, *Legislative Texts* . . . , p. 291).

<sup>601</sup> Official Records of the Economic and Social Council, Twenty-fourth Session, Supplement No. 2 (E/2959), para. 277. ECAFE endorsed the statement, which was based on an ECAFE document "Development of water resources in the Lower Mekong Basin" (ECAFE/L.119).

<sup>602</sup> Exchange of notes of 9 November and 21 December 1961 (see *Yearbook* . . . 1974, vol. II (Part Two), pp. 292-293, document A/CN.274, para. 69).

<sup>603</sup> Preamble and art. 9, para. 1 (United Nations, *Treaty Series*, vol. 760, pp. 346 and 354).

<sup>604</sup> Art. 9, para. 2 (*ibid.*, p. 354). Each of the parties is also to ensure that "sufficient lands to hold one half of the volume of water which must still be retained in order to reduce the cresting of floodwater remain available in its territory" (art. 9, para. 3).

<sup>605</sup> Resolution 24-M/66, "Control and economic utilization of hydrographic basins and streams in Latin America" (Pan American Union, *Final Report of the Fourth Annual Meeting of the Inter-American Economic and Social Council*, vol. I (*op. cit.*), p. 48). (Reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380.) The resolution begins with this statement:

"Whereas: Control and better utilization of the hydrographic basins and streams that . . . make up a part of the common patrimony . . . will help to speed up the integration and multiply the potential capacity for development of those countries." See also "Trends and problems in water administration in the ECAFE region", paper prepared by the ECAFE secretariat (United Nations, *Proceedings of the Interregional Seminar on Current Issues of Water Resources Administration* (New Delhi, 22 Jan.-2 Feb. 1973), p. 41, and works there cited); B. Palta, "Co-ordination of sectoral water policies and planning: some models" (*ibid.*, pp. 79-80); W. R. D. Sewell, *Water Management and Floods in the Fraser River Basin* (Chicago, Ill., University of Chicago, 1965); G. F. White, *Choice of Adjustment to Floods* (Chicago, Ill., University of Chicago, 1964).

<sup>606</sup> For example, the 1964 Agreement between Poland and the USSR concerning the use of frontier waters provides that the parties

for warnings and for the exchange of information and data specifically pertaining to hazards on a regular basis.<sup>607</sup> In many international agreements the aspect of control or prevention of hazards is not explicit but is presumed, and subsumed under provisions for control of flow, that is, river "training" or regulation.<sup>608</sup>

## 2. ICE CONDITIONS

350. As will have been noted from some of the examples already given, the problem of damage from ice ranks with floods as a concern to many system States located in the northern latitudes. A few additional examples from treaty practice will serve to demonstrate the dimensions of this hazard.

351. The 1952 Agreement between the Democratic Republic of Germany and Poland devotes a chapter to "Principles of co-operation in precautionary measures against flooding and ice floes", which includes these provisions with respect to ice:

The two contracting parties undertake to exercise joint vigilance and to co-operate with each other to prevent the formation of potentially dangerous ice barriers . . .

The Polish party shall inform the German party in good time of the place and time of ice clearance operations . . .

Ice-breaking operations shall proceed upriver from the mouth of the Oder. Where necessary, and provided that no danger to the lower reaches of the river is entailed, local ice barriers may be demolished by blasting . . .<sup>609</sup>

352. The 1958 Agreement between Bulgaria and Yugoslavia concerning water economy questions delegates to the frontier and local authorities the duty to "advise each other, by the most rapid possible means, of any danger from . . . drifting ice . . . on rivers and tributaries followed or intersected by the State frontier", as well as from high water or any other danger that may arise.<sup>610</sup> Austria and Czechoslovakia have

shall take co-ordinated action with a view to the elimination or reduction of danger resulting from "floods, drifting ice and other natural phenomena"\* (art. 8, para. 2) (United Nations, *Treaty Series*, vol. 552, p. 194).

<sup>607</sup>See e.g. art. 8, para. 1, of the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters, requiring the parties to provide reports on various hazards and on water-level forecasts, as well as on hydrological research results and the texts of relevant laws and regulations (*ibid.*, vol. 538, p. 112); art. 21 of the 1961 Treaty between Poland and the USSR concerning the régime of the frontier and co-operation and mutual assistance in frontier matters (*ibid.*, vol. 420, p. 258); art. 20 of the similar Treaty between Hungary and Romania of 1963 (*ibid.*, vol. 576, p. 350); and art. 4 of the 1964 Agreement between Bulgaria and Greece on co-operation in the utilization of the waters of the rivers crossing the two countries (see *Yearbook* . . . 1974, vol. II (Part Two), p. 315, document A/CN.4/274, para. 271).

<sup>608</sup>"Training" or "regulation", however, embraces other aspects of water resources management (see chap. III, sect. A, below).

<sup>609</sup>Art. 19 (United Nations, *Treaty Series*, vol. 304, pp. 171-172). See also art. 1 (c) of the 1955 Agreement between Romania and Yugoslavia concerning questions of water control (United Nations, *Legislative Texts* . . . , p. 928); art. 2, para. 2, of the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters (United Nations, *Treaty Series*, vol. 538, pp. 108-110).

<sup>610</sup>Art. 8 (*ibid.*, vol. 367, p. 110). See also art. 11 of the 1956 Treaty between Austria and Hungary concerning the regulation of water economy questions in the frontier region (*ibid.*, vol. 438, p. 158); art. 19 of the 1950 Treaty between Hungary and the USSR concerning the régime of their frontier (United Nations, *Legislative Texts* . . . , p. 825); art. 7 of the 1954 Mura Agreement between Austria and Yugoslavia (United Nations, *Treaty Series*, vol. 396, p. 104); art. 17 of the 1960 Agreement between Finland and the USSR concerning

agreed to promote the construction of hydraulic installations and facilities to provide protection against the danger, along their frontier waters, of ice, as well as from flooding.<sup>611</sup>

## 3. DRAINAGE

353. Works to improve or ensure adequate drainage, and to regulate discharges made for drainage purposes, have also been the subject matter of a good number of international agreements. With respect to four drainages specifically identified, Pakistan agreed in its Indus Waters Treaty with India to maintain "in good order its portion of the drainages" and with undiminished capacities; Pakistan also agreed to undertake the deepening or widening of any of those drainages, should India find such drainage improvement necessary and provided that India agreed to pay the cost.<sup>612</sup> And in the article, "Future co-operation", the parties "recognize that they have a common interest in the optimum development of the rivers" and declare their intention in particular to co-operate, *inter alia*, with respect to new drainage works.<sup>613</sup>

354. Among other illustrations of State practice, the Netherlands and the Federal Republic of Germany, in their Frontier Treaty signed in 1960, agreed to "take or support, within an appropriate period of time, all measures required" to secure and maintain "the adequate drainage of the boundary waters, to the extent required in the interest of the neighbouring State".<sup>614</sup>

355. Albania and Yugoslavia have agreed to examine and to resolve by agreement all water economy questions, including measures and works of interest to either party or to them both, which may affect the

the régime of their frontier (*ibid.*, vol. 379, p. 344); art. 15 of the 1956 Treaty between Hungary and Czechoslovakia concerning the régime of their frontiers (*ibid.*, vol. 300, p. 162); art. 19 of the 1956 Agreement between the USSR and Czechoslovakia concerning the régime of their frontier (*ibid.*, vol. 266, p. 314).

<sup>611</sup>Art. 4, para. 2, of the 1967 Treaty concerning the regulation of water management questions relating to frontier waters (*ibid.*, vol. 728, p. 356). Art. XII of the 1816 Boundary Treaty between Prussia and the Netherlands prohibited the erection in the river of works likely to prevent the passage of ice, or to hinder the flow of water, and thereby cause damage to the opposite bank, failing prior agreement between the parties (United Nations, *Legislative Texts* . . . , p. 737).

<sup>612</sup>Art. IV, paras. (4) and (5) (United Nations *Treaty Series*, vol. 419, p. 138). The 1954 Agreement between India and Nepal on the Kosi project also provides for drainage (clause 13). United Nations, *Legislative Texts* . . . , p. 294).

<sup>613</sup>Art. VII, para. (1) (United Nations, *Treaty Series*, vol. 419, p. 144). Art. VII, para. (1) (b) provides:

"Each party, to the extent it considers practicable and on agreement by the other party to pay the costs to be incurred, will, at the request of the other party, carry out such new drainage works of the other party" (*ibid.*, p. 146).

On the other hand, art. IV, para. (3), 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 . . . , provided that "any material damage to the other party" is avoided as far as practicable and does not involve, on the western rivers, any use of water or any storage by India beyond that provided under article III" (*ibid.*, p. 136).

<sup>614</sup>Art. 58, para. 2 (a) (*ibid.*, vol. 508, p. 190). Under art. 57, the parties agreed to conduct "regular consultations on all questions relating to the use and management of water resources" in their Permanent Boundary Waters Commission and its sub-commissions. See also annex A of the Treaty (*ibid.*, p. 212).

quantity and quality of the water.<sup>615</sup> Among particular questions identified is the discharge and drainage of water, preceded by regulation and canalization of watercourses and followed by protection against flooding.<sup>616</sup> Poland and the Soviet Union have determined that their "competent authorities" will agree upon the method of regulating drainage into frontier waters, as well as upon all other questions relating to the frontier régime.<sup>617</sup> The 1963 Protocol between Greece and Turkey concerning the final elimination of differences over the execution of hydraulic operations for the improvement of the bed of the river Meriç-Evros carried out on both banks sets forth the parties' rights and obligations in connection with the installation of drainage systems and pumping stations, as well as with regard to the strengthening or construction of dikes.<sup>618</sup>

356. Adequate drainage of surplus waters is an ancient problem.<sup>619</sup> Lack of it ruins soils, keeps groundwater tables injuriously high and causes standing, stagnant water, or local flooding.<sup>620</sup> It is not surprising in this context that drainage and flood prevention have often been linked in State practice, since improved drainage increases the flow of water in the watercourse into which the drains discharge. Uncontrolled dis-

<sup>615</sup> Art. 1, para. 1, of the 1956 Agreement concerning water economy questions (United Nations, *Legislative Texts* . . . , p. 441). The Agreement covers natural surface and underground water as well as artificial waters (art. 1, para. 3).

<sup>616</sup> Art. 1, para. 2.

<sup>617</sup> Art. 17, para. 2, of the 1961 Treaty between the USSR and Poland concerning the régime of the frontier and co-operation and mutual assistance in frontier matters (United Nations, *Treaty Series*, vol. 420, p. 256). It is also stipulated, in art. 17, para. 1, that the "natural flow of water in frontier watercourses and in adjacent areas which are inundated during periods of high water must not be altered or obstructed to the detriment of the other party by the erection or reconstruction of installations or structures in the water on the banks, or in any other way".

<sup>618</sup> See *Yearbook* . . . 1974, vol. II (Part Two), p. 308, document A/CN.4/274, paras. 206-210.

<sup>619</sup> Among earlier agreements, see the 1816 Boundary Treaty between Prussia and the Netherlands, especially arts. XXIV-XXVII (United Nations, *Legislative Texts* . . . , pp. 737-739); the 1824 Frontier Treaty between the Netherlands and Hanover, especially arts. 34-35, 37-38 and 40 (*ibid.*, pp. 741-744); the 1929 Frontier Agreement between Germany and Belgium, arts. 71-74, which provide for land drainage boards (League of Nations, *Treaty Series*, vol. CXXI, p. 367); the 1922 Agreement between Denmark and Germany relating to watercourses and dikes on the German-Danish frontier, art. 53, first para. (United Nations, *Legislative Texts* . . . , p. 597). The Lausanne Treaty of 1923 between the British Empire, France, Italy, Japan, Greece, Romania, the Serb-Croat-Slovene State and Turkey provided in art. 109:

"In default of any provisions to the contrary, when . . . the hydraulic system (canalization, inundation, irrigation, drainage or similar matters) in a State is dependent on works executed within the territory of another State, . . . an agreement shall be made between the States concerned to safeguard the interests and rights acquired by each of them.

"Failing an agreement, the matter shall be regulated by arbitration" (League of Nations, *Treaty Series*, vol. XXVIII, p. 95).

Identical provisions are found in art. 309 of the 1919 Treaty of Saint-Germain-en-Laye with Austria (*British and Foreign State Papers*, vol. CXII (London, 1922), p. 469, and in art. 292 of the 1920 Treaty of Trianon with Hungary (*ibid.*, vol. CXIII (London, 1923), p. 618).

<sup>620</sup> Waterlogging and "salinization" of once fertile soil is a well-known consequence of inadequate drainage. This is the case in the Indus Basin (see Baxter, *loc. cit.*). See also resolution VII (Scientific water management: irrigation, drainage and flood control) of the World Food Conference (*Report of the World Food Conference* (Rome, 5-16 Nov. 1974) (United Nations publication, Sales No. 75.II.A.3), pp. 10-11).

charges of drainage waters can mean the inundation of the territory of downstream system States. Drainage has thus been the subject of system-State agreement for the purpose of flood control or prevention.<sup>621</sup>

357. Austria and Czechoslovakia, in their Treaty of 1928 regarding the settlement of legal questions connected with the frontier, required that the legitimate interests of the inhabitants of the other State be taken into account, as far as possible, if "the construction of an installation is calculated to cause any considerable or permanent change in the supply of water of a frontier waterway or of a waterway which cuts the frontier".<sup>622</sup> The following provision indicates the broad, multipurpose scope of the parties' thinking about hydraulic installations:

1. The contracting States shall promote the construction of such works as are designed to protect the frontier waters and the contiguous flood area against damage by floods, and ensure the draining\* and irrigation of the adjacent territory, or as the case may be, regularize the flow of water, provide the frontier communes with water, and ensure the utilization of the waterpower supplied by the frontier waterways.

2. . . . the contracting parties agree as to the following principles:

(b) When systematically regularizing a frontier waterway . . . , care shall be taken to secure as far as possible the normal outflow of medium high water . . . Care shall also be taken . . . to avoid any excessive draining of the land situated on one side or the other, and to facilitate the employment of muddy water on this land and its irrigation during periods of drought.<sup>623</sup>

358. On this record, it can be seen that provisions governing drainage in an international watercourse system are well established, not as a use of the waters but as protection against "harmful effects", though drainage or the lack of it may favourably or adversely affects uses (including navigation). The harmful effects of inadequate drainage or of uncontrolled drainage extend beyond water uses to, for example, many land uses, community health and the environment generally. Poor drainage conditions or excess drainage flows usually occur naturally at first, but man's activities may create a need for accelerating or restraining drainage within the watercourse system; that is, man may have had effects upon the system sufficient to make a bad drainage situation worse. The international implications of the problems thus presented have given rise to regulation, if not management, of drainage matters by international agreement. It may now also be possible to enunciate some general principle of international law with respect to co-operation among system States on this matter.

#### 4. FLOW OBSTRUCTIONS

359. Agreements covering hazards or harmful effects frequently include clauses with respect to obstructions to the flow of the waters, as will have been noted in some of the examples already set forth. Obstructions

<sup>621</sup> See e.g. the 1843 Convention between Belgium and the Netherlands on the discharge of the Flanders waters, art. 8 (United Nations, *Legislative Texts* . . . , p. 543); the 1905 Convention between the Netherlands and Prussia concerning the Dinkel and Vechte rivers, art. I, sect. 4, art. IV, sect. 2, and art. V (*ibid.*, pp. 752-755). See also Gupta, "Brahmaputra River Basin development . . .", *loc. cit.*, pp. 213-219.

<sup>622</sup> Art. 28, para. 3 (League of Nations, *Treaty Series*, vol. CVIII, p. 69).

<sup>623</sup> Art. 29 (*ibid.*, p. 71).

can hinder necessary drainage, or they can impair or interrupt navigation and hydropower generation, for example. They may also enhance the likelihood of floods, if not actually cause them. Obstructions are indeed hazards. State practice indicates that many system States have addressed the problem in their relations with their co-system States.<sup>624</sup>

360. The Indus Waters Treaty is again a clear and recent illustration of this type of concern:

Each party will use its best endeavours to maintain the natural channels of the rivers . . . in such condition as will avoid, as far as practicable, any obstruction to the flow in these channels likely to cause material damage to the other party.<sup>625</sup>

361. When navigation was the only use of international significance, obstructions affecting navigation received considerable attention. In 1851 Austria and Bavaria agreed that they would remove from the channel "all obstacles to navigation" and "permit no construction on the stream or its banks which would endanger the security of navigation".<sup>626</sup>

362. In 1905 the Netherlands committed itself to Prussia to remove entirely portions of a dam, to observe other requirements designed to ensure certain flows and clearances, and to take "such further measures as may be required to prevent the formation of new obstructions to the free flow of water below the present barrage".<sup>627</sup>

363. The hand of man is by no means requisite to the occurrence of obstructions. Landslides, earthquakes, the accumulation of gravel and sand, and natural logjams, for example, often result in damaging obstruction. The treaty between Poland and the Soviet Union concerning the régime of the Soviet-Polish State frontier, concluded in 1961, requires that the parties jointly take the necessary steps to remove obstacles which may cause displacement of the beds of frontier rivers, streams or canals or which may obstruct the natural flow of water.<sup>628</sup>

<sup>624</sup>The operation of hydraulic works and navigation can, of course, be blocked by ice, a hazard already taken up in more general terms. See, in addition, the 1957 Agreement between Norway and the USSR on the utilization of water-power on the Pasvik (Paatsio) River, art. 16, second para. (United Nations, *Treaty Series*, vol. 312, p. 286).

<sup>625</sup>Art. IV, para. (6) (*ibid.*, vol. 419, p. 138). The Treaty was concluded between India and Pakistan in 1960.

<sup>626</sup>Art. 12 of the Agreement concerning territorial and frontier arrangements, which also states: "The greatest case shall also be taken to prevent navigation from being obstructed or hindered by mills or other machinery or by the rolling down of blocks from quarries or the disposal of rubbish close to the banks." (United Nations, *Legislative Texts* . . . , p. 464.) The agreements on navigation were reviewed in some detail in the Special Rapporteur's second report (*Yearbook* . . . 1980, vol. II (Part One), pp. 188 *et seq.*, document A/CN.4/332 and Add.1, paras. 186-214), for the purpose of examining the basis for the sharing of a natural resource. The 1978 Treaty for Amazonian Co-operation, art. VI, and the 1948 Convention regarding the régime of navigation on the Danube, art. 3, there quoted (paras. 206 and 211), also deal with obstruction. The Statute on the régime of navigable waterways of international concern, annexed to the Convention signed at Barcelona in 1921, obliges each riparian State "to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation" (art. 10, para. 1) (League of Nations, *Treaty Series*, vol. VII, p. 57). For the status of the Convention and Statute, see *Yearbook* . . . 1974, vol. II (Part Two), p. 60, document A/5409, footnote 53.

<sup>627</sup>Art. II, Convention between the Netherlands and Prussia concerning the Dinkel and Vechte rivers (United Nations, *Legislative Texts* . . . , pp. 753-754).

<sup>628</sup>Art. 16, para. 3 (United Nations, *Treaty Series*, vol. 420, p. 254). For similar provisions, see the 1963 Treaty between Hungary and

364. Thus while strictly speaking "obstructions" are not directly a harmful effect of water, they are the occurrence of restriction or blockage that may cause water to have harmful effects, such as flooding, or may be a hazard to the use of the waters for timber floating, navigation or generation of power, among other things. Optimum utilization of international watercourses, including their conservation, control and protection, requires that the Commission should not omit this aspect from its articles.

## 5. AVULSION

365. There are other hazards and harmful effects that deserve mention. Avulsion, an occurrence that in some watercourses frequently accompanies seasonal high water,<sup>629</sup> can be destructive of human settlements, factories, transportation and communications, livestock and agricultural lands, as the watercourse precipitously abandons the stream bed and is redirected across-country. In addition to engulfing previously dry land, the hydraulic works and other water-related facilities along the old path of the river are deprived, perhaps altogether, of viable connection with the stream. The case of one international watercourse may be sufficient to document the importance of this hazard:

. . . The past history of the Helmand river in Seistan shows that it has always been subject to sudden and important changes in its course, which have from time to time diverted the whole river into a new channel and rendered useless all the then existing canal systems. Such changes are liable to occur in the future, and great care should therefore be exercised in the opening out of new canals, or the enlargement of old canals leading from the Helmand. Unless this is done with proper precaution, it may cause the river to divert itself entirely at such points and cause great loss to both countries. This danger applies equally to Afghanistan and Persia.<sup>630</sup>

Romania concerning the régime of the frontier, art. 16, para. 2 (*ibid.*, vol. 576, p. 348).

<sup>629</sup>Earthquakes, lava flows and landslides also on occasion cause avulsion.

<sup>630</sup>Clause VIII, Award of 10 April 1905, the *Helmand River Delta* arbitration (see footnote 584 above). For a discussion of the controversy surrounding the award, see *Yearbook* . . . 1974, vol. II (Part Two), pp. 188-190, document A/5409, paras. 1034-1037, and works there cited. The award was not accepted; however, the veracity of the quoted passage was not at issue.

<sup>631</sup>Dredging and placer mining for precious metals and stones, or dredging for sands and gravels, can result in considerable sediment load, as can overgrazing and other improper agricultural practices. Licences to dredge in the Tanoe River (Ivory Coast and Ghana are the system States today) were formerly required to be approved by the two Governments concerned (Ivory Coast and Gold Coast). See the exchange of notes of 16 and 25 June 1907 between the British and French Governments respecting licences to dredge in the Tanoe River (in completion of the Anglo-French Agreement of 10 August 1889) (United Nations, *Legislative Texts* . . . , pp. 123-124). In fulfilment of the agreed duty "to take or to support all measures required to establish and to maintain within . . . the boundary waters . . . such orderly conditions as will mutually safeguard their interests", the Netherlands and the Federal Republic of Germany, in their 1960 Frontier Treaty, specified in particular, *inter alia*, "all measures" required to prevent "the excessive extraction of sand and other solid substances liable to cause substantial prejudice to the neighbouring State" (art. 58, paras. 1 and 2 (d)) (United Nations, *Treaty Series*, vol. 508, p. 190). See also e.g. art. 14 of the 1954 Agreement between Hungary and Czechoslovakia on the settlement of technical and economic questions concerning frontier watercourses (*ibid.*, vol. 504, p. 262). If the introduction of the silt is directly or indirectly caused by the activities of man, the detrimental change in water quality would, of course, meet the test of the definition of pollution (see sect. F above). "Suspended substances and sludge [from the iron and coal and other mining industries] . . . cause silting, which reduces the

(Continued on next page)

## 6. SILTATION

366. Some watercourses carry heavy charges of silt. As this sediment load is shifted continually downstream, reservoirs are gradually filled in, spawning beds may be smothered, water supply intakes and treatment plants become clogged or damaged, channels silt up, decreasing the depth of the fairway and harbours, light transmission essential for aquatic life is reduced, and recreational uses are spoiled. Costly dredging and filtration efforts are engaged in and are frequently overwhelmed; in addition, these make no headway against most harmful effects of siltation. The usual remedy prescribed is stabilization of the headwater areas by watershed (or range) management to decrease erosion, the source of the problem. On the other hand, irrigation by inundation has from ancient times depended upon the annual deposit of silt upon agricultural lands for partial renewal of fertility; stemming the transport of silt has major significance for the downstream State dependent upon this "gift" of nature. Although man's activities in the watercourse may cause or increase sediment content,<sup>631</sup> nature is capable of introducing great quantities of sediment into international watercourses. Corrective measures may require extensive and unceasing effort on the part usually of an upstream State whose own uses of the watercourse may be insignificant or unaffected. Clearly, concerted action and contribution by the system States to be benefited by the measures are called for. Austria and Switzerland concluded one of the earliest agreements on record treating this particular problem:

The Swiss Federal Council and the Government of Austria-Hungary shall make every effort, in the catchment basins of the tributaries of the Rhine, to carry out corrective measures, construct dams and execute other works calculated to retain sediment in order to reduce drifting in the bed of the Rhine as much as is possible and to maintain a regular course for that river in the future.

Each Government reserves the right to determine the time of execution and the extent of the various measures to correct the flow; nevertheless, the work shall be undertaken as promptly as possible and shall be actively pursued, beginning with the tributaries which cause the greatest damage owing to their heavy load of sediment.<sup>632</sup>

367. The Plata international watercourse system in South America suffers exceedingly from the problem of siltation. The Bermejo River, lying in Bolivia and Argentina, tributary to the Paraguay-Paraná subsystem of the Plata, contributes some 70 per cent of the total sediment transported in the whole system.<sup>633</sup> The Paraná's annual silt load is about 250 million tons, two of the results of which are the choked delta where it meets the Uruguay River to form the Plata River and the

(Footnote 631 continued)

number of organisms on which fish feed and forces the fish to migrate. Silted areas become desolate, and an increase in the amount of sludge in the water may hinder the growth of plant life. All these processes reduce the natural capacity of the water for self-purification" (Lester, "Pollution", *loc. cit.* p. 91). On the problem generally, see A. Ron, "Aspectos jurídicos de la sedimentación" *International Association for Water Law, Annales Juris Aquarum-II*, Caracas, 1976), vol. 3, p. 1655).

<sup>632</sup> Art. XVII of the 1892 Treaty for the regulation of the Rhine from the confluence of the Ill, upstream, to the point downstream where the river flows into the Lake of Constance (United Nations, *Legislative Texts* . . . , p. 494). See generally, Florio, *loc. cit.*, p. 591, and *Yearbook* . . . 1974, vol. II (Part Two), pp. 156-157, document A/5409, paras. 810-817.

<sup>633</sup> G. Cano, *Recursos hídricos internacionales de la Argentina* (Buenos Aires, de Zavalía, 1979), p. 186.

constant dredging required in the area of the port of Buenos Aires.<sup>634</sup> Several studies have been undertaken on the subject, for example for the multipurpose development of the Bermejo. Eleven projects, including three binational ones, one in Bolivia and seven in Argentina, would, it is estimated, eliminate 95 per cent of the silt the Bermejo delivers into the Paraguay River.<sup>635</sup>

## 7. EROSION

368. Treaties often speak in terms of erosion control. The 1955 Agreement between Yugoslavia and Romania concerning questions of water control on water control systems and watercourses on or intersected by the State frontier applies, *inter alia*, to "protection against erosion".<sup>636</sup> The Indus Waters Treaty preserves, among other things, the right of each party to undertake schemes for the "conservation of soil against erosion" and dredging, provided that, *inter alia*, material damage to the other party is avoided as far as practicable.<sup>637</sup>

369. Concern is frequently as much for the protection of stream banks or channel depth as it is for reduction of sediment. France and the Federal Republic of Germany have undertaken to develop jointly the course of the Rhine downstream from the Iffezheim barrage "with a view to preventing or remedying erosion of the river-bed".<sup>638</sup>

## 8. SALINE INTRUSION

370. The penetration of maritime waters upstream from the mouth of a river, and into groundwater aquifers, is a serious "harmful effect" in a number of international watercourse systems. This phenomenon is

<sup>634</sup> See Hayton, "The Plata Basin", *loc. cit.*, pp. 401 and 440, footnote 374, and "Preliminary review of questions relating to the development of international river basins in Latin America", paper prepared for ECLA under the direction of G. Cano (E/CN.12/511).

<sup>635</sup> Large irrigation and hydropower benefits are also involved. See Cano, *Recursos hídricos* . . . , *op. cit.*, pp. 185-186; Organization of American States, *Cuenca del río de la Plata, estudio para su planificación y desarrollo—I. Alta Cuenca del río Bermejo: estudio de los recursos hídricos* (Washington, D.C., 1974); K. Rodgers, "Estudio piloto sobre medio ambiente, en el desarrollo de la cuenca del río Bermejo", prepared for the Argentine National Commission for the United Nations Water Conference (CONFAGUA/C5/4). All watercourses carry some suspended sediments, and also dissolved salts. Nature's actions, and man's, can augment the quantities to such a degree that sediment (or salt) loads become an overriding problem in some international watercourses such as the Mekong and the Ganges. Generally speaking, much more silt is carried by watercourses in Asia than by watercourses in the rest of the world. See R. J. Gibbs, "The geochemistry of the Amazon river system. Part I. The factors that control the salinity and the composition and concentration of the suspended solids", *Geological Society of America Bulletin* (Boulder, Colo.), vol. 78, Oct. 1967, p. 1203.

<sup>636</sup> Art. 1, second para., subpara. (i) (United Nations, *Legislative Texts* . . . , p. 928). On the relationship between man's activities and erosion/siltation, see e.g. J. Moreno, P. Urriola and G. Colmenares, "Criterios jurídico-institucionales para el desarrollo y conservación de los recursos hidráulicos a nivel de cuencas en Venezuela" *Annales Juris Aquarum-II* (*op. cit.*), p. 1661.

<sup>637</sup> Art. IV, para. (3) (United Nations, *Treaty Series*, vol. 419, p. 136).

<sup>638</sup> Art. 1, para. 1, of the 1969 Convention concerning development of the Rhine between Strasbourg/Kehl and Lauterbourg/Neuburgweier (*ibid.*, vol. 760, p. 347). See also the 1927 Convention between the USSR and Turkey regarding the use of frontier waters, art. 6 (United Nations, *Legislative Texts* . . . , p. 385).

termed saline or saltwater intrusion. Nature accomplishes this infiltration without any assistance from man in most cases,<sup>639</sup> above all during the dry or low-flow season. Yet the abstraction or removal of water from the watercourse, for irrigation for example, reduces the freshwater pressure at the interface even further and results in more maritime water penetration than nature alone inflicts.<sup>640</sup> It is primarily the naturally induced saltwater intrusion that is the subject of discussion at this point—the hazard to health or to uses of the water generally from the increased salinity.<sup>641</sup>

371. Most international watercourse systems, even if not now affected, are potentially vulnerable. High salinity renders the waters unusable for domestic, municipal, agricultural and most industrial purposes; treatment to lower salt content is very expensive, unless quantities of sweet water can be brought in for purposes of dilution.<sup>642</sup>

## 9. NATURAL HAZARDS GENERALLY AND DROUGHT

372. There is a considerable technical literature on the hazards and harmful effects just discussed.<sup>643</sup> The international legal literature is little developed,<sup>644</sup> but

<sup>639</sup> It should be noted that in extreme cases low-lying coastal areas and deltas may suffer "saline inundation" at certain times of the year. See the case of Bangladesh described by Abbas, "River basin development for socio-economic growth: Bangladesh", *loc. cit.*, pp. 188–190.

<sup>640</sup> If the reduced flow or pressure results from abstraction of water by a co-system State, the coastal system State or States may experience appreciable harm from what would be pollution as defined in sect. D above. The reverse situation, that is, harm done to the maritime waters and marine environment generally by the outflow of contaminated fresh water has already been dealt with in sect. F, "Environmental protection and pollution", above.

<sup>641</sup> Hydraulic works at or near the freshwater/salt water interface may have a role to play in maintaining or defending acceptable salinity levels. See the 1960 Treaty between Belgium and the Netherlands concerning improvement of the Terneuzen and Ghent Canal and settlement of various related matters, title VII, "Salinity and water withdrawal", especially art. 32 (United Nations, *Treaty Series*, vol. 423, p. 66).

<sup>642</sup> Salinity can also be increased to harmful levels as a result of return flows from irrigation. This is a clear case of pollution, however, and without connection with maritime waters. But see e.g. I. Pla and F. Dappo, "Criterios para reglar el uso de aguas salinas en agricultura" *Annales Juris Aquarum-II* (op. cit.), vol. 3, p. 1687-A; *The Global 2000 Report* . . . (op. cit.), p. 343.

<sup>643</sup> See *inter alia* United Nations, *Guidelines for Flood Loss Prevention and Management in Developing Countries*, Natural Resources/Water Series No. 5 (Sales No. E.76.II.A.7); Office of the United Nations Disaster Relief Co-ordinator, "Disaster prevention and mitigation", vol. 2: "Hydrological aspects" (UNDRO/22/76); "Report of the United Nations Interregional Seminar on Flood Damage Prevention Measures and Management" (25 Sept.–15 Oct. 1969, Tbilisi, USSR) (ST/TAO/SER.C/144); *The Global 2000 Report* . . . (op. cit.), pp. 335 and *passim*; United Nations, *Integrated River Basin Development* . . . , annex II, pp. 51–55, "Correlating measures of land improvement in the drainage basin with engineering works on the stream"; Iran, Ministry of Energy, "Protection and conservation of groundwater resources in salinated areas" *Annales Juris Aquarum-II* (op. cit.), vol. 2, p. 412; F. Briatico, "Ecological effects of hydraulic works", *ibid.*, vol. 3, p. 1281; T. Won, "Some effects of flood control works in international rivers", *ibid.*, p. 1509; G. Posewitz, "Problemas de las lagunas costeras", *ibid.*, p. 1677.

<sup>644</sup> The now numerous works on ultra-hazardous activities, a problem in State responsibility, do not reach the concern responded to in this section; but see e.g. C. W. Jenks, "Liability for ultra-hazardous activities in international law", *Recueil des cours* . . . , 1966–I (Leyden, Sijthoff, 1967), vol. 117; Dupuy, *La responsabilité internationale des Etats pour les dommages d'origine technologique et industrielle*, op. cit. On the interrelationships generally between "land" and harmful effects, see the report of the ILA Committee on

water lawyers have been emphasizing the need to control or prevent "harmful effects" for many years.<sup>645</sup>

373. The United Nations Water Conference accorded considerable attention to "natural hazards" in its general debate:

100. Many countries of the world were prone to hazards caused by extremes of water—floods and droughts . . . The rapid concentration of dwellers in flood plains, and the poor ecological management of areas susceptible to droughts, had contributed to the seriousness of these hazards in terms of loss of life and damage to physical facilities and, in some cases, to damage to the total ecological balance as well as cultures. At present the negative economic impact of water-related natural disasters in developing countries was greater than the total value of all the bilateral and multilateral assistance given to these countries.

101. It was recognized that emergency measures could not be a substitute for predisaster planning and disaster prevention . . . It was pointed out (a) that natural disasters were an important factor of setback to development; (b) that they were mostly preventable; . . .

102. A number of representatives drew attention to the tragic effects of the recent drought in the Sahel region . . . It was noted that the dimension of this catastrophe was due in great part to the weakness of the existing socio-economic structure and the lack of a water-related infrastructure capable of responding to the lack of precipitation. It was further noted that, contrary to generally held opinion, the main problem was not one of fundamental lack of water in the region. Assessment studies in fact showed that the potentially available supply, especially in relation to groundwater, was quite sizeable . . .<sup>646</sup>

374. "Natural hazards", focusing on floods and drought, became the subject of a series of recommendations adopted by the Conference. Excerpts will serve to illustrate the collective concern of the representatives:

62. There are extensive areas of the world where severe hydro-meteorological phenomena frequently occur and cause great damage . . . Experience shows that, with appropriate combinations of engineering works and non-structural measures, damages can be substantially reduced. It is necessary to plan ahead and co-ordinate the measures that need to be taken . . .

## Flood loss management

63. . . . The flood losses can be decreased by comprehensive structural and non-structural precautions and by the organization of

International Water Resources Law, part III, "Relationship of international water resources with other natural resources and environmental elements" (ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), p. 373). Included are the two articles on "the relationship between water, other natural resources and the environment", approved by the Conference, one subparagraph of which merits quotation:

"Consistent with article IV of the Helsinki Rules, States shall ensure that:

" . . .  
"(b) the management of their natural resources (other than water) and other environmental elements located within their own boundaries does not cause substantial injury to the water resources of other States" (*ibid.*, pp. 374–375).

<sup>645</sup> See Cano, *Derecho, política y administración de aguas*, book III, vol. 1 (Mendoza, Argentina, Instituto Nacional de Ciencia y Técnica Hídricas, 1976), pp. 49–50, 89, 281–282, and vol. 3, 1977, pp. 1271–1272, 1339–1343, and by the same author, *Recursos hídricos* . . . , op. cit., pp. 28–29; M. Prieur, "Régimen jurídico francés de protección del medio ambiente contra las inundaciones, la erosión y la sedimentación", *Annales Juris Aquarum-II* (op. cit.), vol. 3, p. 1260; J. Alvarez Michelangeli, "Manejo de planicies inundables", *ibid.*, p. 1645; E. Hernández and L. Tamayo, "Aspectos metodológicos y legales de la delimitación de áreas inundables en cuencas montañosas (especialmente analizando el moderno control de torrentes en Austria)", *ibid.*, vol. 2, p. 914.

<sup>646</sup> *Report of the United Nations Water Conference* . . . , pp. 111–112.



emergency services, including expanding the hydrological services to aid in forecasting floods and related events.

65. To this end it is recommended that countries should:

- (a) As part of general land and water management programmes:
  - (i) Provide the maximum feasible scope for flood mitigation in reservoir design and operation . . . ;
  - (ii) Take into consideration the effect of catchment use on the amount and timing of run-off;

(b) Develop flood forecasting and warning systems as well as flood-fighting and evacuation measures to minimize loss of lives and property . . . ;

(c) Improve the collection of data on damage caused by floods so as to provide a better basis for the planning, design and management of measures for the mitigation of flood loss, and to evaluate the performance of measures taken;

(e) Give appropriate consideration to structural measures such as dikes and levees and also to non-structural measures like flood-plain regulations, flood zoning, the preparation of flood-risk maps, flood insurance, etc. and integrate measures for upstream watershed management into overall flood control plans.

#### *Drought loss management*

66. In the recent past, droughts of exceptional severity have caused major hardships in many areas of the world. Such disasters can arise again at any time. In consequence, steps to mitigate the effects of drought in such areas is a top priority. In order to remedy the situation, structural and non-structural and emergency measures should be adopted, and for this purpose the development and management of water resources as well as drought forecasting on a long-term basis should be viewed as a key element.

68. To this end, it is recommended that countries should:

(b) Make an inventory of all available water resources, and formulate long-term plans for their development as an integral part of the development of other natural resources . . . These activities may require co-ordination with similar activities in neighbouring countries;

(c) Consider the transfer of water from areas where surplus in water resources is available to areas subjected to droughts;

(d) Intensify the exploration of groundwater through geophysical and hydro-geological investigations and undertake on a regional scale large-scale programmes . . . ;

(e) Determine the effect of drought on aquifers . . . ;

(k) Strengthen institutional arrangements . . . for the preparation and dissemination of hydrological, hydro-meteorological and agricultural forecasts and for the use of this information in the management of water resources and disaster relief;

(m) Evolve contingency plans to deal with emergency situations in drought-affected areas;

(n) Study the potential role of integration of surface and underground phases of water basins utilizing the stocks of water stored in groundwater formations in order to maintain a minimum supply under drought conditions.<sup>647</sup>

375. Where the watercourse is an international one, it is obvious that these, and other actions set forth in the Water Conference recommendations, need to be co-

<sup>647</sup> *Ibid.*, pp. 39–41. Principle 9 of 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" of the UNEP Working Group is directed at the hazard problem:

"States have a duty urgently to inform other States which may be

ordinated among the system States or taken jointly in order to be effective.

376. Following the lead of the debates and recommendations of the United Nations Water Conference, the aspect of drought is here added to the list of natural hazards. Although the earlier concept of "harmful effects" of water envisaged detrimental consequences from the presence or behaviour of water, this particular concern treats the other side of the coin: lack of the minimum supplies of water when normal sources fail. The required role of the law, including international water resources law, is, among other things, to anticipate these critical periods of shortage and to foster reserve supplies, contingency plans, conservation measures and interjurisdictional collaboration.<sup>648</sup> For many countries, effective international programmes for drought mitigation may be the most important single aspect of their relations with co-system States.<sup>649</sup>

377. That drought management has received the attention of States can be further demonstrated by citation of other documents and agreements. In 1973 a number of African States entered into a Convention establishing a Permanent Inter-State Committee on Drought Control in the Sahel in order, among other things:

(i) To co-ordinate all action to combat the drought and its consequences at the subregional level;

(ii) To make the international community aware of the problems caused by the drought;<sup>650</sup>

affected: (a) Of any emergency situation arising from the utilization of a shared natural resource which might cause sudden harmful effects on their environment; (b) Of any sudden grave natural events related to a shared natural resource which may affect the environment of such States" (para. 1), and

"States concerned should co-operate, in particular by means of agreed contingency plans, when appropriate, and mutual assistance, in order to avert grave situations, and to eliminate, reduce or correct, as far as possible, the effects of such situations or events" (para. 3) (UNEP/IG.12/2, annexed to document UNEP/GC.6/17).

<sup>648</sup> See Hayton, "Contingency planning and drought: legal and institutional aspects", paper prepared for the technical and scientific meetings held in Mar del Plata, Argentina, 14–25 March 1977, by the Argentine National Commission for the United Nations Water Conference; V. Yevjevich, "Outlook for long-range forecasting of droughts", *Water International* (Lausanne), vol. 6, 1981, p. 16; National Academy of Sciences, Board of Science and Technology for International Development, *More Water for Arid Lands* (Washington, D.C., 1974); E. F. Schulz, V. A. Koelzer, K. Mahmood, eds., *Floods and Droughts: Proceedings of the Second International Symposium in Hydrology*, (Fort Collins, Colo., Water Resources Publications, 1973); J. Barnea, "Men and the desert", *UNITAR News* (New York), vol. IX, 1977, pp. 35 *et seq.*

<sup>649</sup> The wider-ranging and perhaps permanent problem of desertification, an increasingly grave hazard in several parts of the world, was the subject of a special United Nations Conference. "Experience has shown that processes of desertification at times transcend national boundaries, making efficient regional co-operation essential in the management of shared resources . . ." (recommendation 26) (*Report of the United Nations Conference on Desertification* (Nairobi, 29 Aug.–9 Sept. 1977) (A/CONF. 74/36), chap. I, sect. V, para. 93. In the same recommendation, the Conference reaffirmed the recommendation of the United Nations Water Conference that, in the absence of bilateral or multilateral agreements, Member States should continue to apply generally accepted principles of international law in the use, development and management of shared water resources (*ibid.*, para. 94), and stated that higher priority should be given by the International Law Commission to its work on the law of the non-navigational uses of international watercourses (*ibid.*, para. 95).

<sup>650</sup> Art. 4 (A/9178, annex II). See also the 1905 Convention between the Netherlands and Prussia concerning the Dinkel and Vechte rivers, art. IV, sect. 2 (United Nations, *Legislative Texts* . . .



378. The ECE Committee on Water Problems approved a recommendation to the Governments of southern European countries concerning selected water problems that pointed out the "many features" these countries have in common, including in particular:

(a) Very marked seasonal and interannual fluctuations in precipitation, causing considerable variations in stream flow and in some cases floods and long periods of drought.<sup>651</sup>

Without using the term "drought", concern for the conservation of the supply of water in contemplation of shortage of water for irrigation has been made part of a number of treaties.<sup>652</sup> From Djibouti, to China, to Portugal, to the United States of America, to the United Republic of Tanzania and in many other areas, drought is a major preoccupation. The Commission's articles should include a proper provision comprehending this concern with respect to international watercourse systems. No other category of concern appears

p. 755). By its resolution 8 (II) of 22 March 1974, the Governing Council of UNEP adopted proposals for future action, with observations on priority subject areas, the second listed of which was "Land, water and desertification" (*Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 25 (A/9625)*, pp. 59-61, annex I).

For an analysis of "how to use lands exposed to natural hazards (floods, droughts, typhoons, earthquakes, volcanic eruptions, tsunamis, forest fires, locusts, etc.) and how to prevent or reduce the losses caused by such disasters", see Committee on Natural Resources, "Policy options" (E/C.7/L.53), para. 153.

<sup>651</sup>Sect. I, para. 2 (a) (ST/ECE/WATER/6/Add.1). Sect. II, para. 5 (b) provided for: "Appointment (or reinforcement) of adequate bodies for the whole country and for each river basin to apply policies of water quality protection, water resources management, erosion and flood control, etc.". See also I. Z. Balló, I. Orlóci and G. Reich, "Water resources development in the Tisza River Basin: past and future perspectives" (United Nations, *River Basin Development* . . . , vol. II, pp. 271-277).

<sup>652</sup>See e.g. art. 10 of the 1959 Agreement between Nepal and India on the Gandak irrigation and power project (United Nations, *Legislative Texts* . . . , pp. 298-299); the 1946 Treaty between Iraq and Turkey, Protocol relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries, preamble, fourth para. (United Nations, *Treaty Series*, vol. 37, p. 287).

more appropriate than this one, the prevention and control of water-related hazards.

#### 10. THE PROPOSED ARTICLE

379. Considering the importance of water-related hazards to the interests of system States, the following article is proposed for the consideration of a successor Special Rapporteur and of the Commission:

##### *Article 11. Prevention and mitigation of hazards*

1. System States shall co-operate on an equitable basis with a view to the prevention or mitigation of water-related hazardous conditions and occurrences such as flood, ice accumulation, erosion, sediment transport, avulsion, saltwater intrusion, obstruction, deficient drainage and drought, as the circumstances of the particular international watercourse system warrant.

2. Without delay and by the most expeditious means available, each system State shall communicate information regarding any emergency condition or occurrence or threat thereof to any other system State affected or likely to be affected.

3. The duty set forth in paragraph 1 of this article includes, but is not limited to:

(a) the timely exchange of all information and data that would contribute to more effective prevention, mitigation or emergency measures with respect to water-related hazardous conditions and occurrences;

(b) the duty to consult concerning joint measures, structural and non-structural, where such measures might be more effective than measures undertaken by the system States individually;

(c) the accomplishment of studies of the efficacy of measures taken; and

(d) the establishment, individually or jointly, of régimes providing monitoring of conditions in international watercourse systems susceptible to hazardous occurrences and early warning to the system State or States concerned of the threat of a hazardous occurrence.

### CHAPTER III

#### Introductory consideration of certain other questions

380. Although most of the relatively familiar legal issues ascribed to international watercourses have been addressed in the Special Rapporteur's first two reports and in chapter II of this third report, a number of significant aspects of the topic have not received specific attention. Some of these subtopics have entered into the discussion of other matters. It is believed that in due course these will need to be considered and developed if the Commission is eventually to present a complete set of articles on the topic. In this chapter, then, some of these special subtopics will be given a preliminary airing, along with some assaying of the merit of each as a subject of a tentative principle or rule. The following sections are submitted in a particularly provisional fashion with a view to sharing with the Commission the conceptual framework which has been developed, the direction believed sound for the Commission to follow and any proposed formulations arrived at by the time it was necessary to cease work on the topic.

##### A. River regulation

381. Control of the flow of an international watercourse, as with any watercourse of consequence, is a prime objective of the system States. Historically the hydraulic works and other measures taken were regarded as "river training"; more recently, "river regulation" or "river improvement" have become the more commonly used terms. The 1955 Canadian International River Improvements Act defines such improvement to mean "a dam, obstruction, canal, reservoir or other work the purpose or effect of which is (a) to increase, decrease or alter the natural flow of an international river, and (b) to interfere with, alter or affect the actual or potential use of the international

river outside Canada".<sup>653</sup> In the 1967 Treaty between Austria and Czechoslovakia concerning the regulation of water management questions relating to frontier waters, the expression "water management questions and measures" applies to changes in the river régime, regulation of watercourses, erection of high-water embankments, protection against flooding and ice, land reclamation and improvement, water supply, cleaning, utilization of water power, bridges and ferries and also to navigation matters related to hydraulic measures.<sup>654</sup>

### 1. MANAGING THE SUPPLY

382. Although the means are several and the techniques may be simple or sophisticated, the notion in essence is quite straightforward: withhold surplus water by storage or diversion; release additional water when downstream availability is insufficient. Regulation, not itself a use of the waters, seeks to tame the watercourse's rampages, seasonal or otherwise; to store water for later use, such as irrigation; to maintain the flow necessary for "firm" hydro-power generation; to provide scouring and minimum flows for dilution of pollutants; to sustain navigation, timber floating and fisheries; and to protect hydraulic works and other facilities and structures such as docks and bridges. In short, well-planned regulation is almost always multi-purpose, designed to satisfy "different needs and purposes, beneficial as well as protective, in an equitable manner".<sup>655</sup>

### 2. RESTATEMENT BY THE INTERNATIONAL LAW ASSOCIATION

383. After several years of deliberation, the International Law Association approved nine articles on river regulation at its fifty-ninth Conference, in 1980. As the sole professional effort to present the subject in the context of general international law, as well as on the merits of the result, these articles merit quotation:

#### Article 1

For the purpose of these articles, "regulation" means 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>653</sup> Art. 2 (*Revised Statutes of Canada, 1970* (Ottawa)), vol. IV, chap. I-22.

<sup>654</sup> Art. 2 (United Nations, *Treaty Series*, vol. 728, p. 354). In art. 2, para. 1, of the Canada Water Act 1969-1970, "water resource management" is defined to mean "the conservation, development and utilization of water resources, and includes . . . the control and regulation\* of water quantity and quality" (*Revised Statutes of Canada, 1970*, 1st Supplement, chap. 5). For a fairly recent use of "river training works", see art. 5 of the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters (United Nations, *Treaty Series*, vol. 538, p. 110).

<sup>655</sup> From the comment to art. 1 submitted to the International Law Association at its Belgrade Conference in 1980 by the the ILA Committee on International Water Resources Law in its second report (Chairman/Rapporteur: E. J. Manner) (ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), p. 363). The question of prevention and control of floods and other hazards has been separately treated in the present report (see chap. II, sect. G, above). Prevention or mitigation of pollution by dilution has not been treated separately as a pollution control measure; see however chap. II, sect. F, above.

#### Article 2

Consistent with the principle of equitable utilization, basin States shall co-operate in a spirit of good faith and neighbourliness in assessing needs and possibilities and preparing plans for regulation. When appropriate, the regulation should be undertaken jointly.

#### Article 3

When undertaking a joint regulation, basin States should settle all matters concerning its management and administration by agreement. When necessary, a joint agency or commission should be established and authorized to manage all relevant aspects of the regulation.

#### Article 4

Unless otherwise agreed, each basin State party to a regulation shall bear a share of its costs proportionate to the benefits it derives from the regulation.

#### Article 5

1. The construction of dams, canals, reservoirs or other works and installations and the operation of such works and installations required for regulation by a basin State in the territory of another can be carried out only by agreement between the basin States concerned.

2. Unless otherwise agreed, the costs of such works and their operation should be borne by the basin States concerned.

#### Article 6

A basin State shall not undertake regulation that will cause other basin States substantial injury unless those States are assured the enjoyment of the beneficial uses to which they are entitled under the principle of equitable utilization.

#### Article 7

1. A basin State is under a duty to give the notice and information and to follow the procedure set forth in article XXIX of the Helsinki Rules.

2. When appropriate, the basin State should invite other basin States concerned to participate in the regulation.

#### Article 8

In the event of objection to the proposed regulation, the States concerned shall use their best endeavours with a view to reaching an agreement. If they fail to reach an agreement within a reasonable time, the States should seek a solution in accordance with chapter 6 of the Helsinki Rules.<sup>656</sup>

384. As formulated by the Special Rapporteur, all aspects of "substantial injury", that is, appreciable harm, have been brought together in one article;<sup>657</sup> the matter of prevention and settlement of disputes will be addressed in section E of this chapter. But without doubt, the engineering community views watercourse regulation as a vital part of the use, protection and control of the waters of watercourses.

### 3. STATE PRACTICE

385. Training or regulation has often been the subject

<sup>656</sup> *Ibid.*, pp. 362-369. Art. 9 notes that application of these articles "is without prejudice to the application of the relevant articles on flood control adopted by" the Association in 1972 (*ibid.*, p. 372). Each article is accompanied by commentary, and the articles were prepared and revised after consultation with technical experts. For the Committee's first report on this subject and the discussion during the 1978 Conference, see ILA, *Report of the Fifty-eighth Conference, Manila, 1978* (London, 1980), pp. 221-237 and 238-247 respectively. The revised articles, after discussion, were approved by a resolution adopted at the Belgrade Conference (ILA, *Report of the Fifty-ninth Conference* . . . , p. 4).

<sup>657</sup> See para. 156 above, draft article 8.

of international agreement.<sup>658</sup> An early treaty between Switzerland and Austria, for example, was concluded for the express purpose of regulating the Rhine between its confluence with the Ill until its entry into Lake Constance.<sup>659</sup> The 1922 Agreement between Denmark and Germany relating to watercourses and dikes on the German-Danish frontier contains a separate section on "Regularization of frontier watercourses".<sup>660</sup> The Convention of 1950 between the Soviet Union and Hungary concerning measures to prevent floods and to regulate the water régime on the Soviet-Hungarian frontier in the area of the frontier river Tisza includes these provisions:

#### Article 2

The contracting parties undertake to carry out works for the purpose of regulating the water systems of the Tisza river basin along the Soviet-Hungarian frontier, and to develop the existing hydraulic installations and construct new ones in order to protect their territories against floods . . .

#### Article 3

All planning and survey work necessary for the execution of the measures provided for in article 2 of this Convention shall be carried out by each party in its own territory. . . . in accordance with programmes agreed between the contracting parties.

#### Article 6

The contracting parties undertake to exchange all data in their possession which are necessary for technical planning and for carrying out survey work.

#### Article 7

The contracting parties pledge themselves to maintain the operation of the water control system (of rivers, canals, and hydraulic installations) in good order . . .

#### Article 8

Should either contracting party wish to entrust to the other party the execution of the works referred to in articles 2 and 3 of this Convention, the commission shall be registered in official form, the other contracting party's consent having been obtained, through the

signature of a protocol concerning the execution and cost of the works and the procedure for the reimbursement of expenses . . .<sup>661</sup>

386. The express purpose of the construction and administration of the Owen Falls dam in Uganda was "control of the waters of the Nile", as well as production of hydro-electric power.<sup>662</sup> Annex E of the 1960 Indus Waters Treaty between India and Pakistan deals in detail with India's storage of waters on the western rivers. The requirements for storage for various purposes—for example, dead storage, flood storage, conservation storage and power storage—are described and provided for.<sup>663</sup> The Treaty of the River Plate Basin of 1969 commits the parties, Argentina, Bolivia, Brazil, Paraguay and Uruguay, to join forces for, among other things, the advancement of "the rational utilization of water resources in particular by the regulation of watercourses and their multipurpose and equitable development";<sup>664</sup> Mexico and the United

<sup>661</sup> *Ibid.*, pp. 827–828. See also, for example, the 1928 Treaty between Austria and Czechoslovakia regarding the settlement of legal questions connected with the frontier, especially art. 29 (League of Nations, *Treaty Series*, vol. CVIII, p. 71); annex B, entitled "Regulation of streams and resultant future changes in the course of the frontier . . ." of the 1960 Frontier Treaty between the Netherlands and the Federal Republic of Germany (United Nations, *Treaty Series*, vol. 508, pp. 254–258); the 1955 Convention between Italy and Switzerland concerning the regulation of Lake Lugano (*ibid.*, vol. 291, p. 213); the 1959 Agreement between Finland, Norway and Soviet Union concerning the regulation of Lake Inari (*ibid.*, vol. 346, p. 192); art. 1 of the 1957 Agreement extending the provisions of the Romanian-Soviet Convention of 1952 concerning measures to prevent floods and to regulate the water régime of the River Prut to the rivers Tisza, Suceava and Siret and their tributaries and to the irrigation and drainage canals forming or intersecting the Romanian-Soviet frontier (*Yearbook . . . 1974*, vol. II (Part Two), p. 303, document A/CN.4/274, para. 156); the 1963 Protocol between Greece and Turkey concerning the final elimination of differences concerning the execution of hydraulic operations for the improvement of the bed of the River Meriç-Evros, especially art. 20 (*ibid.*, p. 309, para. 209); the 1954 Agreement between Hungary and Czechoslovakia on the settlement of technical and economic questions concerning frontier watercourses, especially arts. 2–7, 10, 18 (United Nations, *Treaty Series*, vol. 504, pp. 256–264); preamble and arts. 4 and 5 of Protocol No. 1, relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries, to the 1946 Treaty between Iraq and Turkey (*ibid.*, vol. 37, pp. 287–290).

<sup>662</sup> Exchange of notes of 30 and 31 May 1949 constituting an Agreement between the United Kingdom and Egypt (*ibid.*, vol. 226, p. 274). For the upper reaches of the Nile, the Governments of Egypt, Kenya, Sudan, Uganda and the United Republic of Tanzania initiated in 1967, with the assistance of UNDP and WMO, the hydrometeorological survey project that now covers Lakes Victoria, Kyoga and Mobutu Sese Seko, together with the upper reaches of the White Nile. The aim is to study the water balance of this "coupled system" in order to permit planning of water conservation and to provide ground work for the intergovernmental co-operation with a view to full utilization of the Nile in the mutual interests of the participating countries. Control and regulation of the Lakes-Nile system would yield several advantages. In 1971 Ethiopia joined the Technical Committee, set up to manage the project, as an observer. Rwanda and Burundi became members in 1972, and Zaire in 1977, expanding the scope of the co-operation and the coverage. See "The hydrometeorological survey project" by A. B. Abul Hoda, Project Director, paper prepared for the United Nations Interregional Meeting of International River Organizations, Dakar, Senegal, 5–14 May 1981 (United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.A.17), p. 398).

<sup>663</sup> United Nations, *Treaty Series*, vol. 419, p. 186. See also the 1959 Agreement between the United Arab Republic and Sudan for the full utilization of the Nile waters, especially art. 2, "The Nile control projects and the division of their benefits between the two Republics" (*ibid.*, vol. 453, pp. 66–68).

<sup>664</sup> Art. 1, subpara. (b) (*ibid.*, vol. 875, p. 11). See also art. I of the 1973 Agreement between Paraguay and Argentina on the establishment of the Yacyretá enterprise (*Derecho de la integración* (Buenos Aires), vol. VII, No. 15, 1974, p. 211).

<sup>658</sup> In chap. II, sect. G, above, entitled "Prevention and control of water-related hazards", most of the examples cited relate to watercourse regulation measures for the prevention or mitigation of hazards. The 1923 Geneva Convention relating to the development of hydraulic power affecting more than one State included, in a list of points that might appropriately be taken up in specific agreements on hydro-power works, regulation of water flow (art. 6, para. (f)) (League of Nations, *Treaty Series*, vol. XXXVI, p. 75); see also art. 10, especially paras. 2 and 3, of the Statute on the régime of navigable waterways of international concern accompanying the Convention on the same subject signed at Barcelona on 20 April 1921 (*ibid.*, vol. VII, p. 57).

<sup>659</sup> Signed at Vienna, 30 Dec. 1892 (United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (Sales No. 63.V.4), pp. 489–494). See also, *inter alia*, the 1931 Treaty between Austria and Liechtenstein regarding the regulation of the Rhine and tributary waters (*ibid.*, pp. 486–488); the 1951 Convention between Switzerland and Italy concerning the correction of the Roggia Molinara (*ibid.*, pp. 850–851); the 1913 Convention between France and Switzerland for the development of the water-power of the Rhone, especially art. 4 (*ibid.*, p. 709); the 1955 Agreement between Yugoslavia and Romania concerning questions of water control on water control systems and watercourses on or intersected by the frontier, especially art. 2 (*ibid.*, p. 929).

<sup>660</sup> Sect. C (see especially arts. 15–28) (*ibid.*, pp. 583–587).

States agreed in 1944 to construct dams and other works jointly in the Rio Grande (Rio Bravo) for the purposes of conservation, storage and regulation of the flow "in a way to ensure the continuance of existing uses and the development of the greatest number of feasible projects . . ."<sup>665</sup>

387. As a final example, the 1971 Agreement between Finland and Sweden concerning frontier rivers has "Special provisions concerning water regulation".<sup>666</sup> Regulation of "the flow of water from a lake or in a watercourse" is for the purpose of achieving "better water management with a view to promoting traffic, timber floating, the use of water power, agriculture, forestry, fishing, water supply, water conservancy or any other significant public interest."<sup>667</sup> The parties' Frontier River Commission must issue rules governing participation in a regulation project which involves two or more interested parties.<sup>668</sup> Where industrial, power or other enterprises benefit from the regulation project without participating in it, the Frontier River Commission may require payment of compensation to the project "representing a reasonable share of the costs of regulation".<sup>669</sup>

#### 4. DISTINGUISHING "REGULATION" FROM ANTI-HAZARD MEASURES

388. Thus while measures directed at water-related hazards have a "negative" control or prevention approach, the concept of watercourse regulation is much broader, embracing in addition the planned facilitation of uses and even of waste elimination by management of the flow of the waters in the system. Equally significantly, regulation is not aimed at enjoining changes in the régime of the watercourse. On the contrary, it envisages active intervention for the purpose of attaining improved and more reliable benefits from the waters, delivered to the places and at the times needed. River "training" is seen as the fundamental means of reconciling conflicting, and periodically changing, demands by augmenting or by diminishing supplies to meet diverse requirements and also contributing to the avoidance and mitigation of water's "harmful effects". River regulation is, in brief, the hydraulic engineer's scheme for rational optimum utilization.

#### 5. THE PROPOSED ARTICLE

389. For the Commission to take account of this virtually universal dimension of co-operation with respect to international watercourse systems, a succinct article may be sufficient. The following draft language may be useful as a basis for discussion.<sup>670</sup>

<sup>665</sup> Art. 5, sect. 1, of the Treaty relating to the utilization of the waters of the Colorado and Tijuana rivers and of the Rio Grande (Rio Bravo) (United Nations, *Treaty Series*, vol. 3, p. 324). See also art. 5, sect. II, and arts. 6-8; *re* the Colorado, art. 12; *re* the Tijuana, art. 16, para. 2 (*ibid.*, pp. 324-350).

<sup>666</sup> Chap. 4 (*ibid.*, vol. 825, p. 292).

<sup>667</sup> Chap. 4, art. 1 (*ibid.*).

<sup>668</sup> Chap. 4, art. 3 (*ibid.*).

<sup>669</sup> Chap. 4, art. 4 (*ibid.*, pp. 292-294).

<sup>670</sup> Although this article includes a definition, it is presumed that in due course the Commission will collect all definitions in one article.

#### Article 12. Regulation of international watercourses

1. System States shall co-operate in the ascertainment of the needs and opportunities for regulation of their international watercourse.

2. Consistent with the principle of equitable participation, system States shall undertake and maintain, individually or jointly, those regulation works and measures regarding which agreement has been reached among the system States concerned, including with respect to the defrayal of costs.

3. "Regulation", for the purposes of this article, means the use of hydraulic works or any other continuing measure to alter or vary the flow of the waters in an international watercourse system for any beneficial purpose.

#### B. Hydraulic installations and water security

390. Questions of public safety with respect to the possible failure, mismanagement or sabotage of major hydraulic works and of the security of the installations themselves are not novel. The collapse of a high storage dam, for example, may take thousands of lives as well as have devastating economic and financial consequences. As more elaborate and much more costly multi-purpose projects have been constructed, especially in recent decades, concern has heightened. In addition to the potential for catastrophe posed by intensified occupation and use of low-lying areas downstream, the vulnerability of such works to acts of terrorism has led, or should have led, waterworks administrators to enhance their security precautions and to review their emergency operating procedures.

#### 1. THE INTERNATIONAL PROBLEM

391. Where important hydraulic works are erected or operate even in the territory of one State on an international watercourse system, sensitivity is usually not confined to that one system State. Downstream system States in particular have traditionally expressed concern for construction standards and operating schemes, especially during crisis situations. The need to be assured that adequate security measures are in effect to forestall or repel attack by terrorists or insurgents is of more recent inception, and the sufficiency of previous security arrangements may be questioned in these days by the system State or States concerned, including a system State in whose territory the hydraulic work is located. The problem could become profoundly serious.

392. System States have a legitimate interest in the safety and security of water-related installations, and not simply because of their potential for death and destruction. More and more major projects are part of a regional or system-wide plan for development, control and environmental protection, with benefits and costs, direct and indirect, to each participating system State. In their consultations and their sharing of information and data, system States will increasingly include questions of installation security and water safety, as well as the more familiar concern for safe construction and operation.

#### 2. PROTECTION IN TIMES OF ARMED CONFLICT

393. One important aspect of hydraulic safety and

security has received special scrutiny. It is the area of greatest pertinent development in international law: the protection of hydraulic works and water resources during armed conflict, international and non-international.

394. On the initiative of the International Committee of the Red Cross, and convoked by the Swiss Government, sessions of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict took place in Geneva from 1974 to 1977. In June 1977, the Conference adopted by consensus two protocols which have, in part, direct relevance to international watercourses. Protocol I to the Geneva Conventions applies to international armed conflict and contains, in chapter III (Civilian objects) of part IV (Civilian population), an article on "Protection of objects indispensable to the survival of the civilian population", which provides in part:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas . . . , crops, livestock, *drinking water installations and supplies and irrigation works*,\* for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

...

4. These objects shall not be made the object of reprisals.<sup>671</sup>

395. Another pertinent article is entitled "Protection of works and installations containing dangerous forces", and provides as follows:

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations

...

2. The special protection against attack provided by paragraph 1 shall cease:

(a) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

...

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions . . . and that their armament is limited to weapons

capable only of repelling hostile action against the protected works or installations.

6. The high contracting parties and the parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in article 16 of annex I to this Protocol . . .<sup>672</sup>

396. The following article stipulates that "constant care shall be taken to spare . . . civilian objects";<sup>673</sup> those who plan or decide upon an attack shall "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, . . . damage to civilian objects".<sup>674</sup> Moreover, "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".<sup>675</sup>

397. The Protocol also requires parties to the conflict to take "necessary precautions to protect . . . civilian objects under their control against the dangers resulting from military operations".<sup>676</sup> Also provided is the authority of a party to declare a locality to be non-defended: "It is prohibited for the parties to the conflict to attack, by any means whatsoever, non-defended localities."<sup>677</sup> By agreement, in peacetime or after the outbreak of hostilities, the parties to a conflict may confer the status of "demilitarized zone"; it is "prohibited for the parties . . . to extend their military operations to" such zones contrary to the terms of the agreement.<sup>678</sup>

398. Protocol II to the Geneva Conventions relates to the protection of victims of non-international armed conflicts.<sup>679</sup> Two articles, similar in purport to articles 54 and 56 of Protocol I, read as follows:

Article 14—*Protection of objects indispensable to the survival of the civilian population*

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas . . . , crops, livestock, *drinking water installations and supplies and irrigation works*.\*

Article 15—*Protection of works and installations containing dangerous forces*

Works or installations containing dangerous forces, namely, dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>680</sup>

<sup>672</sup> Art. 56 (*ibid.*, pp. 115–116).

<sup>673</sup> Art. 57, para. 1 (*ibid.*, p. 116).

<sup>674</sup> Art. 57, para. 2 (a) (ii) (*ibid.*).

<sup>675</sup> Art. 57, para. 2 (c) (*ibid.*, p. 117).

<sup>676</sup> Art. 58, para. (c) (*ibid.*).

<sup>677</sup> Art. 59, para. 1 (*ibid.*).

<sup>678</sup> Art. 60, paras. 2 and 1 (*ibid.*, p. 118).

<sup>679</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international conflicts (Protocol II) (*ibid.*, p. 135). Excluded, however, are "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". (art. 1, para. 2).

<sup>680</sup> *Ibid.*, p. 140. For a description and analysis of the conference diplomacy behind Protocol II, see D. Forsythe, "Legal management of internal war: the 1977 Protocol on Non-International Armed Conflicts", *American Journal of International Law*, vol. 72, 1978, especially pp. 277–295 and works and documents there cited.

<sup>671</sup> Art. 54, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 115. Art. 55, para. 1, requires that care shall be taken "to protect the natural environment against widespread, long-term and severe damage".

399. Any provision in the Commission's articles concerning the protection of water resources and hydraulic installations must be drawn up to take full account of these progressive provisions and to avoid, insofar as possible, any entanglement in the larger questions of the "Law of war". Without doubt, unqualified general language of proscription would run the risk of embroiling this topic in considerations and controversy far afield from the purpose at hand. Nonetheless, the extreme gravity of the potential harm, including in some cases calamitous losses, from the wrecking of modern major hydraulic works—plus the patent unacceptability of lethal contamination of water supplies—renders this particular problem ripe for codification. Governments of system States are, on humanitarian and economic grounds, constrained to use their best efforts to protect their peoples and their economies from ruin. Water, and water-related installations, are vital. And credible threats to cause such poisoning or damage, holding whole countries or regions in a sense hostage, could become increasingly feasible unless security programmes are equal to the tasks of protection. In any event, since special rules for the protection of hydraulic installations have only recently been brought to the fore, an effort should be made to arrive at applicable legal principles on that aspect acceptable in and applied by the international community. The Protocols to the Geneva Conventions, when they come into force among the States most concerned, will go far towards meeting the problem. But as suggested below, there may perhaps be room for a relevant contribution by these draft articles.

### 3. HISTORY OF CONCERN FOR WATER SAFETY

400. In most treatises on the law of land warfare, water enters quite incidentally, in relation to water supplies. The 16th century jurist Alberico Gentili found the rule against the poisoning of wells and springs already an established part of international law.<sup>681</sup> In 1646, Grotius described the point in this way:

*Ceterum non idem statuendum de aquis sine veneno ita corruptendis ut bibi nequeant . . . Id enim perinde habetur quasi avertatur flumen aut fontis venae intercipientur, quod et natura et consensu licitum est.*<sup>682</sup>

Similarly, Vattel later reported:

There is an even more general agreement in condemning the poisoning of streams, springs and wells. Certain authors give as a reason that thereby innocent persons, who are not our enemies, may be killed. . . . But while the use of poison is forbidden, it is perfectly lawful to turn aside a stream, to cut it off at its source, or in any other way to render it useless, in order to force the enemy to surrender.<sup>683</sup>

401. In the early twentieth century, Fauchille maintained:

The use of poison in any form, whether to contaminate wells or food or to envenom weapons, is strictly prohibited in modern warfare

<sup>681</sup> A. Gentili, *De jure belli, libri tres* (1612). See *The Classics of International Law* (Oxford, Clarendon Press, 1933), vol. I (facsimile of original) and vol. II (English trans.). However, Michel d'Amboise had earlier asserted (1543), in *Le guidon des gens de guerre*, that it was legally permissible to "gaster, infester, intoxiquer et empoisonner les eaux des ennemis".

<sup>682</sup> H. Grotius, *De jure belli ac pacis, libri tres* (1646). See *The Classics of International Law* (Oxford, Clarendon Press, 1913), vol. I.

<sup>683</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1758). See *The Classics of International Law* (Washington, D.C., Carnegie Institution of Washington, 1916), vol. 3, p. 289.

. . . However, it is permissible to perforate dikes, to demolish sluice gates. One may also divert the course of a river, cut off the enemy's sources of water. Once deprived of an element so essential to the survival of both men and animals, the enemy will surely be forced to abandon his positions.<sup>684</sup>

Oppenheim, discussing the prohibitions in article 23 of the Regulations annexed to Convention IV, respecting the laws and customs of war on land, signed at The Hague in 1907, concludes: "wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned".<sup>685</sup> Also, "an armed force besieging a town may . . . cut off the river which supplies drinking water to the besieged, but must not poison the river".<sup>686</sup>

402. Ancillary to the provision concerning the use of weapons or material "calculated to cause unnecessary suffering" (article 23 (e) of the Regulations annexed to The Hague Convention IV of 1907), the field manual on the law of land warfare of 1956 of the United States army states: "The foregoing rule does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses. . . ."<sup>687</sup> But in a list of acts "representative of violations of the law of war ('war crimes')", the same manual cites "poisoning of wells or streams".<sup>688</sup>

The corresponding British manual provides:

Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.<sup>689</sup>

403. Incidents in recent years have focused public attention on the vulnerability of water, as such, to deliberate poisoning. Such poisoning can result from

<sup>684</sup> P. Fauchille, *Traité de droit international public*, 8th ed., rev. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1921), vol. II, p. 123. In the same vein, see A. Mérignhac, *Le droit des gens et la guerre de 1914-1918* (Paris, Sirey, 1921), vol. I, p. 164. Most of the early citations in this section are taken from the report of the ILA Committee on International Water Resources Law, part III, "Intermediate report on the protection of water resources and water installations in times of armed conflict" (Rapporteur: F. J. Berber) (ILA, *Report of the Fifty-sixth Conference, New Delhi, 1974* (London, 1976), p. 129).

<sup>685</sup> L. Oppenheim, *International Law: A Treatise*, 7th edition, H. Lauterpacht, ed. (London, Longmans, Green, 1952), vol. 2: *Disputes, War and Neutrality*, p. 340, sect. 110.

<sup>686</sup> *Ibid.*, p. 419, sect. 157.

<sup>687</sup> Para. 37(b). Quoted in M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office) vol. 10, p. 455.

<sup>688</sup> Para. 504 (i).

<sup>689</sup> United Kingdom, War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), p. 42, quoted in Whiteman, *op. cit.*, p. 458. As one of the "examples of punishable violations of the laws of war, or war crimes", the same manual lists "poisoning of wells, streams, and other sources of water supply" (para. 626 (i)). The report of the ILA Committee on International Water Resources Law contains the following statement: "Because of the interrelation of all water, the prohibition of poisoning or making drinking water useless for human consumption by other means would also apply to rivers, lakes and canals, especially irrigation canals. . . ." (ILA, *Report of the Fifty-sixth Conference*, . . . p. 138). On the questions of poisoning water intended only for animal consumption and whether water supplies may legally be cut off, or rivers diverted from their courses, *ibid.*, pp. 138-139. For a discussion of the deliberate causing of floods by the opening of spillway gates, etc., as distinct from the destruction of dams and dikes for "the necessities of war" (Regulations annexed to The Hague Convention IV, art. 23 (g)), and striking illustrations of destruction of water systems and the civilizations they sustained, see ILA, *Report of the Fifty-sixth Conference*, . . . pp. 140-141.

the introduction of highly toxic chemicals or infectious biological agents (or their toxins); moreover, a damaged or malfunctioning nuclear reactor may release dangerously radioactive matter. Sophistication in toxicology is essential in the planning of avoidance of such contaminations as well as in neutralizing and cleansing operations.

404. Where a water supply from an international watercourse could be perniciously polluted with consequences in another system State, the system States concerned would do well to assure themselves of sufficient safeguards to avert such noxious contaminations. This is clearly not a matter of pollution in the ordinary sense. Special measures are called for and responsibilities need to be defined; the costs of such measures may be allocated by agreement on an equitable basis. However, a system State is not, generally speaking, an insurer against such poisoning. Due diligence would appear to be the normal measure of responsibility in such cases, as with other acts of sabotage or terrorism.

#### 4. CONSIDERATION BY THE INTERNATIONAL LAW ASSOCIATION

405. The Committee on International Water Resources law of the International Law Association included this subject in its Rapporteur's extensive "Intermediate report" for discussion at the Association's New Delhi Conference in 1974.<sup>690</sup> It submitted:

It is only in the last decade that the new awareness of the world-wide threat to human environment has meant a turning point also in the considerations concerning the protection of water and water installations in times of armed conflict, although these considerations are still far from being materially comprehensive or methodically systematic.

The dangers menacing dams and consequently the civil population living in the potential flood area of such dams have been visualized by a number of Governments and have led to municipal legislation providing for special protection, notably in Switzerland, Sweden and Germany.<sup>691</sup>

406. The report points out further the importance of safeguarding water supplies to the parties when, as the result of fixing a new boundary, "the hydraulic system (canalization, inundations, irrigations, drainage, or similar matters) in a State is dependent on works executed within the territory of another State".<sup>692</sup>

<sup>690</sup> *Ibid.*, p. 129. The report does not cover "a mere state of international tension, nor does it intend to examine the problems of the protection of water and water installations in cases of natural catastrophe which might well be the object of a special study", nor did it include "problems raised by so-called terrorist activities . . ."

(*ibid.*, p. 134).  
<sup>691</sup> *Ibid.*, p. 136. The report cites, *inter alia*, a proposal submitted by experts from Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary and Poland at the second session, in 1972, of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: "It is forbidden to use means and methods which destroy the natural human environmental conditions" (draft art. 30, para. 4) (International Committee of the Red Cross, *Report on the Work of the Conference*, vol. II, *Annexes* (Geneva, 1972), p. 63).

<sup>692</sup> ILA, *Report of the Fifty-sixth Conference*, . . . , p. 142, quoting from the Treaty of Saint-Germain with Austria of 1919 (art. 309), of Trianon with Hungary of 1920 (art. 292), of Sèvres with Turkey of 1920 (art. 363) and of Lausanne with Turkey of 1923 (art. 109), and citing similar provisions in the 1947 Peace Treaty between the Allied and Associated Powers and Italy (art. 9 and annex III, and art. 13 and annex V). The report also refers to the nearly 13 years of "dangerous controversy ended only in 1960 by the Indus Waters Treaty", as the

407. The Committee proposed to the 1976 Conference of the International Law Association its articles on "the protection of water resources and water installations in times of armed conflict", which were approved by the Conference and read as follows:

#### RESOLUTION

*Recalling* the significant increase, during recent decades, in the demand for water and the consequent development of water installations;

*Being aware* of the destructive power of modern weapons;

*Taking into account* the vital importance of water and water installations for the health and even the survival of people all over the world and the susceptibility of water and water installations to damage and destruction;

*Considering* the lack of specific rules of international law for the protection of water and water installations against damage or destruction in times of armed conflict;

*Convinced* of the urgent need to establish precise rules for the protection of water and water installations against damage or destruction and thus to contribute to the development of international humanitarian law applicable to armed conflicts;

*Adopts* the following articles as guidelines for the elaboration of such rules:

#### Article I

Water which is indispensable for the health and survival of the civilian population should not be poisoned or rendered otherwise unfit for human consumption.

#### Article II

Water supply installations which are indispensable for the minimum conditions of survival of the civilian population should not be cut off or destroyed.

#### Article III

The diversion of waters for military purposes should be prohibited when it would cause disproportionate suffering to the civilian population or substantial damage to the ecological balance of the area concerned. A diversion that is carried out in order to damage or destroy the minimum conditions of survival of the civilian population or the basic ecological balance of the area concerned or in order to terrorize the population should be prohibited in any case.

#### Article IV

The destruction of water installations such as dams and dikes which contain dangerous forces, should be prohibited when such destruction might involve grave dangers to the civilian population or substantial damage to the basic ecological balance.

#### Article V

The causing of floods as well as any other interference with the hydrologic balance by means not mentioned in articles II to IV should be prohibited when it involves grave dangers to the civilian population or substantial damage to the ecological balance of the area concerned.

#### Article VI

1. The prohibitions contained in articles I to V above should be applied also in occupied enemy territories.

2. The occupying power should administer enemy property according to the indispensable requirements of the hydrologic balance.

consequence of what it maintains was "a frontier delimitation unaware of the priority of a reasonable regulation of water supplies" (*ibid.*, p. 151, footnote 20). On the problem of the continued validity of water treaties in times of international conflict", see sect. IV of the report (*ibid.*, pp. 142-145).



3. In occupied territories, seizure, destruction or intentional damage to water installations should be prohibited when their integral maintenance and effectiveness would be vital to the health and survival of the civilian population.

#### Article VII

The effect of the outbreak of war on the validity of treaties or of parts thereof concerning the use of water resources should not be termination but only suspension. Such suspension should take place only when the purpose of the war or military necessity imperatively demand the suspension and when the minimum requirements of subsistence for the civil population are safeguarded.

#### Article VIII

1. It should be prohibited to deprive, by the provisions of a peace treaty or similar instrument, a people of its water resources to such an extent that a threat to the health or to the economic or physical conditions of survival is created.

2. When, as the result of the fixing of a new frontier, the hydraulic system in the territory of one State is dependent on works established in the territory of another State, arrangements should be made for the safeguarding of uninterrupted delivery of water supplies indispensable for the vital needs of the people.<sup>693</sup>

Useful as the foregoing ILA resolution is, it is believed that the draft article or articles of the International Law Commission on this aspect should not be limited to situations of armed conflict.<sup>694</sup>

### 5. WATER RESOURCES: TREATY PRACTICE AND SECURITY

408. A number of international agreements dealing with water resources include express provision for hydraulic installation security and public safety, and some other treaties may have taken such considerations to be an unspoken underlying premise. The drafters of and signatories to the 1923 Geneva Convention relating to the development of hydraulic power affecting more than one State were "safety conscious", as a reading of article 6 reveals:

The agreement contemplated in the foregoing articles may provide, amongst other things, for:

(a) General conditions for the establishment, upkeep and operation of the works;

(b) Equitable contributions by the States concerned towards the expenses, risks, damage and charges of every kind incurred as a result of the construction and operation of the works, as well as for meeting the cost of upkeep;

...

(d) The methods for exercising technical control and securing public safety;

(e) The protection of sites;

(f) The regulation of the flow of water;

(g) The protection of the interests of third parties; . . .<sup>695</sup>

409. With respect to the construction and operation of the Emosson hydroelectric project, France and Switzerland required the Governments' approval of the designs and layout of the works as prepared by the concessionaire; concerning installation security, the works are subjected to the national law of the party

<sup>693</sup> ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (London, 1978), pp. xxxv-xxxvi.

<sup>694</sup> In adopting its resolution approving the proposed rules, the International Law Association stated that this was "with the understanding that these rules should be applied also with respect to other conduct intended to damage or destroy the water resources of a State or area . . ." (*ibid.*, p. xxxiv).

<sup>695</sup> League of Nations, *Treaty Series*, vol. XXXVI, p. 83.

in which the particular installations are situated.<sup>696</sup> Switzerland also has an agreement with Italy governing the construction and operation of a dam and a reservoir near the junction of the Spöl and Ova dal Gall. Maximum safety for Switzerland is required in connection with the dam's specifications; adequate water outlets, so that flood waters may be released freely at all times, is specially stipulated.<sup>697</sup>

410. The "safety" originally contemplated in the treaties may have been, primarily at least, protection against the hazards and harmful effects taken up as a separate aspect earlier in this report (chap. II, sect. G).<sup>698</sup> In this section, it is above all protection against wilful actions that is the object of study and possible regulation.

### 6. TERRORIST ACTS OF SABOTAGE

411. Besides destructive or contaminating action taken during armed conflict, acts of sabotage by terrorists are more than ever before of prime concern. However, there is little published record of concerted international action. Individual system State practice, certainly, is intensive or indubitably should be; Governments are presumably fully conscious of the risks at stake, though consultation and collaboration among system States appears underdeveloped.

412. Lacking generally is authoritative articulation of general principles of co-operation in the fields of public safety and security of water installations, as is expression of the extent of a system State's possible responsibility for failure to use its best efforts to keep this kind of harm from happening. Responsibility of a system

<sup>696</sup> Art. 2 of the 1963 Convention on the Emosson hydroelectric project between France and Switzerland (*Revue générale de droit international public* (Paris), 3rd series, vol. XXXVI, No. 1, 1965 p. 571; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 311, document A/CN.4/274, para. 229). It can be said on good authority that the security precautions for these works, now in operation, are taken seriously. Under art. 3 of the Convention, the concessionaire is obliged to safeguard general interests by operating spillways and drains so that proper flows are maintained; under art. 4 a permanent supervisory commission was also established. See also the 1975 Treaty between Iran and Iraq on international borders and good neighbourly relations, and the Protocol on border security, especially arts. 1, 6 and 9 (*re sabotage, subversion and safeguarding the security of joint water borders in Shatt-ul-Arab*) (*International Legal Materials*, vol. XIV, No. 5, 1975, pp. 1133-1135).

<sup>697</sup> Art. 8 of the 1957 Convention concerning the use of water-power of the Spöl (United Nations, *Legislative Texts . . .*, p. 862).

<sup>698</sup> See e.g. the 1913 Convention between France and Switzerland for the development of the water-power of the Rhone, arts. 1-4 (*ibid.*, p. 709); the 1950 State Treaty between Luxembourg and the Rhineland-Palatinate concerning the construction of a hydroelectric power plant on the Saure (Sûre), arts. 5-6, 8-9, 20-21 (*ibid.*, pp. 722-726). Navigation treaties traditionally deal with the responsibility of the riparian State to maintain, if not improve, the safety of navigation. See R. R. Baxter, *The Law of International Waterways* (Cambridge, Mass., Harvard University Press, 1964); H. Zurbrugg, *Das internationale Flussschiffahrtsrecht und die Schweiz* (Basel, 1945); report of the ILA Committee on International Water Resources Law, part two, "Report on maintenance and improvement of naturally navigable waterways separating or traversing several States" (Rapporteur: H. Zurbrugg) (ILA, *Report of the Fifty-sixth Conference . . .* especially pp. 123-125, and works and examples there cited). Ultimately, however, the elements dealt with in discrete articles for the purposes of international legal formulations merge in practice into a co-ordinated pattern of co-operation, if not joint action; a communications system, for example, set up to transmit early warnings in the case of the threat or occurrence of natural and accidental hazardous events, can serve equally to inform co-system States of acts of sabotage, etc.; installation security and public safety can be made agenda items during regular or special consultations.

State normally would be not for the fact of poisoning or damage to an installation, but for failure to fulfil a special duty to use diligence and foresight to ward off the person or persons, even including in some cases insurgents or foreign military; a separate duty, absolute unless excused, would of course apply to the system State's own actions of this kind of wilful nature. There might also be absolute liability attaching to certain types of installations, notably nuclear installations.

413. Acts of terrorists against water and hydraulic installations have been given, publicly, little methodical attention at the intergovernmental level. The matter belongs to the wide, evolving field of lawful measures countering terrorism.<sup>699</sup> It is not recommended that the Commission, through the topic on the law of the non-navigational uses of international watercourses, become involved in the controversial phases of the contemporary debate on terrorism.

414. Indeed, some of the proposals earlier in this century appear to have taken a broader view of terrorist acts than is commonly seen today. Among the acts deemed to be terrorism, as studied by the International Conferences on the Unification of Penal Law,<sup>700</sup> were, in express terms: flooding; the damaging of public utilities; the pollution, fouling or deliberate poisoning of drinking water; causing or propagating contagious or epidemic diseases; and any wilful act endangering lives and the community.<sup>701</sup>

#### 7. THE PROPOSED ARTICLE

415. In a preliminary fashion, in the light of the compelling considerations and limited precedent marshalled above, these paragraphs of a draft article, restricted to shared water resources and associated installations, are offered for the consideration of a successor Special Rapporteur and of the Commission:

#### **Article 13. Water resources and installation safety**

**1. System States shall employ their best efforts to prevent the poisoning of shared water resources by any and all persons or from any source.**

<sup>699</sup> From a burgeoning literature, see e.g. F. and B. Lockwood, Jr., "Preliminary thoughts towards an international convention on terrorism", *American Journal of International Law*, vol. 68, 1974, p. 69, and works and documents there cited; J. Dugard, "Towards the definition of international terrorism" (American Society of International Law, *Proceedings of the 67th Annual Meeting* (Washington, D.C., 1973)), p. 94; discussion and interim report of the ILA Committee on International Terrorism (Chairman/Rapporteur: A. Evans) submitted to the Association at its New Delhi Conference in 1974 (ILA, *Report of the Fifty-sixth Conference* . . . , pp. 155-177), and discussion and second interim report of the Committee submitted to the Madrid Conference in 1976 (ILA, *Report of the Fifty-seventh Conference* . . . , pp. 119-152).

<sup>700</sup> Six conferences were held from 1927 to 1935. In accordance with a decision taken by the Sixth Committee of the General Assembly at its 1314th meeting, during the Assembly's twenty-seventh session, the Secretariat carried out a study on international terrorism (A/C.6/418 and Add. 1), which includes a chapter on the work of these conferences.

<sup>701</sup> See arts. 1 and 2 on terrorism proposed at the Third International Conference on the Unification of Penal Law (Brussels, 26-30 June 1930), *Actes de la Conférence* (Brussels, Office de publicité, 1931), p. 194, annex B, sect. III. See also annex I of the reports on the same subject submitted at the Sixth International Conference on the Unification of Penal Law (Copenhagen, 31 Aug.-3 Sept. 1935), *Actes de la Conférence* (Paris, Pedone, 1938), p. 176, part two, sect. IV.

**2. Hydraulic installations and other facilities, associated with an international watercourse system and capable of releasing dangerous forces or substances, shall not be attacked, destroyed or damaged during peacetime, or in time of armed conflict unless such installations or facilities are demonstrably being used as part of an adversary's offensive military positions or apparatus.**

**3. Hydraulic installations and other facilities, associated with an international watercourse system and capable of releasing dangerous forces or substances, shall not be used in preparation for, or in the conduct of, offensive military operations.**

**4. System States shall, at the request of any of them, consult with a view to reaching agreement with respect to sufficient practicable security and safety measures, individual and joint, for the protection of shared water resources from poisoning and of hydraulic and other installations and facilities associated with their international watercourse system from terrorist acts of sabotage.**

**5. Without prejudice to the question of the effect otherwise of the outbreak of hostilities upon the status of any system agreements or other water-related treaties or arrangements, system States shall, to the extent possible, by direct or indirect means, sustain during times of armed conflict warning systems established with other system States for the purpose of informing a system State or States of the threat or occurrence of a water-related hazardous event.**

**6. Withholding, by diversion or other means, of water from a system State so as to place in jeopardy the survival of the civilian population or to imperil the viability of the environment is prohibited in peacetime and in time of armed conflict.**

#### **8. CORRESPONDENCE OF THE PROPOSED ARTICLE 13 WITH THE 1977 GENEVA PROTOCOLS**

416. The proposed article, although applicable only to the works and waters of international watercourses, is drawn in large part from relevant articles of the two Additional Protocols to the Geneva Conventions dealing with "international humanitarian law" quoted earlier in this section. Although the proposed article is essentially consonant with those Protocols, only a few of the many provisions of the Protocols apply,<sup>702</sup>

<sup>702</sup> The scope of the Protocols is broad. Protocol I consists of 102 articles as well as annexes; it deals extensively with the wounded, sick and shipwrecked (part II), the methods and means of warfare, combatant and prisoner-of-war status (part III), and execution of the Geneva Conventions and of Protocol I (Part V), as well as with the civilian population (part IV), our concern here. And this latter part treats, in addition to water-related matters (arts. 54-56), of protection of cultural objects and of places of worship (art. 53), of refugees and stateless persons (art. 73), of women (art. 76), of children (arts. 77-78) and of journalists (art. 79), among other topics such as relief actions (art. 70) and reunion of dispersed families (art. 74). An International Fact-finding Commission, with a procedure for recognition of the Commission's competence *ipso facto* and without special agreement, is an important institution created by Protocol I (art. 90); its constitution and competence may merit study in connection with the elaboration of provisions on settlement and avoidance of disputes for the law of international watercourses. Protocol II contains only 28 articles, yet covers many of the same issues as Protocol I for internal armed conflict, i.e. between a party's "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military

(Continued on next page)

nonetheless, especially in view of the considerable negotiations that finally led to the agreed texts of the Protocols, departure by the Commission from their provisions should be undertaken with caution.<sup>703</sup> Accordingly, comparison of the provisions of the proposed article with the terms of the Protocols may be of use.

(a) *Paragraph 1 of the draft article*

417. Paragraph 1 of proposed article 13 employs rather traditional language on this point: that the poisoning of shared water resources is to be prevented by engaging the best efforts of system States. The principle is obliquely and differently expressed in Protocol I, where the destruction or rendering useless of, among other things, "drinking water . . . supplies" is prohibited.<sup>704</sup> The proposed rule in paragraph 1 is straightforward and comprehensive.

(b) *Paragraph 2 of the draft article*

418. Paragraph 2, dealing with the protection of hydraulic works and other facilities, is in substantially close correspondence with both Protocols. The language of the paragraph, however, is more compact. No enumeration of the kinds of works intended is given. But it is contemplated that works other than "dams, dikes and nuclear electrical generating stations" may be dangerous;<sup>705</sup> thus the wording is more general. Protected works must, however, be associated, that is, closely connected, with an international watercourse system. The application of the rule in peacetime, as well as in time of armed conflict, is naturally and intentionally broader than in the Protocols. The existence of hostilities is not what makes hydraulic installations vital or dangerous. The language "shall not be attacked, destroyed or damaged", is preferred to "shall not be made the object of attack" in the Protocols, inasmuch as the prohibition does not contemplate action by armed forces only.

419. The situation of armed conflict, however, is given specific consideration in paragraph 2. The duty to spare the protected works is lifted where it is objective-

ly evident that offensive military use is being made of the installations or facilities. Cast in more concise form, this exception coincides generally with article 56, paragraph 2, of Protocol I.<sup>706</sup>

420. In one important respect the proposed article is substantially less restrictive than Protocol I. Dams, dikes and nuclear generating plants, according to that international agreement, are not to be attacked even if they are military objectives; then it also exempts "other" military objectives at or in the vicinity of the works or installations from attack, if the result would be the release of dangerous forces and consequent severe losses among the civilian population.<sup>707</sup> The article here proposed, however, does not consider nearby military "objectives". It intentionally extends protection only to hydraulic and other water-related facilities. To do otherwise would amount to an unjustifiable departure from the proper terms of reference of the topic.<sup>708</sup> In addition, the proposed paragraph speaks of military positions and military apparatus, terms which denote use for military purposes; the phrase "military objectives" used in the Protocols signifies in the military vocabulary, in a specific sense, all targets deemed by a party to an armed conflict worthy of capture, destruction, neutralization, etc., and would certainly embrace the key physical infrastructure of the "enemy", including such facilities as are intended to be protected. These need not be used for any "military" purpose. The term "objectives", for that reason, has not been employed in the proposed draft article.

(c) *Paragraph 3 of the draft article*

421. Paragraph 3 states the duty of the State in whose territory the potentially perilous installations or facilities are situated: use of such works for offensive military purposes is proscribed, in line with the requirement in Protocol I that the parties endeavour not to locate "military objectives in the vicinity of" the protected works or installations, except installations for defensive actions to protect the works. Armament for such positions must be limited to weapons capable only of "repelling hostile action against the protected works".<sup>709</sup>

(d) *Paragraph 4 of the draft article*

422. Paragraph 4 mandates consultations among system States with a view towards agreement on safety and security matters to combat sabotage. The corresponding provision in Protocol I urges the contracting parties and the parties to the conflict "to conclude further

(Footnote 702 continued.)

operations and to implement this Protocol" (art. 1, para. 1). The subject of hydraulic installations and water safety, including non-international armed conflict, has a prior and at least partly settled existence for which both Protocols, it is believed, constitute some evidence; they are the most recent intergovernmental formulations.

<sup>703</sup> See "Protocols additional to the Geneva Conventions on the laws of war" (American Society of International Law, *Proceedings of the 74th Annual Meeting, 1980* (Washington, D.C., 1981), pp. 191-212) (panel chairman: G. Aldrich; papers prepared by A. Rubin and H. Almond, Jr.).

<sup>704</sup> Art. 54, para. 2. This provision is by its terms limited to action "for the specific purpose of denying [the civilian population of certain objects] for their sustenance value". The equivalent language in Protocol II (art. 14) does not include this qualification. Of course, all provisions of these Protocols are perforce restricted to situations of armed conflict. That fact, however, furnishes no basis for concluding that the problem, considered from the perspective of the law of international watercourses, is or should be so limited.

<sup>705</sup> Both Protocols include the phrase "namely dams, dikes and nuclear electrical generating stations" (Protocol I, art. 56, para. 1; Protocol II, art. 15). The Protocols speak of "containing dangerous forces"; recommended to the Commission is the phrase "capable of releasing dangerous forces or substances", regarded as an improvement without substantive change of meaning, since the "release" aspect appears subsequently in the provisions referred to in both Protocols.

<sup>706</sup> Protocol II has no such exception. By specifying "offensive" military use in the proposed draft, it is intended to provide, as in art. 56, para. 5, of Protocol I, that "installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions . . .".

<sup>707</sup> Art. 56, para. 1. The protection ceases with respect to such military objectives "only if they are used in regular, significant and direct support of military operations" and if such attack is the only feasible way to end that support (art. 56, para. 2 (c)). Protocol II has no comparable provision.

<sup>708</sup> No position is taken, consequently, on the question of the exempt status of military installations near protected works. Military installations at the protected works are covered.

<sup>709</sup> Art. 56, para. 5. Protocol II has no comparable provision.

agreements among themselves to provide additional protection for objects containing dangerous forces".<sup>710</sup> The paragraph comprehends water supply poisoning, as well as damage to or destruction of hydraulic works and facilities; the phrase "terrorist acts of sabotage" has been chosen to comprehend isolated acts of violence against the protected works and waters, as distinguished from acts committed by armed forces, treated in the preceding two paragraphs.<sup>711</sup>

423. It is taken for granted that attack *en masse*, or by sapping or infiltration, against such protected installations, and acts of poisoning, whether by individuals or groups, are prohibited acts in municipal law. Often absent is the transnational co-ordination of security and of safety programmes. Active co-operation in these matters does not appear central to the Geneva Protocols.<sup>712</sup>

(e) *Paragraph 5 of the draft article*

424. The benefit, especially in humanitarian terms, of helping to avert calamity by warning one's neighbour is manifest and already established in this report in connection with accidental hazardous events.<sup>713</sup> In this section of the report, dealing with the poisoning of drinking water and with devastation as the result of damage to water-related works, the need to provide for the uninterrupted operation of arrangements for communicating disaster warnings and information may be self-evident. The provision requiring system States to continue this specific kind of co-operation even during hostilities is contained in paragraph 5 of the draft article. It presumes the existence of warning systems between States. More accurately, the paragraph could not be operative if such a system had not been established prior to the initiation of armed conflict.

425. Chapter IV ("Precautionary measures") of part IV of Protocol II contains provisions related to such a rule: "Constant care shall be taken to spare" both the civilian population and "civilian objects".<sup>714</sup> Such care would certainly include warning systems, where possible. The avoidance, or in any event the minimizing of the loss of life and injury to civilians, and of damage to "civilian objects" is part of the requirement in Protocol I that "all feasible precautions" be taken in choosing the means and methods of armed attack.<sup>715</sup> At least arguably, one such "means" could include, regardless of adversary or friendly status, the transmission of a

warning to a system State certain or likely to be affected by the poisoning of or damage to a facility.

426. The requirement in the proposed text to "sustain" warning systems is not absolute, only "to the extent possible". Protocol I requires "effective advance warning"—and this would include warning an adverse party—of attacks that may affect the civilian population, "unless circumstances do not permit".<sup>716</sup>

(f) *Paragraph 6 of the draft article*

427. A basis for the first part of paragraph 6 of the proposed article—prohibiting the cutting off of a population's vital water supply—is found in several provisions of the Protocols. Protocol I makes it illegal to "remove" drinking water, "whether in order to starve out civilians, to cause them to move away, or for any other motive".<sup>717</sup> It is true that, under Protocol I, "derogation from the prohibitions contained in paragraph 2 may be made by a party to the conflict . . . where required by imperative military necessity".<sup>718</sup> However, "in no event shall actions . . . be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement".<sup>719</sup> Paragraph 6 of the proposed article is not subject to the derogation clause just quoted.

428. It must be acknowledged that the doctrine of military necessity has not been incorporated in this draft, as another issue involving far-reaching considerations in the "law of war".<sup>720</sup> An effort was made to draft this paragraph in such a way that at least a traditional clause on military necessity might be obviated. This, however, is one of several problems that would require consideration should the Commission decide to include an article of this kind in its draft articles.

429. The second element in the proposed paragraph 6, prohibiting the diversion of water so as "to imperil the viability of the environment" is amply supported by a special article of Protocol I:

*Article 55—Protection of the natural environment*

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

<sup>710</sup> Art. 56, para. 6. Protocol II has no comparable provision. Draft paragraph 4 is consistent with and reinforces other provisions of these draft articles concerning the duty to consult and negotiate.

<sup>711</sup> All non-accidental and wilfully negligent acts (not committed by military forces) damaging to, or destructive of, protected works could simply be defined as "sabotage". The term "terrorist acts of sabotage" may serve to intensify the disapprobation of the international community; the need to foster system agreements covering this problem area is unmistakable. It is expected that an article on definitions will properly delimit the chosen term.

<sup>712</sup> But art. 89 ("Co-operation") of Protocol I reads: "In situations of serious violations of the Conventions or of this Protocol, the . . . parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the . . . Charter"; art. 88 deals with "mutual assistance in criminal matters".

<sup>713</sup> See chap. II, sect. G, above.

<sup>714</sup> Art. 57, para. 1.

<sup>715</sup> Art. 57, para. 2 (a) (ii).

<sup>716</sup> Art. 57, para. 2 (c).

<sup>717</sup> Art. 54, para. 2. The equivalent provision in Protocol II, art. 14, expressly prohibits "starvation" of civilians as a method of combat; "to . . . remove . . . drinking water . . ." is also prohibited without qualification. Protection under Protocol I is not applicable if the objects (e.g. "drinking water installations and supplies and irrigation works") are used by an adverse party "as sustenance solely for the members of its armed forces" or "in direct support of military action" (art. 54, para. 3 (a) and (b)). There is no similar provision in Protocol II.

<sup>718</sup> Art. 54, para. 5. Except for the language of art. 3, para. 1, no such provision is found in Protocol II.

<sup>719</sup> Art. 54, para. 3 (b).

<sup>720</sup> See e.g. Oppenheim, *op. cit.*, pp. 232–233, 415–416, and works there cited; W. Downey, Jr., "The law of war and military necessity", *The American Journal of International Law*, vol. 47, 1953, p. 251; E. Castrén, *The Present Law of War and Neutrality* (Helsinki, Suomalainen tiedeakatemia, 1954), especially p. 66; R. Tucker, *The Law of War and Neutrality at Sea* (Washington, D.C., 1957), pp. 33–37, and works there cited.

430. Protocol I is devoted to the regulation of international armed conflict, and so the general provision quoted above, in paragraph 1, addresses prohibited methods and means of warfare. But if such protection of the environment can be exacted under conditions of warfare, *a fortiori* that protection ought to prevail in peacetime.

### C. Interaction with navigational uses

431. The topic before the Commission is, it may be recalled, "The law of the non-navigational uses of international watercourses". The Commission, in its questionnaire on the scope of its study, raised the relevant question of the interrelationship between navigational uses and other uses.<sup>721</sup>

#### 1. PREVIOUS CONSIDERATION OF THE QUESTION OF NAVIGATIONAL USES

432. After review of this question at the outset of his work on the topic, the Special Rapporteur reached these conclusions in his first report:

As the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the Commission's draft articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses and requires that certain levels of water be maintained; it further requires passage through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so many that, on any watercourse where navigation is practised or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators entrusted with development of the watercourse. . . .<sup>722</sup>

433. Based upon these considerations, a draft provision was put forward tentatively, embracing navigation in the Commission's articles insofar as provisions of the articles respecting other uses of water affect navigation or are affected by navigation.<sup>723</sup> Subsequent discussion of this portion of the Special Rapporteur's first report on the scope of the topic did not challenge the appropriateness of such a provision.<sup>724</sup> Consequently, the draft provision relating to navigation in the second report retained substantially the language originally proposed.<sup>725</sup>

434. After discussion within the Commission, the draft articles as revised by the Special Rapporteur were referred to the Drafting Committee during the course of the thirty-second session. The Drafting Committee revised and refined the language of all but one of the draft articles submitted by the Special Rapporteur and reported back to the Commission; the Commission, in turn, provisionally adopted draft articles 1 to 5 and

article X.<sup>726</sup> With respect to the provision here under consideration, the Commission's draft provides:

The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.<sup>727</sup>

The Commission's commentary to the provision

. . . recognizes that the exclusion of navigational uses . . . cannot be complete. As both the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the present articles . . . [The provision] has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation. . . .<sup>728</sup>

435. In the Sixth Committee of the General Assembly, in the debate on the Commission's report and provisionally adopted articles on this topic, only a few representatives commented on this particular provision (see para. 16 above).<sup>729</sup> The Commission's conclusion, that it must deal with the frequent and significant interactions between navigational uses and other uses, when they in fact are present, was understood and generally accepted.

#### 2. NAVIGATION AND PROVISIONAL ARTICLE 5

436. This section takes up the implementation of that general proposition in express terms. Implementation by implication may be said to have been already achieved by the broad terms of the Commission's draft article 5, "Use of waters which constitute a shared natural resource";

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are . . . a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.<sup>730</sup>

<sup>726</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

<sup>727</sup> Art. 1, para. 2.

<sup>728</sup> Para. (12) of the commentary to art. 1 (*ibid.*, p. 111). The commentary bases itself on and substantially repeats the findings of the Special Rapporteur quoted above. It was recorded that one member favoured omission of the provision as beyond the scope of the Commission's mandate on the topic.

<sup>729</sup> The interrelationship was given legal significance as early as 1888 in the arbitration between Costa Rica and Nicaragua concerning the San Juan River. The arbitrator, G. Cleveland, gave the opinion that the execution of works of improvement by Nicaragua on its own territory could not be prevented by Costa Rica "provided such works . . . do not result [*inter alia*] . . . in the destruction or serious impairment of the navigation of the river or any of its branches at any point where Costa Rica is entitled to navigate the same" (J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, (Washington, D.C., U.S. Government Printing Office, 1898), vol. II, pp. 1964-1965) (see also *Yearbook* . . . 1974, vol. II (Part Two), p. 191, document A/5409, para. 1041). For recent examples, see the 1964 Convention relating to the status of the Senegal River (Guinea, Mali, Mauritania, Senegal), requiring submission to the Interstate Committee of the riparian States of projects whose execution was likely to alter, *inter alia*, the conditions of navigability of the river (art. 3) (*Revue juridique et politique* (Paris), XIXth year, No. 2, 1965), p. 299; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 290, document A/CN.4/274, para. 47. Similarly, see the 1963 Act regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Chad, Dahomey, Ivory Coast, Guinea, Mali, Niger, Nigeria, Upper Volta), preamble, third para.; art. 2, second para.; art. 4 (United Nations, *Treaty Series*, vol. 587, pp. 11-13).

<sup>730</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 120.

<sup>721</sup> Item G. See final text of the questionnaire in *Yearbook* . . . 1980, vol. II (Part Two), p. 105, para. 69.

<sup>722</sup> *Yearbook* . . . 1979, vol. II (Part One), pp. 158-159, document A/CN.4/320, para. 61.

<sup>723</sup> Draft art. 1, para. 2 (*ibid.*, p. 158, para. 60).

<sup>724</sup> See *Yearbook* . . . 1980, vol. II (Part One), pp. 161-163, document A/CN.4/332 and Add. 1, paras. 6-26.

<sup>725</sup> "The use of water of international watercourses for navigation is within the scope of these articles in so far as provisions of the articles respecting other uses of water affect navigation or are affected by navigation" (draft art. 1, para. 2) (*ibid.*, p. 167, document A/CN.4/332 and Add. 1, para. 52).

437. It will be noted that "use" in that article is not limited to non-navigational uses, nor can it logically or properly be so limited. Though the specifics of regulation by general international law of the navigational uses are not to be taken up, the status of a shared resource comprehends conflicts between uses and the intimately related problems of, for example, pollution, environmental protection, hazards, public safety and improvement works for regulation. Navigation is or may be involved with each of these aspects, if the international watercourse is used for, or will be used for, navigation.<sup>731</sup>

### 3. *IPSO FACTO* PRIORITY AND EQUITABLE SHARING

438. The concept of what is now termed "shared natural resource" is said to have had its origins in the use of an international watercourse for navigational purposes. Riparians learned to share the use of the watercourse for navigation in promotion of their several and mutual interests. When other uses became economically and socially important, the body of law associated with non-maritime navigation provided precedent by analogy for the principle of equality of right and then its modern formulation, equitable utilization with respect to all beneficial uses.<sup>732</sup> The principle of equitable participation advanced in this report (see chap. II, sect. B, above) further subjects any use, including navigation, to consideration of certain non-use aspects of the protection and control of international watercourses.

439. Because navigation was historically the first economically important use,<sup>733</sup> it gained a privileged position not only vis-à-vis other uses as they rose to

prominence but also with respect to the building of bridges, watercourse safety and river regulation in general. All watercourse-related activities had to yield to the requirements of navigation.<sup>734</sup>

440. A prime example of that posture of preference, developed in Europe and imparted to other parts of the world, is found in the 1921 Barcelona Convention and Statute on the régime of navigable waterways of international concern:

Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation.<sup>735</sup>

441. The "Declaration of Montevideo", approved by the Seventh International Conference of American States in 1933, even though dedicated to the use of international waters for industrial or agricultural purposes, gave priority to navigation:

In no case either where successive or where contiguous rivers are concerned, shall the works of industrial or agricultural exploitation performed cause injury to the free navigation thereof.<sup>736</sup>

442. By the time the Inter-American Juridical Committee produced its revised draft convention on the industrial and agricultural uses of international rivers and lakes in 1965, the corresponding provision had been softened somewhat, but still looked backward to a preference for navigation:

The utilization of the waters of an international river or lake for industrial or agricultural purposes must not prejudice the free navigation thereof in accordance with the applicable legal rules . . . .<sup>737</sup>

443. The following year, the Inter-American Economic and Social Council spoke of control and economic utilization of the hydrographic basins and

<sup>731</sup> On environmental pollution and protection, and on hazards, see chap. II above, sects. F and G respectively; on safety, and on regulation, see sects. B and A respectively. When the Institute of International Law adopted its "Salzburg resolution" on "utilization of non-maritime international waters (except for navigation)", it none the less did not exclude navigational uses from its general rules: "Every State has the right to utilize waters which traverse or border its territory . . ." (art. 2, first para.); "If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity . . ." (art. 3); "No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled . . ." (art. 4) (*Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, Part Two, pp. 381-383). The rules of the International Law Association on the uses of the waters of international rivers (the "Helsinki Rules"), which however include an entire chapter (chap. 4) on navigation, also cast the general rules to include all uses (e.g. art. IV: "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the water of an international drainage basin" (ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 486).

<sup>732</sup> On the development of these principles and their application in the draft articles proposed for consideration by the Commission, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 127-132, sect. 5 of the commentary to art. 5 and treaties and studies there cited, and *Yearbook . . . 1980*, vol. II (Part One), pp. 188-194, document A/CN.4/332 and Add. 1, paras. 186-214. See also J. Lipper, "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), pp. 28-29 and 73, note 59 d.

<sup>733</sup> At least in those parts of the world most influential in the development of international law. Fishing, the use of water for power by mills, irrigation, timber-floating and stock watering were also early uses, in addition to domestic uses, but only later attained "international" recognition (see F. Berber, *Rivers in International Law* (London, Stevens, 1959), pp. 5-6).

<sup>734</sup> On the development and scope of the international law of navigation, see *inter alia* the literature cited in P. Ogilvie, *International Waterways* (New York, Macmillan, 1920); O. Gönnerwein, *Die Freiheit der Flussschifffahrt* (Stuttgart, Kohlhammer, 1940); D. Vignes, "L'égalité du traitement des usagers dans les transports internationaux", *Annuaire français de droit international, 1958* (Paris), vol. IV, p. 144; D. P. O'Connell, *International Law*, 1st ed., vol. 1 (London, Stevens, 1965), pp. 625-639.

<sup>735</sup> Art. 10, para. 1, of the Statute (League of Nations, *Treaty Series*, vol. VII, p. 57).

<sup>736</sup> Art. 5 (Carnegie Foundation for International Peace, *The International Conferences of American States, First Supplement, 1933-1940* (Washington, D.C., 1940), p. 88; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I, A.) Not only were such works not to injure free navigation "but, on the contrary, [they shall] try to improve it in so far as possible" (art. 6). The Conference adopted the language of rule II. 4 of the "Madrid resolution" of the Institute of International Law (*Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24, p. 366).

<sup>737</sup> Art. 5 (Pan American Union, *Report of the Inter-American Juridical Committee on the Work accomplished during its 1965 Meeting* (Washington, D.C., 1966), p. 7, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 350, document A/CN.4/274, para. 379). The draft convention was not altogether well received, apparently in part because of this provision. Emphasis on navigation was already criticized in "Preliminary review of questions relating to the development of international river basins in Latin America" (E/CN.12/511). See also G. J. Cano, "Problemas jurídicos e institucionales de los proyectos multinacionales de desarrollo hídrico en América Latina y el Caribe", *Corporaciones públicas multinacionales para el desarrollo y la integración de la América Latina y el Caribe*, M. Kaplan, ed. (Mexico, Fondo de cultura económica, 1972), p. 274; I. Zanotti, "Aproveitamento dos rios e lagos internacionais para fins industriais e agrícolas", *Boletim da Sociedade brasileira de direito internacional* (Rio de Janeiro), 20th year, Nos. 39 and 40, 1964, p. 5; M. A. Espeche Gil, *Direito internacional público especializado* (Rio de Janeiro, Pontifícia Universidade Católica, 1963).



streams . . . for the purpose of promoting, through multinational projects, their utilization for the the common good, in transportation, the production of electric power, irrigation works and other uses, and particularly in order to control and prevent damage such as periodically occurs as the result of . . . floods.<sup>738</sup>

Though "transportation" heads the list of uses, after "utilization for the common good", the Council's equal interest in other uses and aspects is clear.

444. There seems little doubt but that, today, navigation has been deprived of its preferential status. System States may still establish any priority of uses by agreement; where navigation is still the predominant use, it may thus still enjoy the traditional preference. But such cases are becoming fewer as treaties are being revised and international watercourses are being subjected to multiple uses; system States are also taking a more integrated approach to development, protection and control of the resource.<sup>739</sup> Some treaties still give first priority to navigation; others favour different uses.<sup>740</sup>

445. The change may be illustrated, even for a region where navigation has long reigned supreme, by quoting from the Declaration of Asunción on the use of international rivers:

5. The States shall do their best to maintain the best possible conditions of navigability on the reaches of the rivers under their sovereignty and shall adopt for that purpose whatever measures may be necessary to ensure that any permanent works that are constructed do not interfere with the other present uses of the river system.

6. When executing permanent works for any purpose on rivers of the Basin, the States shall take the necessary steps to ensure that navigability is not impaired.

7. When executing permanent works on the navigable waterways system, the States shall ensure the conservation of the living resources.<sup>741</sup>

446. Also, the 1969 Convention concerning development of the Rhine between Strasbourg/Kehl and Lauterbourg/Neuburgweier, between France and the Federal Republic of Germany, reflects the broader approach:

The development . . . shall be carried out in such a way as not to cause . . . any adverse change in the present water-table or in the

flow conditions of the old arms of the Rhine and its affluents. The development must not result in any serious impediment to navigation. The interests of water supply, agriculture and fisheries shall be preserved. Consideration shall also be given, to the fullest extent possible, to protection of the landscape.<sup>742</sup>

447. In 1927, concerned with the hydro-electric development of the Douro River, Portugal and Spain declared "that they will not recognize the river as a navigable waterway . . . in the zones of the international section, where such a character would be incompatible with the full use of the zones of development".<sup>743</sup> Thus, although in many international watercourses navigation remains a leading use, system States are now mindful of the importance of other uses and of other, non-use, considerations.

#### 4. CLARIFYING PRIORITY WITH RESPECT TO RESIDUAL ARTICLES

448. Whether by agreement States accord priority to navigation or to any other use is not of consequence to the Commission's articles. What is relevant is the general abandonment of the former automatic preference for navigation over *other* uses, which are central to the topic. Priority constitutes the key legal interrelationship between non-navigational and navigational uses in general international law. That shift, one consequence of the reception by system States of the doctrines of equitable utilization and environmental protection, should receive expression.

449. The International Law Association took this position in 1966:

A use or category of uses is not entitled to any inherent preference over any other use or category of uses.<sup>744</sup>

#### 5. THE PROPOSED ARTICLE

450. The motivation for examining the aspect of preference, or priority, was provided by the need to delimit the role of navigation in these articles in a manner consistent with multipurpose utilization, and the larger concept of equitable participation. It was soon realized, however, that the problem was in fact not limited to navigational uses. None the less, survival of special deference to navigation in a number of international watercourse treaties seems to make it

<sup>738</sup> Resolution 24-M/66, "Control and economic utilization of hydrographic basins and streams in Latin America" (sole operative para.) (Pan American Union, *Final Report of the Fourth Annual Meeting of the Inter-American Economic and Social Council* (Washington, D.C., 1966), vol. I, p. 48; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380).

<sup>739</sup> See *inter alia* Lipper, *loc. cit.*, pp. 60-62; G. J. Cano, *Recursos hídricos internacionales de la Argentina* (Buenos Aires, de Zavalia, 1979), especially pp. 94, 98 and 116-124; UNITAR, *International Navigable Waterways—Financial and Legal Aspects of their Improvement and Maintenance* (New York, 1975); "Legal aspects of hydroelectric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1, pp. 21, 35, 92); H. A. Smith, *The Economic Uses of International Rivers* (London, King, 1931), pp. 143, 150; United States of America, Memorandum of the Department of State of 21 April 1958, "Legal aspects of the use of systems of international waters with reference to the Columbia-Kootenay River system under customary international law and the Treaty of 1909" (85th Congress, 2nd session, Senate document No. 118, pp. 88-91).

<sup>740</sup> See agreements concerning navigation cited in Lipper, *loc. cit.*, pp. 86-87, notes 206 and 213.

<sup>741</sup> Resolution 25, of 3 June 1971, adopted by the Ministers for Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay, Uruguay) at their Fourth Meeting (Organization of American States, *Ríos y lagos internacionales (utilización para fines agrícolas e industriales)* (Washington, D.C., 1971, p. 188). (Reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326.)

<sup>742</sup> Art. 2, para. 1 (United Nations, *Treaty Series*, vol. 760, p. 347). The "development" referred to involves a fixed dam in the river, a movable weir, a set of locks, a hydroelectric plant, levees, side channels and appurtenant works; progressive paving of the bed and supplementary measures to deepen the navigable channel are envisaged (art. 1, paras. 1 and 3).

<sup>743</sup> Art. 6, first para., of the 1927 Convention to regulate the hydroelectric development of the international section of the River Douro (League of Nations, *Treaty Series*, vol. LXXXII, p. 135). Were the parties to decide that the development of navigation on the Douro was desirable, a special convention was to be required "concerning the method of carrying out the work and of affecting transport without interfering with the hydroelectric operations" (art. 6, second para.).

<sup>744</sup> Art. VI of the Helsinki Rules (ILA, *Report of the Fifty-second Conference* . . . , p. 491). It should be recalled that the Helsinki Rules were designed to apply if the matter was not governed "otherwise by convention, agreement or binding custom among the basin States" (art. I). The commentary in support of art. VI states: "In the past twenty-five years . . . the technological revolution and population explosion, which have led to the rapid growth of non-navigational uses, have resulted in the loss of the former pre-eminence accorded navigational uses. Today, neither navigation nor any other use enjoys such a preference. A drainage basin must be examined on an individual basis and a determination made as to which uses are most important . . .".



desirable to identify navigational uses in a draft article on use preference.

451. In the belief that this approach, including the already approved provision in article 1, meets the problem of navigation in these articles, at least until consideration of particular uses is undertaken, the following text is proposed for possible consideration of a successor Special Rapporteur and of the Commission:

**Article 14. Denial of inherent use preference**

1. Except as may otherwise be provided by system agreements in force or locally binding custom, neither navigation nor any other use enjoys an automatic preference over other uses.

2. Each use shall be weighed along with any conflicting uses and other considerations relevant to the particular international watercourse system in determining a system State's equitable participation, in accordance with articles 6 and 7 of these articles.

**D. Administrative arrangements for international watercourse systems**

452. It can readily be discerned from the complex dynamics of man's relationships with and dependence upon water, including the water resources of international watercourse systems, that mere defence-of-rights postures, or even spasmodic co-operative efforts, are now utterly unsuited to the circumstances of most international watercourses. The requirements of use, protection and control, moreover, are increasing at a rapid pace, as are the costs and sophistication of the indicated and effective measures to meet those requirements.

**1. ADVANCES IN STATE PRACTICE**

453. Numerous international watercourse systems are now provided with permanent institutional machinery, tailored to the needs of the participating system States and the singularities of the shared water resources.<sup>745</sup>

<sup>745</sup> The secretariat has compiled, for the use of the Special Rapporteur, an annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses. For summary descriptions of the institutional scope, composition, operations, functions, administrative arrangements, decision-making processes and financing arrangements of 18 such international watercourse organizations, "selected to illustrate the widest possible variety of arrangements", see United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), p. 198, annex IV.

<sup>746</sup> A number of studies have been published on international river commissions. See *inter alia* N. Ely and A. Wolman, "Administration", *The Law of International Drainage Basins* (op. cit.), p. 124; J. D. Chapman, ed., *The International River Basin: Proceedings of a Seminar on the Development and Administration of International River Basins* (Vancouver, 1961) (Vancouver, University of British Columbia, 1963); L. A. Teclaff, *The River Basin in History and Law* (The Hague, Nijhoff, 1967); T. Parnall and A. E. Utton, "The Senegal Valley Authority: a unique experiment in international river basin planning", *Indiana Law Journal* (Bloomington, Ind.), vol. 51, 1976, p. 235; L. Wehle, "International administration of European inland waterways", *The American Journal of International Law*, vol. 40, 1946, p. 100; Secretariat of the Danube Commission, "Practice and principles of development of the Danube basin", document No. 12 submitted at the Seminar on the Development and Administration of International River Basins (Vancouver, 1961); Commission centrale pour la navigation du Rhin, *Le Rhin, son statut, son organisation et son trafic*, 1965; G. Waite, "The International Joint Commission: its practice and its impact on land use", *Buffalo Law Review* (Buffalo, N.Y.), vol. 13, 1963, p. 93; C. Hart Schaaf and R. H.

These advances, from *ad hoc* or sporadic negotiations and agreement-making through diplomatic channels to institutionalized collaboration involving data sharing, studies, analysis and projects and programmes, manifest the commitment of the parties to "manage" their shared water resources technically and in a more integrated fashion than would otherwise be possible. These international river and lake organizations vary widely in their capacities and competences, and have a long history of development.<sup>746</sup>

Fifield, *The Lower Mekong: Challenge to Co-operation in South-East Asia* (Princeton, N.J., Van Nostrand, 1963); M. Schreiber, "Vers un nouveau régime international du fleuve Niger", *Annuaire français de droit international*, 1963 (Paris), vol. IX, p. 866, and by the same author, "Accord relatif à la Commission due fleuve Niger et à la navigation et aux transports sur le fleuve Niger", *ibid.*, 1964, vol. X, p. 813; ECLA, "Sistemas de organización administrativa para el desarrollo integrado de cuencas hidráulicas: exposición de los diferentes tipos de estructura institucional utilizados en América Latina y en el resto del mundo" (E/CN.12/503); A. Lepawsky, "International development of river resources", *International Affairs* (London), vol. 39, No. 4, 1963, p. 533; W. Kenworthy, "Joint development of international waters", *The American Journal of International Law*, vol. 54, 1960, p. 592; Y. Baskin, "The contemporary international régime of the Rhine and Rhine navigation", *Soviet Year-Book of International Law* 1960 (Moscow), p. 206 (English summary at p. 216); L. M. Bloomfield and G. F. Fitzgerald, *Boundary Water Problems of Canada and the United States* (Toronto, Carswell, 1958); "Summary of activities of the Central Commission for Navigation of the Rhine", *International Organization* (Boston, Mass.), vol. IV, No. 3, 1950, p. 541; A.-Ch. Kiss, "Commission centrale pour la navigation du Rhine", *Annuaire français de droit international*, 1955 (Paris), vol. I, p. 508; A. Kislov and S. Krylov, "State sovereignty in airspace", *International Affairs* (Moscow), No. 3 (1956), p. 35; G. Kojanec, "Le commissioni fluviali—contributo allo studio dell'organizzazione internazionale" *La Comunità internazionale* (Padua), vol. XVI, No. 4, 1961, p. 745; E. Malešev, "La Commission danubienne", *Revue de la politique internationale* (Belgrade), vol. 9, No. 189, 1958, p. 8; G. Roth, "Territoriale und funktionale Elemente europäischer Flussschiffahrtskommissionen", *Archiv des Völkerrechts* (Tübingen), vol. 11, No. 2, 1963, pp. 168; J. Sauveplanne, "L'autorité centrale en droit rhénan", *Nederlands tijdschrift voor internationaal recht* (Leyden), 1953-1954, No. 2, 1954, p. 140; K. Sinha, "A note on organization for effective execution of river basin development" (United Nations, *Proceedings of the Regional Technical Conference on Water Resources Development in Asia and the Far East*, 1954, Flood Control Series No. 9 (Sales No. 1956.II.F.3), p. 433); P. Biays, "La Commission centrale du Rhin", *Revue générale de droit international public* (Paris), 3rd series, vol. XXIII, No. 2, 1952, p. 223; Baxter, "The Indus Basin", *The Law of International Drainage Basins* (op. cit.), p. 443; R. W. Johnson, "The Columbia Basin", *ibid.*, pp. 167; J. F. Friedkin, "The Colorado River: international aspects", *Pollution and International Boundaries: United States-Mexican Environmental Problems*, A. E. Utton ed. (Albuquerque, N.M., University of New Mexico, 1973), p. 36; C. Sepulveda, "Implications for the future: design of viable international institutions", *Natural Resources Journal* (Albuquerque, N.M.), vol. 15, 1975, p. 215; D. J. LeMarquand, *International Rivers: the Politics of Co-operation* (Vancouver, University of British Columbia, 1977), and works there cited; L. B. Dworsky, "Summary of discussions and findings on co-operative management and development of international river basins" (United Nations, *River Basin Development: Policies and Planning* (Sales No. E.77.II.A.4), vol. II, p. 132; S. Gorove, *Law and Politics of the Danube* (The Hague, Nijhoff, 1964); J.-C. André, "L'évolution du statut des fleuves internationaux d'Afrique noire", *Revue juridique et politique—Indépendance et coopération* (Paris), vol. 19, No. 2, 1965, p. 285; J.-C. Gautron, "L'aménagement du bassin du fleuve Sénégal", *Annuaire français de droit international*, 1967 (Paris), vol. XIII, p. 690; A. Eisenberg, *El aprovechamiento del río Uruguay y el derecho internacional* (Montevideo, Facultad de derecho y ciencias sociales, 1963); G. Vailati, "Le régime international du fleuve Niger", *Revue de droit international de sciences diplomatiques et politiques* (Geneva), 49th year, No. 1, 1971, p. 31; P. K. Menon, "The Mekong River and international development of natural resources", *The International Lawyer* (Chicago, Ill.), vol. 5, No. 1, 1971, p. 53; United Nations, *Management of International Water Resources* . . . , and works there cited. Earlier works, as well as instructive studies on the general principles of water resources

(Continued on next page.)

## 2. THE MODERN DOCTRINE

454. A number of United Nations studies have pointed out the advantages of such institutional arrangements for the management of international watercourse systems.<sup>747</sup> The 1974 draft European convention for the protection of international watercourses against pollution would require system States "to enter into negotiations with each other, if one of them so requests, with a view to concluding a co-operation agreement or to adapting existing co-operation agreements to the provisions of" the convention.<sup>748</sup> Subsequent provisions urge the establishment, and delineate the necessary functions, of international watercourse commissions:

*Article 14*

1. The co-operation agreement . . . shall, unless the interested contracting parties decide otherwise, provide for the establishment of an international commission and lay down its organization, its modes of operating and, if necessary, the rules for financing it.

2. The co-operation agreement shall, where appropriate, provide that any existing commission or commissions shall be assigned the functions provided for in article 15.

3. Where two or more international commissions exist for the protection against pollution of the waters . . . , the interested contracting parties undertake to co-ordinate their activities in order to improve the protection of the waters of the basin.

*Article 15*

1. Each international commission for water protection shall have *inter alia* the following functions:

(a) To collect and to verify at regular intervals data concerning the quality of the water of the international watercourse;

(b) To propose, if necessary, that the interested contracting parties carry out or have carried out any additional investigation to establish the nature, degree and source of pollution; the commission may also decide to undertake certain studies itself;

(c) To propose to the interested contracting parties that an early warning system be set up for serious accidental pollution;

(d) To propose to the interested contracting parties any additional measures that it considers useful;

(e) To study, at the request of the interested contracting parties, the advisability and, if necessary, the methods of jointly financing large-scale projects concerning water pollution control;

(f) To propose to the interested contracting parties the inquiries and the programmes and objectives for reducing pollution . . .<sup>749</sup>

(Footnote 746 continued.)

administration and national watercourse administration (covering also inter-provincial watercourses) have been omitted. But see L. A. and E. Teclaff, "Bibliography on legal and related aspects of the use and development of the waters of international river basins", *The Law of International Drainage Basins* (op. cit.), p. 609 (key to entries under "Administration" at p. 773).

<sup>747</sup> See especially ECE, "Legal aspects of hydro-electric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1); United Nations, *Multi-purpose River Basin Development. Part 2D: Water Resources Development in Afghanistan, Iran, Republic of Korea and Nepal*, Flood Control Series No. 18 (Sales No. 1961.II.F.8); *Integrated River Basin Development* (Sales No. E.70.II.A.4), and *Management of International Water Resources*. . . . See also "Water resources planning experiences in a national and regional context" (TCD/SEM.80/1).

<sup>748</sup> Art. 12, para. 1 (Council of Europe, Consultative Assembly, doc. 3417, 4 April 1974; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 346-349, document A/CN.4/274, para. 377.) See also sect. 13, first para., of the Award in the *Lake Lanoux* arbitration (Spain-France) (United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 308; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066).

<sup>749</sup> Council of Europe, Consultative Assembly, doc. 3417, 4 April

455. In 1979, at its Athens session, the Institute of International Law adopted articles on "The pollution of rivers and lakes and international law".<sup>750</sup>

Article VII of the Institute's articles sets forth a series of nine "ways of co-operation" that system States "shall, as far as practicable, . . . resort to" in carrying out their "duty to co-operate", established in article IV (b). Besides informing, notifying, consulting, co-ordinating and establishing environmental norms, one of the listed ways of co-operation is to:

Set up international commissions with the largest terms of reference for the entire basin, providing for the participation of local authorities if this proves useful, or strengthen the powers or co-ordination of existing institutions.<sup>751</sup>

456. Clearly the specialists in the affairs of international watercourses have concluded that the interests of the system States are best served when an international commission is able, at the very least, to study, co-ordinate and monitor the watercourse conditions and projects.

457. The draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, prepared by the UNEP Intergovernmental Working Group of Experts, also recommends such institutional machinery:

*Principle 2*

In order to ensure effective international co-operation . . . , States sharing . . . natural resources should endeavour to conclude bilateral or multilateral agreements . . . in order to secure specific regulation of their conduct in this respect . . . . In entering into such agreements or arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultation on environmental problems relating to the protection and use of shared resources.<sup>752</sup>

1974. Art. 16 takes up the decision-making process within such commissions; art. 17 details the kinds of water quality standards, "adapted to the various possible uses of the international watercourse" (with reference to art. 15, para. 2, and to the quality limits set out in appendix III to the convention).

<sup>750</sup> *Annuaire de l'Institut de droit international*, 1979 (Basel), vol. 58, Part Two, p. 197 *et seq.* These articles are considered generally in chap. II, sect. F, above, on environmental pollution and protection.

<sup>751</sup> Art. VII, para. 1 (g) (*ibid.*, p. 202). The Institute had as early as 1911 taken an analogous position (then made applicable only to successive international watercourses) in its "Madrid resolution", on "international regulations regarding the use of international watercourses", where it recommended "that the interested States appoint permanent joint commissions, which shall render decisions, or at least shall give their opinion, when, from the building of new establishments or the making of alterations in existing establishments, serious consequences might result in that part of the stream situated in the territory of the other State" (rule II, 7) (*Annuaire de l'Institut de droit international*, 1911, vol. 24, p. 367; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 200, document A/5409, para. 1072.) The Institute's "Salzburg resolution" of 1961 on "utilization of non-maritime international waters (except for navigation)" contains a final article (art. 9) which restates the position in this language: "It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which may arise". (*Annuaire de l'Institut de droit international*, 1961, vol. 49, Part Two, p. 384; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076).

<sup>752</sup> UNEP/IG.12/2, annexed to document UNEP/GC.6/17. Principle 2 is also reproduced in the commentaries to art. 3 ("System agreements" and art. 5 ("Use of waters which constitute a shared natural resource")), provisionally adopted by the Commission (*Yearbook* . . . 1980, vol. II (Part Two), pp. 117 and 124). The principles are generally reviewed in chap. II, sect. F, above, on environmental

458. The 1933 Montevideo Declaration of the Seventh International Conference of American States made express provision for a mixed technical commission, composed of technical experts from both sides, as part of its notice and information procedure where "a State plans to perform [works] in international waters".<sup>753</sup> The revised draft convention produced by the Inter-American Juridical Committee in 1965 retained the same approach, deleting the "technical" requirement<sup>754</sup> for the "Joint Commission". Meanwhile, the Consultative Assembly of the Council of Europe came to the following conclusion, in recommending joint action in the field of pollution control:

A special body for water pollution control should be set up for each international drainage area. In defining the tasks of such a body and in determining its administrative structure, account should be taken of the principles formulated in the report to the Assembly (Doc. 1965).<sup>755</sup>

459. ECE has an active Committee on Water Problems, whose members are governmental experts from the region. In 1971, the Committee adopted a recommendation to the Governments of ECE member States concerning river basin management, which stressed the "ever higher demands for water and an increasing deterioration of the environment", and declared:

It is accepted that only careful planning and rational management of the allocation, utilization and conservation of water resources . . . can assure that requirements will be met in the future and that the natural environment will be improved and preserved. . . .

On the basis of existing experience it appears that the improvement of water resources management may best be attained through the establishment of appropriate regional organs which operate in the framework of natural river basins, sub-basins or groups of smaller basins, as physical and administrative conditions may require . . .<sup>756</sup>

### 3. RECENT INTERNATIONAL ACTION

460. One of the recommendations adopted at the Stockholm Conference addresses this aspect of administrative machinery for the management of international watercourses:

*It is recommended* that Governments concerned consider the creation of river basin commissions or other appropriate machinery

pollution and protection. See also Cano, *Derecho, política y administración ambientales* (Buenos Aires, Depalma, 1978).

<sup>753</sup> Arts. 7 and 8 (*Yearbook* . . . 1974, vol. II (Part Two), p. 212, document A/5409, annex I. A).

<sup>754</sup> Art. 9. (Pan American Union, *Report of the Inter-American Juridical Committee* . . . (*op. cit.*), p. 9; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 350, document A/CN.4/274, para. 379).

<sup>755</sup> Para. 12 of "Guiding principles on fresh water pollution control" (Council of Europe, Consultative Assembly, recommendation 436 (1965), doc. 1965; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 342, document A/CN.4/274, para. 372). In its recommendation 629 (1971), on the pollution of the Rhine valley water-table (doc. 2904), the Consultative Assembly notes that "the management of this water reserve and its safeguarding against pollution are tasks whose effective accomplishment can only be ensured jointly by all the countries bordering on it", i.e. the Federal Republic of Germany, France, Switzerland, Luxembourg and the Netherlands (para. 8), and emphasizes "the urgent need for such co-operation . . . and the practical nature of the problems calling for common action" (para. 9) (reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 349, document A/CN.4/274, para. 378).

<sup>756</sup> Para. 1 (E/ECE/WATER/9, annex II; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 333, document A/CN.4/274, para. 346). Para. 2 lists 13 reasons for the establishment and/or the strengthening or co-ordination of river basin management organs, e.g. in order "to co-ordinate the programmes and activities of river basin management organs with those of corresponding organs of neighbouring countries" (subpara. (m)). The creation of joint or international organs is not addressed expressly.

for co-operation between interested States for water resources common to more than one jurisdiction.

(c) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

- (i) Collection, analysis and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;
- (ii) Joint data-collection programmes to serve planning needs;
- (iii) Assessment of environmental effects of existing water uses;
- (iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic and social considerations of water quality control;
- (v) Rational use, including a programme of quality control, of the water resource as an environmental asset;
- (vi) Provision for the judicial and administrative protection of water rights and claims;
- (vii) Prevention and settlement of disputes with reference to the management and conservation of water resources;
- (viii) Financial and technical co-operation of a shared resource.<sup>757</sup>

461. Stressing "an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers", a report by the Secretary-General on the issues before the Committee on Natural Resources of the Economic and Social Council examined the need for expanded, institutionalized co-operation among system States and made the following points, among others:

3. The occurrence of international water resources offers a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action. Water is a vital resource, the benefits from which can be multiplied through joint efforts and the harmful effects of which may be prevented or removed through joint efforts . . . Moreover, when plans are made and implemented jointly, valuable experience is gained with international institutions both at the policy and working levels. A characteristic trend in more recent international arrangements for water resources development has been the broadening of the scope and diversity of the parties' international water development activities. New dimensions are being added to the traditional organizational patterns developed in Europe and in North America, which were largely based on single-purpose and non-consumptive uses of the international rivers.

13. The range of alternative institutional arrangements is impressive. It includes, for instance, the mere nomination of one official in each country who is empowered to exchange data or even development plans for a specific purpose; or it may entail the establishment of an international basin agency with its own professional staff, technical services and an intergovernmental governing body.

14. Institutional arrangements should be responsive to the specific co-ordination requirements in each case. Taking a long-term perspective, flexibility is also necessitated by the changing demands for water, the nature and characteristics of the resource base, and by other dynamic environmental influences . . .<sup>758</sup>

462. Subsequently the Committee on Natural Resources examined the technical and economic aspects of international river basin development.<sup>759</sup> It also

<sup>757</sup> Recommendation 51 (*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), p. 17).

<sup>758</sup> E/C.7/2/Add.6; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 328, document A/CN.4/274, para. 334.

<sup>759</sup> See *Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 4* (E/5247), paras. 129-137; see also E/C.7/35.

recommended the holding of a United Nations Water Conference.<sup>760</sup> At that Conference, held in Mar del Plata, Argentina, from 14 to 25 March 1977, numerous recommendations expressed or implied the need for improved water resources management, including management at the regional or international level.<sup>761</sup> The Conference adopted a special resolution on "River commissions", recommending that the Secretary-General explore:

the possibility of organizing meetings between representatives of existing international river commissions involved that have competence in the management and development of international waters, with a view to developing a dialogue between the different river basin organizations on potential ways of promoting the exchange of their experiences. Representatives from individual countries which share water resources but yet have no established basin-wide institutional framework should be invited to participate . . .<sup>762</sup>

#### 4. THE DAKAR INTERREGIONAL MEETING OF INTERNATIONAL RIVER ORGANIZATIONS (1981)

463. The first of the meetings of international river commissions and interested countries contemplated in that Conference resolution took place in Dakar, Senegal, in May 1981.<sup>763</sup> Among the pertinent conclusions

<sup>760</sup> *Ibid.* (E/5247, para. 114).

<sup>761</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), especially pp. 7-9, 32-33, 51-57; see also specific recommendations by the regional preparatory conferences (*ibid.*, annex to chap. I, especially pp. 59-61 (Africa and Europe) and 63-65 (Western Asia)). The Caracas Conference on Water Law and Administration of the International Association for Water Law, designated as a technical preparatory meeting for the United Nations Water Conference, recommended that international organizations "make every effort to support the creation of the appropriate legal régimes and of institutional machinery for the effective realization of the required multidisciplinary data base with respect to water resources", and that Governments, in cases where they share international basins, "establish mechanisms for co-operation among interested States with respect to the projects and activities that may cause pollution or other harmful effects in another State" (International Association for Water Law, *Recommendations of the Caracas Conference on Water Law and Administration* (1976), pp. 16-17, recommendations 48 and 52). Further, "mindful of the fact that the total benefits to be obtained from international water resources are greater where co-operative arrangements among co-basin countries exist, Governments may consider: (i) That ways and means be sought to establish or improve international co-operation among co-basin countries in the form of appropriate legal and administrative institutions . . ." (recommendation 52, para. (c)) (*ibid.*, pp. 17-18). Finally, "Governments should take into consideration, in the formulation of their water policies, that the role of law in this respect is to ensure: . . . (f) That, through adequate administrative machinery, the socio-economic and ecological studies be carried out that are essential for the identification and adoption of the water resources development and management policies best suited to the satisfaction . . . of the priority needs set forth in the development plans of a particular area, State or international drainage basin . . ." (recommendation 15) (*ibid.*, p. 9).

<sup>762</sup> Resolution VII (*Report of the United Nations Water Conference* . . . , p. 77).

<sup>763</sup> See United Nations, *Experiences in the Development and Management* . . . , "Report of the Meeting". Among the papers submitted to the meeting, see M. Cohen, "River basin planning: observations from international and Canada-United States experience" (*ibid.*, p. 107); Nigeria, Ministry of Water Resources, "Interregional river and lake commissions of which Nigeria is a member" (*ibid.*, p. 368); Joint Finnish-Soviet Commission, "The Joint Finnish-Soviet Commission on the utilization of frontier watercourses" (*ibid.*, p. 252); Pakistan, Office of the Commissioner for Indus Waters, "The Permanent Indus Commission" (*ibid.*, p. 376); F. Rizzo, "The Commission for the protection from pollution of common waters: Italy-Switzerland" (*ibid.*, p. 364); Permanent Joint Technical Commission for Nile Waters, "The Permanent Joint Technical Commission for Nile Waters: Egypt-Sudan" (*ibid.*, p. 158); U. Dutta "Some

reached at the Meeting, the following, under topic I, "Institutional and legal arrangements", merit quotation.

4. Where it is the intention of States to establish a permanent or *ad hoc* international organization for the management of shared water resources to reflect the common interests involved, the agreement establishing this organization should at least contain, within the framework of principles of international water law acceptable to the Contracting States, the following elements, which should be defined as clearly as possible:

Objectives;

Territorial jurisdiction;

Composition;

Authority and power;

Decision-making procedures;

Financial provisions;

Procedures for the prevention and settlement of disputes.

5. . . . in view of the hydrologic unity of the drainage basins, it would be desirable that integrated development programmes be drawn up and possibly executed at the basin level by recognized agencies. Where this approach was not viable, co-ordination of the activities of the various agencies concerned should be sought.

6. . . . concerning the composition of administrative, managerial and technical personnel, it was felt that technical matters should be dealt with by specialists, that diplomats should assist them where problems arose and that the activities of both groups should complement one another.

7. . . . With regard to internal decision-making . . . , the decision-making processes of international river basin agencies vary and provision should be made in the agreement to ensure the effectiveness of decisions taken.<sup>764</sup>

464. Topic II, "Progress in co-operative arrangements", included these pertinent conclusions:

1. Some co-operating States need to provide their international river and lake organizations with both competence and capability to deal effectively with the existing and impending demands for improved water resources development, use and protection, by legal and institutional arrangements that do not deprive the Governments of their final role in determining policy and controlling the actions of their agencies.

. . .

3. Where benefits and costs are to be shared, international river and lake organizations could be empowered to recommend to their respective Governments the general or specific formulas and rules for such sharing and to propose their draft determinations to the Governments concerned.

4. Water quality, water-related disease and environmental protection considerations have to date received inadequate attention in most cases, and Governments need to request their river and lake organizations to include these aspects as part of their information and

aspects of the Kosi project operation, Nepal" (*ibid.*, p. 415); I. Polohn and F. Szappanos, "Co-operation in water development: Hungary-Yugoslavia" (*ibid.*, p. 342); Q.-L. Nguyen, "Powers of the Organization for the Development of the Senegal River in development of the river basin" (*ibid.*, p. 142); Bangladesh, Ministry of Power, Water Resources and Flood Control, "International rivers: the experience of Bangladesh" (*ibid.*, p. 270); S. A. Ricks, "The Mano River development project" (*ibid.*, p. 165); G. J. Cano (Rapporteur), "Institutional and legal arrangements (topic I)" (*ibid.*, p. 44); R. D. Hayton (Rapporteur), "Progress in co-operative arrangements (topic II)" (*ibid.*, p. 65); K.-E. Hansson (Principal Rapporteur) and R. Revesz, "Economic and other considerations for co-operation in the development of shared water resources (topic III)" (*ibid.*, p. 82). A representative of the secretariat of the International Law Commission, L. D. Johnson, attended the meeting as an observer and conducted an informal half-day discussion with participants on the work of the Commission on the topic of the law of the non-navigational uses of international watercourses; his report (ILC (XXXIII)/Conf. Room Doc. II) has been made available to members of the Commission.

<sup>764</sup> *Ibid.*, Part One, pp. 9-10, para. 28.

data, project and programme planning, or monitoring functions, as appropriate.

5. The prevention and mitigation of floods, droughts and other hazards, natural and man-made, are increasingly of concern to the co-operating States . . . ; therefore new or strengthened activities must be undertaken to deal effectively with the detrimental effects of water-related hazards and conditions. The international river and lake organizations are appropriate bodies for initiating studies and recommending measures, contingency plans and warning systems, as well as for conducting the necessary ongoing review of conditions and the adequacy of measures undertaken.

6. Those co-operating States that have not yet included ground-water as a part of the shared water resources system need to recognize this part of the hydrologic cycle as intimately linked to the quantity and quality of their shared surface waters, and could entrust their international river and lake organizations with the task to initiate technical studies and to call for hydrogeologic data. Concerned Governments may thus apprise themselves of the specifics of the interactions throughout the system, or portion thereof, with a view to benefiting from conjunctive use and to adopting the indicated conservation and protection measures for the underground environment.

8. Where continuing sectoral and intersectoral co-ordination between an international river or lake organization and the responsible national agencies is lacking, the former should be given authority to deal directly with the national agencies, individually or through the designated national entity. National agencies should fully co-operate with the joint or international organization.<sup>765</sup>

465. The final agenda item of the Meeting, topic III, "Economic and other considerations", also yielded relevant conclusions, such as:

3. Realization of joint international river basin projects involves a gradual process of well recognized steps requiring co-operation between basin States.

4. Both regional and integrated planning and execution of individual projects should proceed, but care should be taken in the latter so that they are compatible with, and do not preclude or obstruct, later joint projects and take into account the rights and obligations of neighbours.<sup>766</sup>

## 5. AUTHORITATIVE OPINION

466. The late James L. Brierly observed:

. . . The practice of States, as evidenced in the controversies which have arisen about this matter, seems now to admit that each State concerned has a right to have a river system considered as a whole, and to have its own interests weighed in the balance against those of other States; and that no one State may claim to use the waters in such a way to cause material injury to the interests of another, or to oppose their use by another State unless this causes material injury to itself.<sup>767</sup> This principle of the "equitable apportionment" of all the benefits of the river system between all the States concerned is clearly not a single problem which can be solved by the formulation of rules

applicable to rivers in general; each river has its own problems and needs a system of rules and administration adapted to meet them. The way of advance seems therefore to lie, as Professor Smith suggests, in the constitution of authorities to administer the benefits of particular river systems.

467. The International Joint Commission, Canada-United States of America, after evaluating its own experience, commended to the 1981 Dakar Inter-regional Meeting a number of principles:

(a) *The provision of an ongoing, permanent joint Commission, within which there is absolute parity between countries in spite of the very significant disparity in the size of their populations and of their economies.* Thus Governments are assured that the Commission will provide a balanced forum within which issues can be resolved.

(c) *The development of a Commission structure, including the Commission's boards and reference groups, to provide a broad network within which a great deal of information can be exchanged formally and informally between Governments.* The structure provides a forum which encourages officials with similar responsibilities in both Governments to work together and to know one another . . . Likewise, they take back to their agencies perspectives and potential solutions gained through the board process, and they very often begin to develop programmes to deal with issues in their jurisdictions even before the Commission's final reports are made to the Governments

(d) *The development of a Commission process that permits the Governments to depoliticize issues that are difficult to resolve.* It often acts as a buffer between the two parties whose direct national interests cannot allow the impartial detachment which the Commission can provide. The process of joint fact-finding generally provides Governments with a common data base. This is of critical importance, since the dispute giving rise to a reference is often primarily a dispute over facts . . .

(e) *Provision of a mechanism which can alert Governments to matters of concern that may or may not be fully appreciated by Governments.* Thus the Commission plays a part in assisting Governments in the process of notice and consultation regarding proposed activities in one country which may have adverse impacts in the other country.<sup>768</sup>

## 6. RECENT STUDIES

468. Two comprehensive recent studies have been devoted to the administrative management of international water resources. One is the report of the United Nations Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, previously cited.<sup>769</sup> Designed as "a forward-looking consultation manual systematically setting forth and discussing the range of available legal and organizational alternatives",<sup>770</sup> it cites prior practice and prevailing doctrine. An excerpt from the work's closing findings may help to convey the significance of

<sup>765</sup> *Ibid.*, pp. 14-15, para. 49.

<sup>766</sup> *Ibid.*, p. 19, para. 69.

<sup>767</sup> J. L. Brierly, *The Law of Nations*, 5th ed. (Oxford, Clarendon Press, 1955), pp. 204-205. The reference is to H. A. Smith, *The Economic Uses of International Rivers*, op. cit., a landmark work. The comparable passage in the latest edition of Brierly reads as follows: "The application of these general principles may well involve problems of considerable difficulty in individual cases . . . the exploitation of their water resources often calls for the most complex scientific studies and engineering techniques. In consequence, modern opinion considers it desirable that a State intending to undertake any new exploitation of its part of the river system should notify the other interested States . . . Furthermore, it is increasingly recognized that, for international rivers of any size, some form of joint international administration will almost certainly be needed if the resources of the river system are to be put to the fullest use for the benefit of all the riparian States . . ." (*ibid.*, 6th ed., H. Waldock, ed. (Oxford, Clarendon Press, 1963), pp. 232-233.

<sup>768</sup> "The International Joint Commission: Canada-United States" (United Nations, *Experiences in the Development and Management* . . . , p. 202). The Commission recognized "that instruments and institutions which have served Canada and the United States exceedingly well may not bring the same results in other countries. The mechanisms . . . may well have to be tailored to [the] particular needs [of other States or groups of States], their own perspectives, their own political or juridical procedures. Nevertheless, . . . the principles and structures . . . could serve as the corner-stone for other international accords. Coupled with the establishment of a permanent, impartial international agency to administer such accords, they could serve to address emerging and potential boundary water problems before they become matters of dispute. . . ." (*ibid.*).

<sup>769</sup> *United Nations, Management of International Water Resources*

<sup>770</sup> *Ibid.*, p. iii (preface).

international watercourse organizations in the modern era:

557. . . . The recent agreements with respect to the Nile, the Indus, the Niger, the Senegal, the Plata, the Lower Mekong and the Yarmuk basins constitute serious attempts to realize mutual co-operation and collaboration for joint development and conservation of international water resources. These agreements, among others, reflect the growing acceptance of the principles of regional international planning for the achievement of interdependent national interests.

558. Mutual co-operation of riparian States . . . has in many cases led to a more efficient exploitation than otherwise would be possible. Investigation of the multiple-use potentials and the hydrological effects of water resources works considered in the context of the basin, rather than in the national context alone, has led to development schemes of significant net benefit to all States concerned. The exchange of hydrological and other data, the co-ordinated or joint construction and operation of projects such as dams and river training works and the sharing of the costs of such undertakings have been the subject matter of numerous successful international arrangements.

560. In international water resources systems, arrangements satisfactory to all countries concerned should respond to the totality of the circumstances, irrespective of the "accidental" occurrence of political boundaries. National interests will not be ignored, however, because they are manifestations of separate economic, cultural or political systems that have different water resources needs related to the particular stage of development and alternative sources of water or energy, as well as soil, mineral, climate and settlement patterns within each country. In many cases, unregulated exploitation of water by one country to its advantage turns out to be to the clear disadvantage of other countries.

561. Given these varying national circumstances and the individuality of each international water resources system, it remains for the co-system States to fashion the specific legal régime and institutional arrangements best suited to their purposes and capabilities. Existing international law and international institutional practice, however, are the proper points of departure . . . <sup>771</sup>

469. The other major study was undertaken by the Committee on International Water Resources Law of the International Law Association. In 1976, the Committee reported to the Association's Conference a set of draft articles on international water resources administration, which were approved by the Conference.<sup>772</sup> The articles, as approved, read as follows:

#### Article 1

As used in this chapter, the term "international water resources administration" refers to any form of institutional or other arrangement established by agreement among two or more basin States for the purpose of dealing with the conservation, development and utilization of the waters of an international drainage basin.

#### Article 2

1. With a view to implementing the principle of equitable utilization of the waters of an international drainage basin and consistent with the provisions of Chapter VI [of the Helsinki Rules] relating to the procedures for the prevention and settlement of disputes, the basin States concerned and interested should negotiate in order to reach agreement on the establishment of an international water resources administration.

2. The establishment of an international water resources administration in accordance with paragraph 1 above is without prejudice to the existence or subsequent designation of any joint agency, conciliation commission or tribunal formed or referred to by co-basin States pursuant to article XXXI [of the Helsinki Rules] in the case of a question or dispute relating to the present or future utilization of the waters of an international drainage basin.

<sup>771</sup> *Ibid.*, p. 175.

<sup>772</sup> ILA, *Report of the Fifty-seventh Conference*, . . . , p. xxxiv.

#### Article 3

Member States of an international water resources administration in appropriate cases should invite other States, including non-basin States or international organizations, which by treaty, other instrument or binding custom enjoy a right to, or have an interest in, the use of the waters of an international drainage basin, to participate in the activities of the international water resources administration.

#### Article 4

1. In order to provide for an effective international water resources administration the agreement establishing that administration should expressly state, among other things, its objective or purpose, nature and composition, form and duration, legal status, area of operation, functions and powers, and financial implications of such an international water resources administration.

2. The Guidelines annexed to these articles should be taken into account when an international water resources administration is to be established.<sup>773</sup>

### 7. THE PROPOSED ARTICLE

470. The inclusion of the foregoing material has had as its purpose to enhance awareness of the contemporary consequence of permanent institutions for the optimum exploitation and protection of international watercourses. It is not intended that the Commission consider for adoption any elaborate proposals on this aspect of the topic, since a general rule of international law obliging system States to conclude agreements establishing such entities has not been found to exist.<sup>774</sup> The Commission's article must, given the current state of the law, limit itself to a quite general proposition. Yet, as a leading student of the matter has correctly said:

. . . international administration is *necessary*\* in order to secure integrated development of international drainage basins, deciding on priorities among various projects, settlement of disputes, implementation of investment and reimbursement policies, allocation of benefits deriving from international water resources development and conservation activities, and for many other related aspects.<sup>775</sup>

471. Leaving the specifics to system agreements, the following draft article is proposed for possible consid-

<sup>773</sup> *Ibid.*, p. xxxvii. For the Committee's report on this topic (part III, Rapporteur: D. A. Caponera), *ibid.*, pp. 239-266. In addition to an introduction, and a commentary to each draft article, the report includes a "List of agreements setting up a joint machinery for international drainage basin water resources management" by continent (*ibid.*, pp. 256-266). For the "Guidelines for the establishment of an international water resources administration" referred to in art. 4, para. 2, of the Association's articles, *ibid.*, pp. 253-256.

<sup>774</sup> For concurring views, see *inter alia* Caponera (*ibid.*, p. 246); C. B. Bourne, "Procedure in the development of international drainage basins", *University of Toronto Law Journal*, vol. 22, 1972, p. 172; F. Florio, "Sur l'utilisation des eaux non maritimes en droit international", *Festschrift für Friedrich Berber zum 75 Geburtstag* (Munich, Becksche, 1973), p. 151. The Helsinki Rules, while not taking up administration as a separate topic, only "recommend that the basin States refer" a question or dispute to a "joint agency" (art. XXXI, para. 1) (ILA, *Report of the Fifty-second Conference* . . . , p. 524); similarly, art. 2, para. 1, provides that the States concerned and interested *should* negotiate to that end (see para. 469 above).

<sup>775</sup> Caponera (ILA, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 517 (session on water resources law)). See also L. Dávid, "River basin development for socio-economic growth: general report", United Nations, *River Basin Development* . . . , vol. I, p. 37: "The implementation of the river basin development process at a certain level of development requires a central organization to direct, control and co-ordinate all the activities concerning the development in order to reach its basic socio-economic goal. Therefore, it is proposed to organize river basin commissions for the large river basins. In the case of international river basins, these commissions could co-ordinate the water management activities of the basin countries having common interest".



eration by a successor Special Rapporteur and the Commission:

### Article 15. Administrative management

At the request of any system State and where the economic and social needs of the region are making substantial or conflicting demands on water resources, or where the international watercourse system requires protection or control measures, the system States concerned shall enter into negotiations with a view to the establishment of permanent institutional machinery, or to the strengthening of any existing organization, for the purpose of expanding their consultations, of preparing or implementing their decisions taken with respect to the international watercourse system, and of promoting rational, optimum utilization, protection and control of their shared water resources.

### E. Avoidance and settlement of disputes

472. While in recent years as a general rule the Commission has more often than not left questions of dispute settlement to the initiative as well as to the resolution of a conference of plenipotentiaries, it may in this case wish to consider the utility of including in its draft articles provisions on this question. It is so submitted for two reasons. First, the nature of the topic calls for measures of dispute settlement because resolution of differences in this sphere is often peculiarly urgent. The absence of such provisions may contribute to delay of important projects, suspension of expensive works under construction, postponement of critical pollution control programmes or inability to undertake measures to deal with very real hazards. Secondly, the result achieved in matters of dispute settlement in the United Nations Convention on the Law of the Sea in the analogous area of the law of the sea may perhaps give ground for hoping that provision for dispute settlement is politically feasible in respect of international watercourses.

#### 1. IMPORTANCE ACCORDED TO SETTLEMENT OF DISPUTES

473. While "dispute settlement" is itself a large and traditional topic in international law, settlement of disputes over the use of international watercourses has long received unusually close attention by States and commentators. Numerous water-related disputes have in fact arisen over the years between system States.<sup>776</sup>

<sup>776</sup> It is accordingly not surprising that a considerable literature has appeared addressed to the dispute settlement aspect of international watercourse regulation. See, *inter alia*, Bourne, "Mediation, conciliation and adjudication in the settlement of international drainage basin disputes", *The Canadian Yearbook of International Law*, 1971 (Vancouver), vol. ix, p. 114; J. G. Laylin and R. L. Bianchi, "The role of adjudication in international river disputes: the Lake Lanoux case", *The American Journal of International Law*, vol. 53, 1959, p. 30; W. L. Griffin, "The use of waters of international drainage basins under customary international law", *ibid.*, p. 50; C. A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *Recueil des cours de l'Académie de droit international de La Haye*, 1968-III (Leyden, Sijthoff, 1970), vol. 125, p. 343; G. Sausser-Hall, "L'utilisation industrielle des fleuves internationaux", *Recueil des cours* . . . , 1953-II (Leyden, Sijthoff, 1955), vol. 83, p. 471; J. Andrassy, "Les relations internationales de voisinage", *Recueil des cours* . . . , 1951-II (Paris, Sirey, 1952), vol. 79, p. 77; M. Wolfmont, *L'utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux* (Paris, Pedone, 1964); Smith, *op. cit.*; *The Law of International Drainage Basins* (*op. cit.*); J. Baines, "The diversion of international rivers", *The Indian Journal of International*

Many of these have been resolved, finally, by formal proceedings, as well as by negotiated accommodations of differences.<sup>777</sup> A good number of these disputes have adversely affected or even embittered relations between the system States concerned, and for long periods of time. Some water disputes persist.<sup>778</sup> Owing

*Law* (New Delhi), vol. I, No. 1, 1960, p. 38. Within federal systems, the resolution of disputes concerning interstate and inter-provincial rivers has also contributed to the development of applicable principles. See W. B. Cowles, "International law as applied between subdivisions of federations", *Recueil des cours* . . . , 1949-I (Paris, Sirey, 1949), vol. 74, pp. 659-670, and cases cited therein; M. Huber "Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen", *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (Breslau), vol. 1, 1907, pp. 34-35; J. Friedrich, "The settlement of disputes between States concerning rights to the waters of interstate streams", *Iowa Law Review* (Iowa City), vol. 32, 1946-1947, p. 244; W. Van Alstyne, "International law and interstate river disputes", *California Law Review* (Berkeley, Calif.), vol. XLVIII, 1960, p. 596; E. W. Clyde, "Colorado River decision—1963 (*Arizona v. California*)", *Utah Law Review* (Salt Lake City), vol. 8, 1963-1964, p. 299; C. Meyers, "The Colorado Basin", *The Law of International Drainage Basins* (*op. cit.*), p. 504.

<sup>777</sup> See e.g. *Diversion of water from the Meuse, Judgement, 1937* [Belgium v. Netherlands], P.C.I.J., Series A/B, No. 70, p. 4; *Territorial jurisdiction of the International Commission of the River Oder, Judgement No. 16, 1929* [Czechoslovakia, Denmark, France, Germany and Sweden v. Poland], P.C.I.J., Series A, No. 23; *Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927*, P.C.I.J., Series B, No. 14. For arbitral awards, see the *Lake Lanoux case* (1957) (Spain-France) (United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 285, and *International Law Reports*, 1957 (London, 1961), p. 101); the *Helmand River Delta case*, awards of 1872 and 1905 (*Helmand River Delta Commission, Afghanistan and Iran* (report of the Commission) (Washington, D.C., Feb. 1951), and *Yearbook* . . . 1974, vol. II (Part Two), pp. 188-190, document A/5409, paras. 1034-1037, and works there cited); the *San Juan River case* (1888) (Costa Rica-Nicaragua) (J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, (Washington, D.C., U.S. Government Printing Office, 1898), vol. II, p. 1964, and *Yearbook* . . . 1974, vol. II (Part Two), document A/5409, pp. 190-191, paras. 138-141, and works there cited); the *Kushk River case* (1893) (United Kingdom-Russia) (C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads relating to India and Neighbouring Countries* (Calcutta, vol. XIII, p. 253, and *Yearbook* . . . 1974, vol. II (Part Two), pp. 191-192, document A/5409, paras. 1042-1046); the *Zarumilla River case* (1945) (Peru-Ecuador) (*British and Foreign State Papers, 1943-1945* (London), vol. 145, 1953, p. 566). See also the analogous *Trail Smelter case* (awards of 1938 and 1941 (United States of America-Canada) (United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905).

<sup>778</sup> Many studies exist on specific disputes or questions relating to specific regions. See e.g. S. Agrawal, "Legal aspects of the Indo-Pakistan water dispute", *The Supreme Court Journal* (Madras), vol. XXI, Jan. 1958, p. 157; T. Armstrong et al., "The Columbia River dispute", *Osgoode Hall Law Journal* (Downsview, Ont.), vol. 1, 1958, p. 1; J. S. Bains, *India's International Disputes* (London, Asia Publishing House, 1962); Berber, "The Indus water dispute", *The Indian Yearbook of International Affairs*, 1957 (Madras), vol. VI, p. 46; A. Blondeau, *L'Escaut, fleuve international et le conflit hollandobelge* (Paris, Sirey, 1932); Bolivia, Ministry for Foreign Affairs, *La desviación del río Lauca, antecedentes y documentos* (La Paz, 1962); Chile, Ministry for Foreign Affairs, *La cuestión de río Lauca* (Santiago, Instituto Geográfico Militar, 1963); Bourne, "The Columbia River controversy", *The Canadian Bar Review* (Ottawa), vol. XXXVII, No. 2, 1959, p. 444; Cohen, "Some legal and political aspects of the Columbia River dispute", *ibid.*, vol. XXXVI, No. 1, 1958, p. 25; N. Chiesa, "Las controversias fronterizas entre Argentina y Uruguay y el último tratado de límites", *Revista de derecho internacional y ciencias diplomáticas* (Rosario), vol. VIII, No. 19/20, 1961, p. 125; F. Dehousse, "L'affaire des eaux de la Meuse: les faits de la cause", *Revue de droit international* (Paris), vol. XIX, No. 1, 1937, p. 177; K. Doherty, *Jordan Waters Conflict* (New York, Carnegie Endowment for International Peace, 1965); F. Duléry, "L'affaire du lac Lanoux", *Revue générale de droit international public* (Paris), 3rd series, vol. XXIX, No. 3, 1958, p. 469; A. Gervais, "L'affaire du lac Lanoux", *Annuaire français de droit international*, 1960 (Paris), vol. VI, p. 372; P. Guggenheim, "L'affaire de l'usine

(Continued on next page)



to the severity of these experiences, and the growing awareness of the need to maximize the contributions of their shared waters to development efforts, a number of those States and others have been induced to enter into agreements intended to facilitate the resolution of differences, including those concerning international watercourses.<sup>779</sup> Some international watercourses, however, are still not covered by such arrangements for the settlement of disputes, and not a few of these agreements fail to provide procedures that ensure prompt and effective resolution.<sup>780</sup>

## 2. ACCOMMODATION IN LIEU OF DISPUTE

474. In any event, it is now appreciated that it is as important to build into the institutional relationships between or among system States the opportunity and procedures for avoidance of conflict as it is to bring an arbitral or other procedure for the settlement of disputes into force among them. With the eventual revision and completion of these draft articles by the Commission, and their subsequent disposition, and with the wider creation or strengthening by agreement of joint or international machinery for administrative management of shared water resources, the legal and institutional framework should be in place for the readier composition of differences and, where still necessary, the submission of unresolved disputes to arbitration or adjudication, in reliance upon the conventional law applicable to the parties and the principles and rules of general international law.<sup>781</sup>

475. Long-range benefits accrue to all interested States when procedures are accepted

that preserve the ability to maintain the momentum of data collection and exchange, survey preparation, programme and project planning and execution, and operational and regulatory activities. Successful accommodation or early settlement avoids work stoppages, strained

(Footnote 778 continued)

électrique de Rheinau", *Annuaire suisse de droit international*, 1953 (Zurich), vol. X, p. 193; W. Hall, "Indus waters dispute", *Foreign Agriculture* (Washington, D.C.), vol. XXIII, No. 11, 1959, p. 17; A. Hirsch, "From the Indus to the Jordan—characteristics of Middle East international river disputes", *Political Science Quarterly* (New York), vol. LXXI, No. 2, 1956, p. 203; M. G. Ionides, "The disputed waters of Jordan", *The Middle East Journal* (Washington, D.C.), vol. 7, No. 2, 1953, p. 153; F. Khouri, "The Jordan River controversy", *The Review of Politics* (Notre Dame, Ind.), vol. 27, No. 1, 1965, p. 32; L. M. Lecaros, "International rivers—the Lauca case", *The Indian Journal of International Law* (New Delhi), vol. 3, No. 2, 1963, p. 133; Johnson, "The Columbia Basin", *loc. cit.*, p. 186; Baxter, "The Indus Basin", *loc. cit.*, p. 449; D. Piper, "A justiciable controversy concerning water rights", *The American Journal of International Law*, vol. 56, 1962, p. 1019; V. Radovanovitch, "Le Danube maritime et le règlement du différend relatif aux compétences de la Commission européenne sur le secteur Galatz-Braïla", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. XIII, No. 3, 1932, p. 546; J. Rojas Garcidueñas, "Caso internacional de la salinidad de las aguas entregadas a México en el río Colorado", *Revista de la Facultad de derecho de México* (Mexico City), vol. XIV, 1964, p. 443; C. Sepúlveda, "Areas of dispute in Mexican-American relations", *Southwestern Law Journal* (Dallas, Tex.), vol. 17, 1963, p. 98.

<sup>779</sup>For a digest and analysis of most such agreements, see B. Clagett, "Survey of agreements providing for third-party resolution of international waters disputes", *The American Journal of International Law*, vol. 55, 1961, p. 645.

<sup>780</sup>For reservations, qualifications and absence or inadequacy of provisions for constituting or designating the tribunal, as well as for the question whether certain agreements are still in effect, *ibid.*, pp. 648–668.

<sup>781</sup>United Nations, *Management of International Water Resources* . . . , pp. 179–180, paras. 576–580; Hayton, "Progress in co-operative arrangements", *loc. cit.*, p. 65.

relations and, most important, the hardening of the national position that inevitably occurs once a difference emerges as a full-fledged dispute.<sup>782</sup>

476. A review of differences that arise between system States may first be made by experts fully familiar with the situation at issue. Beginning the consideration at the technical level has been recommended

because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations . . . Moreover, the influence of extraneous considerations, including political considerations where these are unrelated to the problem at hand, can best be minimized when substantial decision-making authority is delegated, at least in the first instance, to the experts directly involved. The need for review of contested technical-level decisions and for ultimate resolution at the higher level should not be overlooked, but every effort should be made to promote the resolution of differences by the provision of competent accommodation machinery at the operating level. In this way, work on international water resources projects or programmes is least likely to be delayed or disrupted and the merits of the matter least likely to be distorted or misconstrued.<sup>783</sup>

477. In this connection, the development of an objective data base for the problem

may serve to allay the apprehension [of a system State] or may show the apprehension to be well founded. Full study of the problem on the basis of all the information may cause one side or the other to give ground or propose some solution that will resolve the differences.<sup>784</sup>

## 3. UTILITY OF SEVERAL "ECHELONS"

478. When an accommodation is not achieved at the operating level, a review at a higher level must take place. This review can still be by water resources professionals, such as the members, or deputies, of the system States' international watercourse commission. Such arrangements are not uncommon in current system State practice.<sup>785</sup>

479. An additional "professional" review may be obtained by reference of the question to a technical commission of inquiry.<sup>786</sup> A notable example of this method to promote the resolution of differences is found in the Indus Waters Treaty of 1960 between India and Pakistan. There the services of a "neutral

<sup>782</sup>United Nations, *Management of International Water Resources* . . . , p. 144, chap. V, "Accommodation procedures and dispute settlement", para. 455.

<sup>783</sup>*Ibid.*, pp. 144–145, para. 457. "Even resolution of differences at the technical level may call for alternative approaches and more than one stage, or echelon, depending upon the circumstances . . ."

<sup>784</sup>*Ibid.*, p. 145, para. 458. "If, under the basin or system agreement, a procedure of mutual consultation is required . . . before positions have hardened unduly, there will ordinarily be greater opportunity for the professional people to persuade one another of the validity of a particular reading of the data and of the preferability of one course of action over another. It should be made certain that at this initial stage a thorough, modern interdisciplinary examination occurs and that the breadth and depth of the data supplied are sufficient for this purpose" (*ibid.*, para. 460).

<sup>785</sup>For example, such authority is delegated to the Mixed Supervisory Commission established by art. VI of the 1955 Convention between Italy and Switzerland concerning the regulations of Lake Lugano (United Nations, *Treaty Series*, vol. 291, p. 222). See also the review relationship between the Frontier Water Commission and the Supreme Frontier Water Commission provided in the Statutes annexed to the Treaty between Denmark and Germany of 1922 (League of Nations, *Treaty Series*, vol. X, pp. 237–243, paras. 20–37 and 43–46).

<sup>786</sup>This alternative is explored in United Nations, *Management of International Water Resources* . . . , pp. 147–148, paras. 464–465.

expert" may be called in by either of the Commissioners.<sup>787</sup> As a further device to forestall the matter's hardening into a formal dispute between the parties, one or more additional "echelons" of review may be built into the arrangements of the system States, such as a diplomatic mission especially constituted for the purpose.<sup>788</sup> System States have, in particular agreements, employed a variety of accommodation mechanisms. Belgium and Germany combined diplomatic and technical representation in one joint administrative commission for the purpose of accommodating differences.<sup>789</sup> Such a separate forum could be designated to function prior to the traditional "referral to the Governments", which may mean that the matter will then become a formal dispute.<sup>790</sup>

#### 4. FORMAL ALTERNATIVES FOR THE SETTLEMENT OF DISPUTES

480. After "referral to the Governments" of any difference that has not been resolved by the institutional machinery set up by the system States for the handling of their shared water resources affairs, the usual next step is direct negotiation between the parties at the political level. The project or programme at issue may be of such importance that even at this stage it may be prudent for the system States to arrange for some or all operations to continue, pending final resolution of the matter.<sup>791</sup>

481. Failing settlement by high-level negotiation, the parties are, of course, free to take the dispute to the International Court of Justice. The Court may in appropriate circumstances indicate provisional measures, which could serve the parties' interests in avoiding delay or disruption of critical water-related activities, or preclude irreversible harm. The parties are also free to refer the matter for adjudication to any other appropriate tribunal (see Article 95 of the Charter on the United Nations).<sup>792</sup>

482. The fundamental requirement, in accordance with Article 33, paragraph 1, of the Charter and the

rules of contemporary international law, is settlement by peaceful means. In addition to resolution by means of negotiation, inquiry and adjudication, the parties may choose, among other peaceful means, conciliation, arbitration or the assistance of regional agencies or arrangements. While each of these familiar means need not be examined in this report, abbreviated reference to current aspects of conciliation and arbitration may prove helpful in considering the scope of a residual rule which the Commission may consider for its draft articles on the topic.

#### 5. CONCILIATION AND ARBITRATION

483. The Third United Nations Conference on the Law of the Sea devoted much time and effort to the consideration of appropriate arrangements for the settlement of disputes, and those arrangements are now embodied in the United Nations Convention on the Law of the Sea.<sup>793</sup> The approaches and considerations embodied in that instrument are instructive. Part XI of the Convention, "The Area" (beyond the limits of national jurisdiction), contains its own section on "Settlement of disputes and advisory opinions";<sup>794</sup> part XIII, "Marine scientific research" also has a separate section on "Settlement of disputes and interim measures".<sup>795</sup> For the Convention as a whole, part XV sets out 21 articles on settlement of disputes in three sections.<sup>796</sup> Supplementing these main articles are four annexes: annex V, "Conciliation"; annex VI, "Statute of the International Tribunal for the Law of the Sea"; annex VII, "Arbitration"; and annex VIII, "Special arbitration". In short, the obligations and procedures of peaceful settlement deemed to be needed for the Law of the Sea are complex and extensive.

484. The procedure for "conciliation", under annex V of the Convention, operates in the first instance under article 284, "Conciliation", of the Convention. That article provides, in paragraph 1:

A State party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation. . . .

The parties may choose the procedure set out in sect. 1 of annex V, or some other conciliation procedure. Resort to conciliation is voluntary, but once the dispute has been submitted, the procedure shall be deemed terminated only

when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report . . . or when a period of three months has expired from the date of transmission of the report to the parties.<sup>797</sup>

485. Under section 2 of annex V, on conciliation, the procedure is to become compulsory under certain circumstances, as provided in article 297, paragraph 3 (b), of the Convention:

<sup>793</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. XVII, document A/CONF.62/122.

<sup>794</sup> Sect. 5, arts. 186-191.

<sup>795</sup> Sect. 6, arts. 264 and 265.

<sup>796</sup> Sect. 1, "General provisions" arts. 279-285; sect. 2, "Compulsory procedures entailing binding decisions", arts. 286-296; sect. 3, "Limitations and exceptions to applicability of section 2", arts. 297-299.

<sup>797</sup> Annex V, art. 8.

<sup>787</sup> Detailed provisions, including provisions with respect to appointment, hearing, remuneration etc. are contained in annex F of the Treaty (United Nations, *Treaty Series*, vol. 419, p. 202). Concerning the Österreichisch-Bayerische Kraftwerke AG, Austria and the Free State of Bavaria agreed in 1950 that the "Governments shall call upon an internationally recognized expert to act as a mediator" if the two States are not able to resolve a difference by negotiation "on an important company matter" (Art. 10) (United Nations, *Legislative Texts* . . . , p. 472).

<sup>788</sup> See United Nations, *Management of International Water Resources* . . . , p. 154, para. 486.

<sup>789</sup> Art. 94 of the 1929 Frontier Agreement between Germany and Belgium (League of Nations, *Treaty Series*, vol. CXXI, p. 378).

<sup>790</sup> Such a "last resort" commission, before referral to the Governments as a dispute, is provided for in the 1955 Agreement between Yugoslavia and Hungary (art. 10) (United Nations, *Legislative Texts* . . . , p. 834).

<sup>791</sup> See art. 25, para. (2), of the 1952 Agreement between Austria and the Federal Republic of Germany and the Free State of Bavaria concerning the Donaukraftwerk-Jochenstein Aktiengesellschaft, under which the arbitral tribunal provided for shall, "at the request of either side, make arrangements for the continued operation of the undertaking as a whole which take into account the interests of the contracting parties" under specified circumstances (*ibid.*, p. 483).

<sup>792</sup> Moreover, pursuant to Article 35 of the Charter, any State may bring a dispute to the attention of the Security Council or the General Assembly. The option of "basin or regional courts" is discussed in United Nations, *Management of International Water Resources* . . . , pp. 157-159, paras. 494-498.

Where no settlement has been reached by recourse to section 1 of this part [articles 279–283, chiefly the obligation to settle by peaceful means chosen by the parties, to exchange views, or to refer the dispute under binding general, regional or special agreements], a dispute shall be submitted to conciliation . . . at the request of any party to the dispute, when it is alleged that:

(i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;

(ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to the stocks which that other State is interested in fishing; or

(iii) a coastal State has arbitrarily refused to allocate to any State, under [specified provisions] . . . , the whole or part of the surplus it has declared to exist.

The possibility of adapting provisions such as these to the field of international watercourses may merit consideration.<sup>798</sup>

486. The United Nations Convention on the Law of the Sea also provides instructive provisions for compulsory adjudication or arbitration of certain disputes. Article 1 of annex VII provides for a detailed procedure, available to any party to a dispute, “by written notification addressed to the other party or parties to the dispute”.<sup>799</sup>

## 6. NON-MARITIME INTERNATIONAL WATERS AND SETTLEMENT OF DISPUTES

487. The procedures, including adjudication and arbitration, provided for in the United Nations Convention on the Law of the Sea, are too complex to analyse in this report; however, its emphasis on settlement of disputes, and the great efforts made to bring maritime waters disputes under some fruitful procedure of peaceful settlement, are clear. The affairs of system States in relation to their no less vital international watercourses would seem to merit substantial, if not equally elaborate, attention in view of the eventuality of controversies that cannot be resolved bilaterally.<sup>800</sup> Pollution and environmental protection problems have emerged as sensitive and difficult matters in connection with shared non-maritime as well as maritime water resources; peaceful resolution of system-State controversy in this area will tax the best machinery for the settlement of disputes.<sup>801</sup>

<sup>798</sup> See generally Bourne, “Mediation, conciliation and adjudication in the settlement of international drainage basin disputes”, *loc. cit.*

<sup>799</sup> Institution of proceedings under annex VII is subject to the provisions of part XV of the Convention, which includes the conciliation provisions and allows the contracting parties to choose, by written declaration, one or more compulsory procedures entailing binding decisions, namely, the International Tribunal for the Law of the Sea (established in accordance with annex VI); the International Court of Justice; an arbitral tribunal constituted in accordance with annex VII; and a special arbitral tribunal constituted in accordance with annex VIII (for one or more of the categories of disputes specified therein) (sect. 2, art. 287, para. 1). Limitations and exceptions to the applicability of the compulsory procedures are spelled out in sect. 3 (arts. 297–299).

<sup>800</sup> The International Tribunal for the Law of the Sea and its Sea-Bed Disputes Chamber established by the Convention are not discussed in this report. But see the Statute of the International Tribunal for the Law of the Sea, (annex VI), and sect. 5 of part XI of the Convention (arts. 186–191) on the Sea-Bed Disputes Chamber.

<sup>801</sup> See *inter alia* R. Bilder, *The Settlement of International Environ-*

488. A decision as to whether a use has to be curtailed, a programme of control or protection instituted, or compensation paid, have become matters of great import and can set into motion often protracted and estranging negotiations between the system States concerned. So important are the development, use, protection and control of shared water resources, and so potentially damaging to friendly relations are the disputes in this field, that many States understand the need for effective dispute settlement machinery for the resolution of conflicts over shared water resources. It would appear that non-negotiable impasses as well as dilatory tactics are perceived, at least in principle, as contrary to the long-run interests of all.

489. The development to date of international law allows disputing States virtually unlimited freedom of choice of means of dispute settlement, failing prior agreement, limited only by the requirement that all means be peaceful. But the time consumed by the preliminary negotiations normally necessary merely to achieve agreement on the means can itself be injurious to the development of the system States or augment the harm being inflicted upon one or more system States. The challenge is, consequently, to draft an article on avoidance or settlement of disputes that avails itself of the widespread recognition among States of the special needs in this field of the non-navigational uses of international watercourses, without overstepping the bounds of the politically feasible.

## 7. THE WORK OF THE INSTITUTE OF INTERNATIONAL LAW

490. The Institute of International Law, at its 1979 Athens session, devoted to “the pollution of rivers and lakes and international law”, did not venture far into the matter of dispute settlement, but it emphasized in its resolution the necessity for co-operation among the States concerned, as well as pollution prevention, and for international conventions dealing with “the procedure for special arrangements providing in particular for objective liability systems and compensation funds with regard to pollution brought about by ultra-hazardous activities”.<sup>802</sup> The Institute also made it a duty of States, “as far as practicable” and “especially through agreements”, to

consult with each other on actual or potential problems of trans-boundary pollution of the basin so as to reach, by methods of their own choice, a solution consistent with the interests of the States concerned and with the protection of the environment;<sup>803</sup>

491. In its “Salzburg resolution” of 1961, the Institute had recognized as a rule of international law that “the States will enter into negotiations with a view to reaching an agreement within a reasonable time”, in

*mental Disputes* (Madison, University of Wisconsin, 1976); Bourne, “Procedure in the development of international drainage basins: the duty to consult and to negotiate”, *The Canadian Yearbook of International Law*, 1972 (Vancouver), vol. X, p. 212; L. Teclaff, “The impact of environmental concern on the development of international law”, *Natural Resources Journal*, vol. 13, 1973, p. 357, and “Harmonizing water use and development with environmental protection”, *ibid.*, vol. 16, 1976, p. 807.

<sup>802</sup> Art. VI, para. (b) (*Annuaire de l’Institut de droit international*, 1979, vol. 58, Part Two, p. 199).

<sup>803</sup> Art. VII, para. (d) (*ibid.*, p. 201).

case objection were made to works or utilizations undertaken.<sup>804</sup>

A recommendation follows that rule:

For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned.<sup>805</sup>

492. The following articles are more specific:

#### Article 7

During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.

#### Article 8

If the interested States fail to reach agreement within a reasonable time, it is recommended that they submit to judicial settlement or arbitration the question whether the project is contrary to the above rules.

If the State objecting to the works or utilizations projected refuses to submit to judicial settlement or arbitration, the other State is free, subject to its responsibility, to go ahead while remaining bound to its obligations rising from the provisions of articles 2 to 4.<sup>806</sup>

493. The final article of the resolution recommends investigation of the desirability of "common organs", *inter alia* "to prevent and settle disputes which might arise".<sup>807</sup>

### 4. SETTLEMENT OF DISPUTES IN THE HELSINKI RULES

494. The International Law Association, for its part, devotes a lengthy chapter to this subject in its Helsinki Rules, with particular attention to prevention of disputes.<sup>808</sup> The relevant rules may profitably be studied.<sup>809</sup>

<sup>804</sup> Resolution on "Utilization of non-maritime international waters (except for navigation)", art. 6, first para. (*ibid.*, 1961, vol. 49, Part Two, p. 383; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076).

<sup>805</sup> Art. 6, second para. (*Annuaire de l'Institut de droit international*, 1961, vol. 49, Part Two, p. 383).

<sup>806</sup> *Ibid.* Art. 2 states that the right to utilize is limited by the right of utilization of other States; art. 3 states that, if there is disagreement over the scope of their rights, settlement will take place on the basis of equity; art. 4 states that no State can undertake works or utilizations which seriously affect the possibility of utilization by other States except on condition of assuring them the enjoyment of advantages to which they are entitled under art. 3, as well as adequate compensation for any loss or damage.

<sup>807</sup> Art. 9 (*ibid.*, p. 385). For a view comparable to that of the Institute, see E. Jiménez de Aréchaga, "International legal rules governing use of waters from international watercourses", *Inter-American Law Review* (New Orleans, La.), vol. II, No. 2, 1960, p. 328; see also, by the same author, "International law in the past third of a century", *Recueil des cours* . . . 1978-I (Aalphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, pp. 199-200.

<sup>808</sup> Chap. 6, "Procedures for the prevention and settlement of disputes", arts. XXVI-XXXVII, and annex, "Model rules for the constitution of the conciliation commission for the settlement of a dispute" (ILA, *Report of the Fifty-second Conference* . . . , pp. 516-532). This portion of the Helsinki Rules was prepared by a working group headed by the late Richard R. Baxter.

<sup>809</sup> Each article is followed by substantial commentary, not adopted by the International Law Association Conference but reproduced in its report. The comment under art. XXXV refers to and recommends the "Model rules on arbitral procedure" contained in the report of the International Law Commission on the work of its tenth session (*Yearbook* . . . 1958, vol. II, 83-86, document A/3859, para. 22).

### CHAPTER 6 PROCEDURES FOR THE PREVENTION AND SETTLEMENT OF DISPUTES

#### Article XXVI

This chapter relates to procedures for the prevention and settlement of international disputes as to the legal rights or other interests of basin States and of other States in the waters of an international drainage basin.

#### Article XXVII

1. Consistently with the Charter of the United Nations, States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security, and justice are not endangered.

2. It is recommended that States resort progressively to the means of prevention and settlement of disputes stipulated in articles XXIX to XXXIV of this chapter.

#### Article XXVIII

1. States are under a primary obligation to resort to means of prevention and settlement of disputes stipulated in the applicable treaties binding upon them.

2. States are limited to the means of prevention and settlement of disputes stipulated in treaties binding upon them only to the extent provided by the applicable treaties.

#### Article XXIX

1. With a view to preventing disputes from arising between basin States as to their legal rights or other interest, it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to such waters.

2. A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the régime of the basin in a way which might give rise to a dispute as defined in article XXVI. The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration.

3. A State providing the notice referred to in paragraph 2 of this article should afford to the recipient a reasonable period of time to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.

4. If a State has failed to give the notice referred to in paragraph 2 of this article, the alteration by the State in the régime of the drainage basin shall not be given the weight normally accorded to temporal priority in use in the event of a determination of what is a reasonable and equitable share of the waters of the basin.

#### Article XXX

In case of a dispute between States as to their legal rights or other interests, as defined in article XXVI, they should seek a solution by negotiation.

#### Article XXXI

1. If a question or dispute arises which relates to the present or future utilization of the waters of an international drainage basin, it is recommended that the basin States refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations for the fullest and most efficient use thereof in the interests of all such States.

2. It is recommended that the joint agency be instructed to

and commended by the General Assembly to the attention of Members for adoption in appropriate cases (General Assembly resolution 1262 (XIII) of 14 November 1958).

submit reports on all matters within its competence to the appropriate authorities of the member States concerned.

3. It is recommended that the member States of the joint agency in appropriate cases invite non-basin States which by treaty enjoy a right in the use of the waters of an international drainage basin to associate themselves with the work of the joint agency or that they be permitted to appear before the agency.

#### Article XXXII

If a question or a dispute is one which is considered by the States concerned to be incapable of resolution in the manner set forth in article XXXI, it is recommended that they seek the good offices, or jointly request the mediation of a third State, of a qualified international organization or of a qualified person.

#### Article XXXIII

1. If the States concerned have not been able to resolve their dispute through negotiation or have been unable to agree on the measures described in articles XXXI and XXXII, it is recommended that they form a commission of inquiry or an *ad hoc* conciliation commission, which shall endeavour to find a solution, likely to be accepted by the States concerned, of any dispute as to their legal rights.

2. It is recommended that the conciliation commission be constituted in the manner set forth in the annex.

#### Article XXXIV

It is recommended that the States concerned agree to submit their legal disputes to an *ad hoc* arbitral tribunal, to a permanent arbitral tribunal or to the International Court of Justice if:

- (a) A commission has not been formed as provided in article XXXIII, or
- (b) The commission has not been able to find a solution to be recommended, or
- (c) A solution recommended has not been accepted by the States concerned, and
- (d) An agreement has not been otherwise arrived at.

#### Article XXXV

It is recommended that in the event of arbitration the States concerned have recourse to the Model rules on arbitral procedure prepared by the International Law Commission of the United Nations at its tenth session in 1958.

#### Article XXXVI

Recourse to arbitration implies the undertaking by the States concerned to consider the award to be given as final and to submit in good faith to its execution.

#### Article XXXVII

The means of settlement referred to in the preceding articles of this chapter are without prejudice to the utilization of means of settlement recommended to, or required of, members of regional arrangements or agencies and of other international organizations.

### 9. DATA SHARING AND AVOIDANCE OF DISPUTES

495. It may be noted that the Helsinki Rules related the giving of "notice of any proposed construction or installation which would alter the régime . . ." to situations "which might give rise to a dispute . . ."<sup>810</sup> Similarly, the furnishing of "relevant and reasonably available information" is set forth in the context of prevention of disputes.<sup>811</sup> In this report, however, the

Commission is urged to treat notice and information requirements as part of customary, continuing co-operation between system States, above all in fulfilment of their obligation to avoid appreciable harm (see chap. II, sect. D, above). It is believed that, when system States so co-operate fully, disputes are less likely to arise.

496. In the process of working out technical adjustments, where needed, to proposed projects and programmes, and in arriving at substantive determinations of equitable participation, procedures for the avoidance of disputes become invaluable to the system States. Failure of dispute avoidance machinery means that the differences are likely to harden into formal disputes, thus invoking the parties' dispute settlement arrangements, if any. And failure to comply with the duties of notice and data sharing could itself lead to a dispute. Therefore, emphasis is placed in this section of the report on the need for system States to endeavour to accommodate and adjust. If such efforts fail, willing resort to an efficient dispute settlement forum is of the essence.

### 10. THE PROPOSED ARTICLE: MINIMAL PROVISIONS

497. While the Special Rapporteur is sympathetic to the more far-reaching proposals of the Institute of International Law and the International Law Association, he wishes to suggest no more at this juncture than he believes existing international law requires. The draft article which is tentatively formulated is far less elaborate than the cited articles of the United Nations Convention on the Law of the Sea, but it shares with those articles a sense of urgency in respect of settlement of disputes involving critical natural resources.

498. The hardening of differences into international disputes is highly undesirable. Yet once a dispute has crystallized, international law—most notably, the Charter of the United Nations (Article 2, para. 3, and Article 33)—requires its settlement by peaceful means, if continuance of the dispute is likely to endanger the maintenance of international peace and security (a condition which disputes over international water-courses too often can fulfil). Moreover, the Security Council may investigate "any dispute, or any situation which might lead to international friction or give rise to a dispute . . ." (Article 34). In the light of these provisions, and the considerations set forth in this section, the following draft article, which is believed to be consonant with State practice and the Charter, is offered for the consideration of a successor Special Rapporteur and of the Commission. It would apply in the absence of means more satisfactory to, or binding upon, the parties.<sup>812</sup> It reads as follows:

#### Article 16. Principles and procedures for the avoidance and settlement of disputes

1. System States are under a duty to settle disputes concerning the development, use, protection or control of their shared water resources by peaceful means that do not endanger international peace and security, and justice.

<sup>810</sup> Art. XXIX, para. 2.

<sup>811</sup> Art. XXIX, para. 1.

<sup>812</sup> The annexes called for in the suggested draft article have not been prepared at this preliminary stage.

2. In the absence of applicable agreement between the system States concerned for the resolution of differences and the settlement of disputes concerning an international watercourse system, such differences and disputes are governed by the rules and principles of these articles and by the following:

(a) A planned or intended use in the future of system water by one or more system States shall not be ground for denying a right of reasonable and beneficial use in the present to another system State.

(b) Pending a determination of equitable use, a system State is not obliged to suspend an existing beneficial use, except by agreement, unless the use is causing or will cause appreciable harm to another system State or to the environment. In the event that appreciable harm is caused, failure to modify the use, to suspend the use, or otherwise to abate the cause of the appreciable harm at the request of another system State subjects the offending system State to liability for damages and denial of the use right.

(c) Conflicting use of an international watercourse system will be made compatible, at the request of a system State affected by the conflict, by restricting one or more of the uses, or by making adjustments to the régime of the system, to the degree necessary and in a manner calculated to produce the minimum practical loss of total utilization; more valuable uses will be given preference where other considerations are determined not to be paramount.

(d) Where the difference between the system States involves the development, protection or control of the international watercourse system, the above principles, *mutatis mutandis*, shall apply.

3. System States shall use their best efforts to adjust their differences regarding the development, use, protection or control of their shared water resources with the view to avoiding the emergence of disputes.

4. Unless the system States concerned otherwise agree,

(a) failure after a reasonable period of consultation and negotiations to reach an accommodation of a difference between system States regarding the development, use, protection or control of an international watercourse system entitles any of the system States concerned to call for the creation of an international commission of inquiry to investigate and report upon the facts relevant to the unresolved difference;

(b) any system State concerned is, after the call for creation of an international commission of inquiry, entitled to convoke a special period of intensified negotiations not to exceed six months measured from the date of the call for the said commission, during which time the formation of the said commission shall be held in abeyance;

(c) international commissions of inquiry shall be constituted in accordance with this article and the procedures annexed to these articles at the instance of any system State concerned;

(d) upon receipt of the report of an international commission of inquiry, the system States concerned shall renew their negotiations and, with the said report as a basis, endeavour to arrive at a just and equitable resolution of the difference;

(e) in the event that resolution of the difference by negotiation is not attained within six months after

receipt by the system States concerned of the report of the international commission of inquiry, or the formation or work of said commission has been frustrated so that its report is not rendered, any system State concerned may thereafter refer the matter to conciliation in accordance with the procedure annexed to these articles;

(f) in the event that, with the assistance of conciliation, the system States concerned fail to resolve the difference within a reasonable time, any system State concerned may, after notice to all system States concerned and thereafter waiting a minimum of ninety days, declare the matter to be an international dispute and call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles. This subparagraph shall not be operative where the system States concerned have an applicable mutually binding agreement to arbitrate or adjudicate disputes.

## F. Concluding observations

499. In these concluding paragraphs of his final report, the Special Rapporteur wishes to offer the following observations in the hope that they may be found useful in future work of the Commission on the topic.

### 1. FUNCTIONS OF THESE DRAFT ARTICLES

500. The Special Rapporteur's reports envisage the draft articles to be formulated by the Commission as a set of principles and rules fulfilling these functions:

(a) Codification and, to a certain extent, progressive development of international law on the subject;

(b) To that end, the settling of "residual" principles and rules to govern those elements of international watercourse law (except for navigational uses) which are not covered, or not dealt with comprehensively, by international agreements in force;

(c) Provision of principles and foundations for the promotion and conclusion of agreements among system States governing their relations in respect of a specific international watercourse system, or some portion or aspect of their shared water resources;

(d) Assisting in the interpretation of provisions, and of terms of art used in provisions, of system agreements.

501. The draft articles adopted or proposed are believed to represent codification of existing principles, and they embody a minimal measure of progressive development of the law as well. They are designed to prevail among the parties to a treaty containing these articles, in the absence of applicable provisions of another treaty in force among the relevant system States. As article X provides, without prejudice to any obligation of system States to negotiate in good faith for the purpose of concluding one or more system agreements, the provisions of those articles do not affect treaties in force relating to a particular international watercourse system or elements of it.<sup>813</sup>

<sup>813</sup> See, in respect of the interplay of treaties and custom in the sphere of international watercourses, Baxter, "Treaties and custom", *Recueil des cours* . . . 1970-1 (Sijthoff, Leyden, 1971), vol. 129, p. 25, and works there cited; Hayton, "The formation of the customary rules of international drainage basin law", *The Law of International Drainage Basins* (op. cit.), p. 834, and works there cited.

## 2. NEED FOR CODIFICATION OF THE TOPIC

502. In the view of the Special Rapporteur, the need for codification of the topic is beyond dispute. The increasing intensity and complexity of use of international watercourses, and the dangers of abuse of international watercourses, require some development of elements of the topic which until this time have been imperfectly distilled from the considerable relevant State practice. It may indeed be fair to say that with respect to relatively few other subjects is co-operation and collaboration among the States concerned more imperative. As the late C. Eagleton, a leading student of the topic, said over 20 years ago:

Each harnessing of a river alters its natural equilibrium and initiates a chain of important and interrelated repercussions. As a result, there exists, between the manifold uses to which a river may be put, a state of interdependence which demands unity of effort. The problem then is, simply, how may this unity be achieved. Now this obviously involves a different approach from that of two riparian States agreeing to a division of the benefits of an isolated segment of a river.

Thus the task is of greater importance than a statement of principles of international law as evidenced by past practice. It is the recognition of, and regard for, the fundamental determination for peaceful co-development of a resource recognized to be as common in legal rights as it is in physics. Rivers simply do not pay homage to political boundaries. It is foolish to attempt to evoke laws that would have them do so.<sup>814</sup>

503. These sentiments have been equally reflected in studies prepared for the Asian-African Legal Consultative Committee at its twelfth session, in Colombo, in 1971, expressed for instance in these terms:

In recent years, notably during the post-war period, it is being realized that a river system being a hydrologic unit, the entire drainage area of a river system ought to be considered as a single unit and that co-operative international river development would bring gain for all the co-operating parties. Even when the objectives of the riparian States are not alike, it is still possible that mutual accommodation can be a means of improving the economics of an international water resources undertaking, provided that the co-operation is sustained. A co-operative venture by all the riparian States can achieve more efficient use of a river than can an independently planned project.<sup>815</sup>

504. Similar convictions motivated the Institute of International Law at its Salzburg session in 1961, as reflected in the preamble to its resolution on "utilization of non-maritime international waters (except for navigation)":

Considering that the economic importance of the use of waters is transformed by modern technology and that the application of modern technology to the waters of a hydrographic basin which includes the territory of several States affects in general all these States, and renders necessary its restatement in juridical terms,

Considering that the maximum utilization of available natural resources is a matter of common interest,

Considering that the obligation not to cause unlawful harm to

others is one of the basic general principles governing neighbourly relations,

Considering that this principle is also applicable to relations arising from different utilizations of waters,

Considering that in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource,

Recognizes the existence in international law of the . . . rules, and formulates the . . . recommendations [set forth in the main body of the resolution].<sup>816</sup>

505. The impact of the "modern technology" referred to by the Institute of International Law in 1961 flourishes unabated. Its achievements in industry and agriculture complicate water management problems, yet it has advanced sharply the tools of investigation, monitoring and management.<sup>817</sup> The fragility of the biosphere has lately brought forward even more fundamental concerns; the central ecological role of water is forthrightly stated by one close student of the inter-relationships:

Water and environment, the two words cannot be dissociated. The integration of environmental aspects with water development and management is an absolute requirement. . . . In this sense, environment, which in itself could not be considered as a sector for management, is a dimension of water management.<sup>818</sup>

506. In response to calls from the United Nations Conference on the Human Environment, the United Nations "Habitat" Conference, the United Nations Water Conference and the United Nations Conference on Desertification, as well as the conclusions and recommendations of various other bodies, and its own resolution 34/191 of 18 December 1979, the General Assembly proclaimed the period 1981-1990 as the International Drinking Water Supply and Sanitation Decade.<sup>819</sup> This seemingly local matter of delivering the "liquid of life", and the handling of water-related wastes, has meaning for international watercourse systems. The supply of potable water is at issue; the

<sup>814</sup>C. Eagleton, "The law and uses of international rivers", research project conducted under the auspices of the New York University School of Law, 30 June 1959, pp. 4-6 (mimeo.), reproduced in M. M. Whiteman, *Digest of International Law*, vol. 3 (Washington, D.C., U.S. Government Printing Office, 1964), pp. 874-875.

<sup>815</sup>Secretariat of the Asian African Legal Consultative Committee, *Brief of Documents on the Law of International Rivers* (New Delhi, 1971) vol. II, p. 429 (part II, chap. VI, "Rights of riparians regarding the uses of waters of international river basins"); see also J. V. Krutilla, *The Columbia River Treaty: the Economics of an International River Basin Development* (Baltimore, Md., Resources for the Future, 1967), pp. 3-4.

<sup>816</sup>*Annuaire de l'Institut de droit international*, 1961, vol. 49, Part Two, pp. 381-382. (Reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076). In the preamble to its "Athens resolution" of 1979, on "the pollution of rivers and lakes and international law", the Institute recalled its resolutions of 1911 and 1961, adopted at Madrid and Salzburg respectively, declared itself "conscious of the multiple potential uses of international rivers and lakes and of the common interest in a rational and equitable utilization of such resources through the achievement of a reasonable balance between the various interests", considered that "pollution spread by rivers and lakes to the territories of more than one State is assuming increasingly alarming and diversified proportions whilst protection and improvement of the environment are duties incumbent upon States", and recalled "the obligation to respect the sovereignty of every State over its territory, as a result of which each State has the obligation to avoid any use of its own territory that causes injury in the territory of another State" (*Annuaire de l'Institut de droit international*, 1979, vol. 58, Part Two, p. 197).

<sup>817</sup>See e.g., in exposition of one technique serving hydrology, earth sciences, remote sensing and engineering, *Satellite Hydrology*, M. Deutsch, D. Wiesnet and A. Rango, eds. (study prepared for the American Water Resources Association, 1980), with chapters on meteorology, snow and ice, surface water, soil moisture, water quality and environment, ground water, wetlands, coastal zones, hydrodata relay, and water use and management. See also, *inter alia*, International Association for Hydraulic Research, *Proceedings of the XIX Congress* (New Delhi, 1981); International Commission on Irrigation and Drainage, *Proceedings of the Third Afro-Asian Regional Conference* (New Delhi, 1980).

<sup>818</sup>D. Alhéritière, "Water and environment", *Water International*, vol. 5, Dec. 1980, p. 8.

<sup>819</sup>General Assembly resolution 35/18 of 10 November 1980.



resultant quality of the waters into which domestic wastes may be channelled is of concern to other States sharing international watercourse systems so burdened. Immense investment is required to meet the objectives of the Decade; both human and financial resources will be very great.<sup>820</sup>

507. In the light of such considerations, the formulation of widely accepted principles respecting international watercourses becomes ever more urgent. It would fundamentally facilitate active management of the resource, carried forward for joint benefit by system agreements:

The essence of water management might be defined as an activity directed towards obtaining optimal co-ordination and harmonization of the natural complement of water resources with the needs of the society by means of planned scientific, technical, economic, administrative and legal measures. Accepting this definition, it appears to be obvious that the purpose of the development of international water management co-operative agreements is to establish advantageous international conditions for those activities as well as to provide for the benefits accruing from the international division of labour.

The distinctive feature of water resources, unlike all other natural resources, highlights the importance of close co-operation between countries sharing the river basin concerned and of common efforts . . .<sup>821</sup>

### 3. PRINCIPLES AND RULES REPORTED AND PROPOSED

508. Thus far six articles have received provisional approval by the Commission and have been reported to the General Assembly (see para. 8 above). These treat of the scope of the articles (article 1), the definition of system State (article 2), system agreements (article 3), entitlement to participate in the negotiation and conclusion of system agreements (article 4), water as a shared natural resource (article 5), and the relationship between the articles and other treaties in force (article X).<sup>822</sup>

509. In his final report, the Special Rapporteur has submitted a number of proposed additional draft articles. These cover, in a first category, the concept of equitable participation (draft article 6), ascertainment of equitable use (draft article 7), responsibility for appreciable harm (draft article 8), information and data sharing (draft article 9), environmental protection and pollution (draft article 10), and prevention and control of water-related hazards (draft article 11).

510. A second group of articles follows, put forward in a still more tentative fashion. These are based upon less thorough studies and contain proposed draft articles on river regulation (draft article 12), hydraulic installations and water security (draft article 13), denial of inherent use preference (draft article 14), administrative arrangements (draft article 15), and avoidance and settlement of disputes (draft article 16).

<sup>820</sup> See M. Tikka, "Vesihuollon nykytila ja ongelmat eri maissa" (The present situation and problems of water supply and sanitation in different countries), *Vesitalous* (Helsinki), vol. 21, No. 4, 1980, p. 5; D. Peterson, "Water: a world problem", *War on Hunger* (Washington, D.C.), vol. 11, No. 7, 1977, p. 1.

<sup>821</sup> B. Csermák, "Goals and forms of co-operation between countries for the development of international river basins" (United Nations, *River Basin Development* . . . , vol. II, p. 28).

<sup>822</sup> In addition, an important tentative note of understanding was approved by the Commission concerning what was meant by the term "international watercourse system" (see *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90; see also para. 7 above).

511. The articles thus far proposed are interrelated, perhaps with a degree of overlapping in some instances. Some aspects of the topic are so closely related, if not in substance then by terminology, or by measures or activities of implementation, as to make difficult or impossible complete treatment without correspondence at their margins between certain provisions. This result is not viewed with concern. In practice, system States normally co-operate, if they co-operate at all, in a multifaceted manner to achieve a number of objectives. Measures of conservation, or of protection and control, are as likely to benefit from multiple arrangements as are uses of the international watercourse system. As system States strive to maximize benefits and minimize detriments from their shared water resources, uses and protection and control measures are in fact combined in various ways to form an integrated, managerial approach to the watercourse.

512. The Special Rapporteur remains persuaded that the concept provisionally defined and adopted by the Commission, that of the international watercourse system, is the preferable one. It has been shown to be a recognized concept employed in State practice and by specialists in and commentators upon the topic. The term "system" is believed preferable to, and is distinct from, the terms "basin" or "drainage basin", primarily in that its focus is on the waters and their uses and their interdependencies. "Basin" suggests, to some, the land area within the watershed as well as the waters, as if the physical basin—both land and water—might be governed by the rules of international water resources law. It is believed that the key element intended by the proponents of terms such as "hydrographic basin" is interdependent waters; however, the additional connotation of land area is avoided by the employment of the term "watercourse system". Indeed, "system" is capable of comprehending canals, groundwater and inter-basin connections without deformation of its plain meaning.<sup>823</sup> At the same time, the Commission's tentative definition of the international watercourse system limits its reach to the sphere of actual international impact; accordingly, for this reason as well, "international watercourse system" may not be equated with "drainage basin".

### 4. ASPECTS NOT REPORTED ON IN THIS REPORT OR IN PRECEDING REPORTS

513. The substantial total list of adopted or proposed draft articles leaves several questions not addressed, in addition to a range of possible articles on specific uses. These questions include the issue of the legality of diversion of water outside the international watercourse system, and the often intricate matter of cost sharing, for example for the production and processing of data or joint studies, the design, construction and operation of projects, the training of technical and managerial personnel, protection and control measures (structural and non-structural), etc.

514. Furthermore, the extremely important subjects of principles and rules governing development, use, protection and control of the waters of shared ground-

<sup>823</sup> Care must be taken that translations of "system" into other languages retain the scientific meaning, and that terms meaning, for example, network (such as *red* in Spanish or *réseau* in French) not be accepted, in order to forestall undue narrowing of this concept.

water resources remains a substantial gap in the draft articles.<sup>824</sup>

515. In some international watercourse systems, a rule of equal access to information and to administrative and judicial process by nationals of co-system States—a matter of equal treatment—has already attained considerable importance. This aspect of the topic also has not been dealt with.

516. The Commission may wish to have the foregoing subjects and others explored. However, it is submitted that, with the articles thus far adopted or proposed in this report, most of the more basic and necessary draft principles and rules are before the Commission for reconsideration by a successor Special Rapporteur and consideration by the Commission.

##### 5. PRESERVATION OF WILD AND SCENIC WATERCOURSES

517. An additional, unusual aspect, which has begun to achieve legal recognition, if in only a few countries to date, should be brought to the Commission's attention. This is the matter of preservation in their natural state of wild and scenic rivers. The desideratum is likely to gain broader recognition in the years ahead, in international as well as other watercourses. It involves the setting aside of a portion, or the entirety, of a stream, selected for its aesthetic beauty or its condition of being relatively unmodified by man: the native flora and fauna are typically abundant. Such free-running and unspoiled watercourses, so designated, will thus still be able to be experienced by future generations.

518. This kind of protection from overuse and abuse, and withdrawal from availability for development, is akin to the preservation of selected tracts and areas of land as national or international parks, where the wildlife and scenery are removed from the operation of ordinary legislation and are reserved, under special régimes, for controlled, limited use as preserves. While the creation and management of such parks is a widely accepted practice of States, the protective designation of a watercourse as a wild or scenic river is a relatively recent extension of the conservation movement. This is true even though a number of existing national and international parks contain portions of international watercourses that flow from, into or through them.

519. It may be hoped that more and more States will act upon their awareness of the progressive loss of these priceless and, once spoiled, irretrievable parts of their heritage. The Governments of many system States can be expected to designate some streams or extensive portions of such streams for preservation under special legal régimes. In some cases, system States may join

forces to preserve an especially valuable portion of an international watercourse.

520. Not a few of the remaining unspoiled stretches of rivers are in fact segments of international watercourses.<sup>825</sup> The Commission's articles on the non-navigational uses of international watercourses could be cast in such a way as to contemplate this emerging practice and to comprehend such preservation régimes as an element of a State's equitable participation in the development, use, protection and control of international watercourse systems. The legislation of those States that have already taken up this policy of virtual non-use may merit study.<sup>826</sup> Legislation which provides for preservation of amenities more generally should also prove instructive.<sup>827</sup> Many countries may be prompted to move in this direction in order to conserve ancient monuments or artifacts, such as cave paintings, glyphs or dwellings, situated adjacent to the watercourse.

521. Preservation of wild and scenic watercourses is an element of environmental protection. "Unspoiled and unmarred rivers" have become

as much an endangered species as [for example] the bald eagle, . . . whose existence depends on the health of the rivers along which it lives. Wild rivers are [moreover] outdoor laboratories where biologists can obtain important insights into the workings of nature by studying life cycles unchanged by man. They are also part of our . . . heritage—an untouched land that gives beauty and pleasure.<sup>828</sup>

522. Studies of hydrology, limnology and watershed management, among other water-related disciplines, also profit from the availability of relatively pristine "base points" of nature in action. These benefits are aside from the values intended to be served by the special legal régime imposed. But the hydropower potential of such streams, for example, or their capacity for timber floating, should remain untapped; any transport of silt unchecked; their flood stages unrestrained. The high long-range cultural or historical benefits derived from the isolation of some segments of an international watercourse from utilization projects and pro-

<sup>825</sup>For example, the 92-mile-long Allagash River in the northern reaches of the State of Maine (United States), tributary of the St. John, which in one stretch contains the boundary between the United States (Maine) and Canada (Province of New Brunswick), was designated the Allagash Wilderness Waterway in 1970, saving the water route through the last great wilderness of the north-eastern United States.

<sup>826</sup>See e.g. the United States Wild and Scenic Rivers Act of 1968 *United States Code, 1970 Edition*, (Washington, D.C., 1971), vol. 4, title 16, chap. 28, sects. 1271–1287: "It is hereby declared to be the policy of the United States that certain selected rivers of the nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural or other similar values, shall be preserved in free-flowing condition and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations" (sect. 1271). Under the Act, in addition to the Allagash, the middle fork of the Clearwater River, in Idaho, a major tributary of the Snake River, and thus within the international watercourse system of the Columbia River (Canada–United States) has similarly been designated; another tributary of the Snake River, the Salmon, also has its middle fork so designated. An upper segment of the Rio Grande (United States–Mexico) is likewise designated (sect. 1274). Others may be added.

<sup>827</sup>Since the park-like status for such streams is by design, and nature parks almost always include significant water resources, State practice in connection with international parks and other protected areas, such as wildfowl reservations and marshlands, should provide analogous guidance.

<sup>828</sup>*Rivers of North America* (Waukesha, Wis., Outdoor World, Wis., 1973), p. 197.

<sup>824</sup>The ILA Committee on International Water Resources Law has a special Working Group on Underground Waters (Chairman/Rapporteur: R. D. Hayton), whose terms of reference and work programme are set out in ILA, *Report of the Fifty-third Conference* . . . , pp. 522 and 524–525. See also L. A. Teclaff and E. Teclaff, "Transboundary groundwater pollution: survey and trends in treaty law", *Natural Resources Journal*, vol. 19, 1979, p. 629; Caponera and Alhéritière, "Principles for international groundwater law", *ibid.*, vol. 18, 1978, p. 589; Hayton, "The law of international aquifers", *ibid.*, vol. 22, 1982, and "The groundwater legal regime as instrument of policy objectives and management requirements", (International Association for Water Law, *Annales Juris Aquarum—II*, vol. 1 (Caracas, 1976), p. 345); L. A. Teclaff and A. E. Utton, eds., *International Groundwater Law* (London, Oceana Publications, 1981).

grammes naturally may have to be weighed, in appropriate cases, against the development goals of system States.

#### 6. THE QUESTION OF PARTICULAR USES

523. Should the articles advanced in this report, as revised and refined by a successor Special Rapporteur and the Commission, meet with substantial tentative acceptance, or should other articles of similar scope be adopted, the Commission would then, it is believed, be in a position to examine particular, non-navigational uses of international watercourse systems with a view to extracting use/specific principles and rules for codification and progressive development.

524. The Commission devised at an early stage of its work on the topic an outline of uses of non-maritime shared water resources for purposes of initial consideration.<sup>829</sup> The choice subsequently was made to pursue general principles and rules prior to taking up individual uses. Consequently little attention was devoted by the Special Rapporteur to the possible content of principles and rules governing the specific uses of international watercourse systems. No effort is made in this report to discuss any specific issues.

525. Prior work on the international law of particular uses is not extensive. Even the very few studies that have appeared do not pretend to many firm rules of law.<sup>830</sup> Conferences and studies on the technical aspects have been numerous. Development of minimal legal principles and rules, however, even by way of progressive development, may prove to be a major challenge. In the interim, a set of general articles, if approved, should serve, for States parties, to govern many of the system-State relationships associated with any particular use.

<sup>829</sup> That outline, submitted to the States as part of the Commission's questionnaire on the topic, is reproduced in *Yearbook* . . . 1980, vol. II (Part Two), p. 105, para. 69, question D.

<sup>830</sup> At the Second General Conference on Communications and Transit, held in Geneva in 1923, the Conference Committee on Electric Questions took as a basis for discussion a draft general agreement on hydropower prepared by a League of Nations Advisory and Technical Committee for Communications and Transit. The much modified result was the 1923 Convention relating to the development of hydraulic power affecting more than one State (League of Nations, *Treaty Series*, vol. XXXVI, p. 77). See also

#### 7. FINAL COMMENTS

526. In the preparation of his reports, every effort was made by the Special Rapporteur to base the conclusions reached and the draft articles proposed not simply on the compelling physical, chemical and biological realities affecting international watercourse systems, but upon the discernible practice of States. Thus the principles and rules put forward endeavour to make more definite and certain a number of widely accepted norms and, in an ancillary way, to regularize closely related procedural propositions in order to render the whole reasonable and workable. Most advantageously consulted were the solutions and standards of those Governments which had in fact found legal and institutional bases for dealing with the problems of international watercourses. The work of regional and universal intergovernmental conferences and agencies was helpful, as was the large contribution of several non-governmental professional organizations.

527. "The law of international rivers", as it has until recent years been called, has made a contribution to the evolution of customary international law. The necessity, over the centuries, for neighbouring States to negotiate their differences as "riparians" has enriched international law in a number of ways.

528. Consolidation, codification and progressive development of the law of the non-navigational uses of international watercourses is now overdue. The relations between system States the world over suffer from the lack of that clarified and sufficient product. This final report is submitted with a view to advancing the topic, however modestly, towards the Commission's goal of completion of its draft articles and commentary on a topic of quite special importance to international life and to the life of mankind.

chap. 5, "Timber floating", of the Helsinki Rules (ILA, *Report of the Fifty-second Conference* . . . , pp. 511-516 (five articles with commentary). Legal aspects of navigation, here excluded, have, on the other hand, been subjected to intensive study by international jurists and in a number of intergovernmental meetings. The Declaration of Montevideo, 1933, of the Seventh International Conference of American States, identified itself as concerned with the "industrial and agricultural" use of international rivers, but was almost entirely given over to procedures for notification (with the necessary technical documentation), consultation and settlement of disputes of general application (for text, see *Yearbook* . . . 1974, vol. II (Part Two), p. 212, document A/5409, annex I, A).

## DOCUMENT A/CN.4/352 and Add.1

### Replies of Governments to the Commission's questionnaire

[Original: English/French]  
[18 February and 28 June 1982]

#### CONTENTS

	Page		Page
INTRODUCTION .....	192	4. Transportation other than navigation; 5. Timber floating; 6. Waste disposal; 7. Extractive (mining, oil production, etc.); (c) Domestic and social uses: 1. Consumptive (drinking, cooking, washing, laundry, etc.); 2. Waste disposal; 3. Recreational (swimming, sport, fishing, boating, etc.)?	
I. GENERAL COMMENTS AND OBSERVATIONS			
Bangladesh .....	193	Bangladesh .....	196
Portugal .....	194	Portugal .....	196
II. REPLIES TO SPECIFIC QUESTIONS		Question E. Are there any other uses that should be included?	
Question A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?		Bangladesh .....	196
Bangladesh .....	195	Portugal .....	196
Portugal .....	195	Question F. Should the Commission include flood control and erosion problems in its study?	
Question B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?		Bangladesh .....	196
Bangladesh .....	195	Portugal .....	196
Portugal .....	195	Question G. Should the Commission take account in its study of the interaction between use for navigation and other uses?	
Question C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?		Bangladesh .....	197
Bangladesh .....	196	Portugal .....	197
Portugal .....	196	Question H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?	
Question D. Should the Commission adopt the following outline for fresh water uses as the basis of its study: (a) Agricultural uses: 1. Irrigation; 2. Drainage; 3. Waste disposal; 4. Aquatic food production; (b) Economic and commercial uses: 1. Energy production (hydroelectric, nuclear and mechanical); 2. Manufacturing; 3. Construction;		Bangladesh .....	197
		Portugal .....	197
		Question I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?	
		Bangladesh .....	197
		Portugal .....	197

#### Introduction

1. By paragraph 4(e) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.<sup>1</sup>

Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add.1.<sup>2</sup>

2. By paragraph 5 of resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97. At the

<sup>1</sup> Yearbook . . . 1974, vol. II (Part One), pp. 301-304.

<sup>2</sup> Yearbook . . . 1976, vol. II (Part One), p. 147.

thirtieth session of the Commission, the replies received were circulated in document A/CN.4/314.<sup>3</sup> An additional reply to the Secretary-General's note was circulated at the thirty-first session of the Commission in document A/CN.4/324.<sup>4</sup>

4. At its thirty-first session, in 1979, the Commission, in view of the importance of the topic and the need to have at its disposal the views of as many Governments of Member States as possible, decided again to request, through the Secretary-General, the Governments of Member States which had not already done so to submit their written comments on the questionnaire formulated by the Commission in 1974.<sup>5</sup>

5. The Secretary-General, by a circular note dated 18 October 1979, invited the Governments of Member States which had not yet done so to submit as soon as possible their written comments on the Commission's questionnaire.

6. The General Assembly, by paragraph 4(d) of resolution 34/141 of 17 December 1979, recommended that the Commission continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

7. New replies to the questionnaire prepared by the Commission were received and circulated in 1980, at the Commission's thirty-second session, in document A/CN.4/329 and Add.1.<sup>6</sup>

<sup>3</sup> *Yearbook* . . . 1978, vol. II (Part One), p. 253.

<sup>4</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 178.

<sup>5</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 169, para. 148.

<sup>6</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 153.

8. The General Assembly, in its resolution 35/163 of 15 December 1980, recommended that, *inter alia*, the Commission should proceed with the preparation of draft articles on the topic, taking into account the replies to the questionnaire addressed to Governments as well as information furnished by them. By resolution 36/114 of 10 December 1981, the General Assembly recommended that, *inter alia*, the Commission should continue its work aimed at the preparation of draft articles on the topic. The General Assembly, by both resolutions 35/163 and 37/114, urged Governments to respond as fully and expeditiously as possible to the requests of the Commission for comments and observations on its draft articles and questionnaires and for materials on topics on its programme of work.

9. Between February and June 1982, replies were received from the Governments of Bangladesh and Portugal. These are reproduced below in the same form as those published previously, with general comments and observations in section I, and replies to the questionnaire in section II.

10. Thus, as of 15 June 1982, the following 32 Member States have submitted replies to the questionnaire formulated by the Commission in 1974: Argentina, Austria, Bangladesh, Barbados, Brazil, Canada, Colombia, Ecuador, Finland, France, Federal Republic of Germany, Greece, Hungary, Indonesia, Libyan Arab Jamahiriya, Luxembourg, Netherlands, Nicaragua, Niger, Pakistan, Philippines, Poland, Portugal, Spain, Sudan, Swaziland, Sweden, Syrian Arab Republic, United States of America, Venezuela, Yemen and Yugoslavia.

## I. General comments and observations

### Bangladesh

[Original: English]  
[27 August 1981]

1. In connection with the replies to the Commission's questionnaire, furnished herewith, the comments already submitted by the Government of Bangladesh on the draft articles provisionally adopted by the Commission on the law of the non-navigational uses of international watercourses<sup>7</sup> may be carefully noted. This subject is of vital importance to Bangladesh and all other riparian and basin States. The formulation of the principles of law, applicable or to be applied, has hardly been touched upon in those draft articles, and the Commission has introduced the new concepts of "system States" and of defining an international watercourse system on the basis of affected uses instead of geographical configuration, which are not substantiated by established international custom or State practice. In its report on its thirty-second session, the Commission supported its use of the word "system" in connection with "river" by citing precedents from the Treaty of Versailles and other treaties and the use of the term "river system" in some scholarly texts.<sup>8</sup> But a close

scrutiny of those provisions shows that the term "river system" was used in the narrower sense of rivers and their tributaries or supplementary streams only. Such concepts, based on the international rivers concept, have become obsolete and have been replaced by the broader and more sound concept of an international drainage basin. Moreover, those treaties and texts did not formulate the concept of a "system State" or of the international nature of a watercourse system based on affected uses, as the Commission has done.

2. The Government of Bangladesh feels that it is necessary to give a precise definition of an international watercourse and to base the provisions on the geographical concept of an international drainage basin. If no agreement is possible, the definition already accepted under customary international law should be adopted. It is also necessary to codify the principles relating to non-navigational uses of international watercourses, as far as possible, according to the well-established norms of international custom and practice, including provisions of treaties; and, in making the necessary rules to suit new uses with the progress of time, it is also necessary to guard against the temptation of introducing new or widely different concepts which, far from being of real benefit to States, might give rise to more complicated problems in the future. An attempt to make provisions to cover future uses of

<sup>7</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

<sup>8</sup> *Ibid.*, pp. 110-111, commentary to art. 1.

watercourses due to technological developments will involve speculation as to what, exactly, such technological developments will be. Hence, it is necessary to base the codification on existing principles and practice which have already proved their usefulness, instead of making such imprecise and novel provisions as the Commission has done in the draft articles.

#### Portugal

[Original: English/French]  
[15 June 1982]

1. The following information is provided in the light of the telegrams referred to in the letter from the Directorate-General for Political Affairs of the Ministry of Foreign Affairs dated 7 February 1980 and dispatched on 13 February 1980 by the Secretariat of State for Nature and the Environment to the National Commission for the Environment.
2. The Office for Water Resources Management of the National Commission for the Environment has consistently followed closely and with the utmost interest and attention, within the context of the United Nations, the legal problems relating to the use of international rivers and has studied the following documents:
  - (a) "Legal problems relating to the utilization and use of international rivers: Report by the Secretary-General";<sup>9</sup>
  - (b) *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation*.<sup>10</sup>
3. These documents contain a number of legislative texts and provisions of treaties concluded between Portugal and other countries.
4. The texts in question include a number relating to rivers having their sources in Spain and forming or traversing the frontier between Portugal and Spain, namely:<sup>11</sup>
  - Frontier Treaty between Spain and Portugal signed on 29 September 1864;
  - Regulation annexed to the Boundary Treaty between Spain and Portugal of 29 September 1864, signed at Lisbon, 4 November 1866;
  - Treaty between Portugal and Spain concerning commercial relations and navigation, signed at Madrid on 27 March 1893;
  - Regulations for fishing in the Miño River, drawn up by a Mixed Spanish-Portuguese Commission pursuant to article V of Appendix VI to the Treaty of Commerce and Navigation between Spain and Portugal of 27 March 1893, Madrid, 15 May 1897;
  - General Act demarcating the frontier between Spain and Portugal from the mouth of the River Miño to the confluence of the Caya and Guadiana, signed at Lisbon on 1 December 1906;
  - Exchange of Notes constituting an Agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes, Madrid, 29 August and 2 September 1912;
  - Convention between Portugal and Spain delimiting the frontier between both countries, from the confluence of the River Cuncos with the Guadiana to the mouth of the latter, signed at Lisbon on 29 June 1926;
  - Convention between Spain and Portugal to regulate the hydroelectric development of the international section of the River Douro, signed at Lisbon, 11 August 1927;
  - Exchange of Notes amending article 14, paragraph 2, of the Convention of 11 August 1927, Lisbon, 2 June and 27 September 1951.
5. The above-mentioned documents also include the following texts of a similar nature relating to the former overseas territories:
  - River M'Pozo [Angola—Belgian Congo]:  
Convention between Belgium and Portugal regarding questions of economic interest in the colonies of the Belgian Congo and Angola, signed at São Paulo de Loanda on 20 July 1927;<sup>12</sup>
  - Kunene River (Rua Cana Falls) [Angola—Territory of South West Africa]:  
Agreement between the Union of South Africa and Portugal regulating the use of the waters of the Kunene River, signed at Cape Town on 1 July 1926;<sup>13</sup>
  - River Rovuma [Mozambique—Tanganyika]:  
Exchange of Notes between the United Kingdom and Portugal regarding the boundary between Tanganyika and Mozambique, Lisbon, 11 May 1936;
  - River Shiré and Lake Nyasa [Mozambique—Rhodesia and Nyasaland]:  
Exchange of Notes between the United Kingdom and Portugal concerning the Shiré Valley Project, Lisbon, 21 January 1953;
  - Lake Nyasa [Mozambique—Rhodesia and Nyasaland]:  
Agreement between the United Kingdom (on its own behalf and on behalf of the Federation of Rhodesia and Nyasaland) and Portugal regarding the Nyasaland-Mozambique Frontier, signed at Lisbon on 18 November 1954;
  - Kwando River [Angola—Rhodesia and Nyasaland]:  
Agreement between the United Kingdom (on its own behalf and on behalf of the Federation of Rhodesia and Nyasaland) and Portugal with regard to certain natives living on the Kwando River, signed at Lisbon on 18 November 1954.
6. The Office for Water Resources Management also notes with interest more recent conventions and regulations concerning the use and hydroelectric development of rivers whose drainage basins lie partly in Portugal and partly in Spain. These include:
  - Convention and Additional Protocol to regulate the hydroelectric development of the international sections of the River Douro and its tributaries, signed at Lisbon on 16 July 1964 and entered into force on 19 July 1966;<sup>14</sup>
  - Convention and Additional Protocol to regulate the use

<sup>9</sup> See *Yearbook* . . . 1974, vol. II (Part Two), p. 33, document A/5409.

<sup>10</sup> United Nations Legislative Series, vol. 12 (Sales No. 63.V.4).

<sup>11</sup> *Ibid.*, pp. 892 *et seq.*, Nos. 241–249.

<sup>12</sup> *Ibid.*, p. 96, No. 3.

<sup>13</sup> For the text of this and the four following agreements, *ibid.*, pp. 132 *et seq.*, Nos. 29–33.

<sup>14</sup> Spain, *Boletín Oficial del Estado* (Madrid), No. 198 (19 August 1966), p. 10876.

and hydroelectric development of the international sections of the Rivers Miño, Lima, Tejo, Guadiana and Chança, and their tributaries, signed at Madrid on 29 May 1968 and entered into force on 7 April 1969;<sup>15</sup> and Second Additional Protocol of 12 February 1976, entered into force on 19 May 1977;

Regulations for fishing in the River Minho (Miño), in force since 1 July 1968, pursuant to the agreement of 22 June 1968, following approval and publication of the Regulations in both countries. In Portugal, approval was given on 20 March 1967.<sup>16</sup>

<sup>15</sup> *Ibid.*, No. 96 (22 April 1969), p. 726.

<sup>16</sup> Decree Law No. 47595 (Portugal, *Diário do Governo* (Lisbon), Series I, No. 67 (20 March 1967), p. 296).

7. As part of its functions, the Office for Water Resources Management has supplied information in the past concerning some of the legal and institutional aspects of international water-resources development; in this connection, attention is drawn to the communication dated 8 May 1976.

8. In replying to the Commission's questionnaire, an effort has been made to reflect what may be regarded as the spirit and scope of the legislative texts and treaties already concluded between Portugal and other countries, as has also been done in regard to the use of international waterways.

## II. Replies to specific questions

[*Replies of Bangladesh (original: English), dated 27 August 1981, and of Portugal (original: English/French), dated 15 June 1982*]

**Question A.** *What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?*

### Bangladesh

An "international watercourse" or even an "international river system" is based on the river concept, even if it includes tributaries, canals and lakes. Since this concept is now obsolete and has been superseded by the modern concept of an international drainage basin, which is broader and more sound, the definition that should be adopted is that of an international watercourse *basin*, or international drainage *basin*, instead of merely an international watercourse or river system. Moreover, the international watercourse system should not have the connotation given by the Commission. In defining the international watercourse basin or drainage basin:

(a) The limits or boundaries of the watercourse basin or drainage basin should be specifically indicated with reference to the watershed limits or the limits of the catchment area;

(b) The definition should be such that the international drainage or watercourse basin cannot be interpreted to include more than one geographical basin, or even a part of a second drainage basin;

(c) The definition should be absolute with reference to geographical configuration, and not variable or contingent on one part of the basin or river being affected by the use of another part of the same.

It will be useful if the Commission roughly accepts the definition proposed by the Helsinki Conference of the International Law Association in 1966.<sup>17</sup> This defi-

nition should be the same in relation to fresh water uses and fresh water pollution; and, even if there is a slight difference in the event of technical difficulties arising, the geographical limits of the basin should not be different in the two cases.

### Portugal

For the purposes specified, and indeed for some others too, an "international watercourse" should be defined as one to which it is possible to apply the geographical concept of an international drainage basin; in other words, a drainage basin extending into the territories of two or more countries.

This definition therefore covers not only watercourses that flow successively through the countries whose frontiers they cross, but also those that form a frontier between countries.

**Question B.** *Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?*

### Bangladesh

In view of this Government's reply to question A above, the answer to this question is in the affirmative. The concept of an international drainage basin has been universally adopted by most riparian States and jurists alike, and should not be changed without very strong justification. Moreover, the concept of an international drainage basin is practical, functional and effective in application, and should form a proper basis for a study of the aspects referred to. The precise limits of the drainage basin make this concept very useful and sound.

### Portugal

Yes. Terms to which preference was given in the past, such as "international river", should be regarded

<sup>17</sup> See "Helsinki Rules on the Uses of the Waters of International Rivers", I.L.A. *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. 357-359, document A/CN.4/274, para. 405.



as less suitable now than the concept of an "international drainage basin", as defined by the Helsinki Rules of 1966,<sup>18</sup> that is, a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

**Question C.** *Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?*

**Bangladesh**

For the same reasons as those given in response to questions A and B, the reply of this Government to this question is in the affirmative. The same concept should underlie the studies of the legal aspects of both pollution and non-navigational uses of international watercourses. Otherwise, if two different concepts are used in the two cases, two entirely different and independent sets of rules will have to be formulated together, instead of formulating imprecise definitions to cover both cases and mixing them up.

**Portugal**

Yes. Water, in its natural state, has never respected political boundaries, and pollution of river water is one aspect that justifies the preference for the term "international drainage basin". Because of the waste discharged into rivers by upstream States, pollution of river water may, and frequently does, necessitate fairly expensive water-treatment arrangements in downstream States to avoid endangering public health and causing inconvenience to industry and other users, and also to facilitate other, later, development activities.

**Question D.** *Should the Commission adopt the following outline for fresh water uses as the basis of its study:*

- (a) *Agricultural uses:*
  1. *Irrigation;*
  2. *Drainage;*
  3. *Waste disposal;*
  4. *Aquatic food production;*
- (b) *Economic and commercial uses:*
  1. *Energy production (hydroelectric, nuclear and mechanical);*
  2. *Manufacturing;*
  3. *Construction;*
  4. *Transportation other than navigation;*
  5. *Timber floating;*
  6. *Waste disposal;*
  7. *Extractive (mining, oil production, etc.);*
- (c) *Domestic and social uses:*
  1. *Consumptive (drinking, cooking, washing, laundry, etc.);*
  2. *Waste disposal;*
  3. *Recreational (swimming, sport, fishing, boating, etc.)?*

**Bangladesh**

The outline is quite satisfactory and fairly comprehensive. However, some of these uses are very neces-

sary while others are not. Thus a lower riparian's need for food production should prevail over an upper riparian's use for recreational purposes such as swimming and sport. Principles should be laid down as to which category of uses should have preference over which other category of uses, and to what extent the quantity of waters can be diminished, or qualitatively impaired, so as not to cause serious damage to a co-basin State. Such principles, of course, cannot be accurately provided for; but broad guidelines for competing uses can be indicated.

**Portugal**

*Reply to questions D and E*

One of the possible uses of fresh water would be in connection with the control of certain diseases, such as malaria, through the reduction or elimination of anopheles mosquito breeding grounds formed by stagnant pools alongside rivers.

Reduction of river pollution is another possible use of water with a wider application than waste disposal.

Similarly, the creation and improvement of open-air living conditions may provide a use of water with more diversified and wide-ranging aspects than those relating solely to the recreational purposes mentioned.

**Question E.** *Are there any other uses that should be included?*

**Bangladesh**

This Government has no other use to suggest for inclusion.

**Portugal**

[See the reply to question D.]

**Question F.** *Should the Commission include flood control and erosion problems in its study?*

**Bangladesh**

The reply to this question is in the affirmative. The necessity of conserving water by storage dams at flood time, for use during the lean or low-flow seasons, and the impact of erosion on the uses of water render the inclusion of these problems in the study quite appropriate.

**Portugal**

Yes. It should not be concerned solely with drainage and possible uses of drainage water. Other questions arise in the life of a river that have a decisive influence on its economic status since, in all the valleys of the world, what happens to rivers is profoundly affected by what happens on land.

When waters cross the political frontiers between States, varied and complex problems may be engendered by the occurrence of significant changes in either the quality or the quantity of the water, or even, over a period of time, in drainage patterns. For example, soil erosion in an upstream State can do damage to ports situated in a downstream State.

<sup>18</sup> Art. II; see footnote 17 above.

**Question G.** *Should the Commission take account in its study of the interaction between use for navigation and other uses?*

**Bangladesh**

The answer to this question is also in the affirmative, because withdrawals of water in very large quantities by an upper riparian for non-navigational uses may seriously affect navigational uses of the waters by a lower riparian, and also because navigation has an impact on other uses and on the question of water pollution.

**Portugal**

Yes. Such interaction is real and, in the majority of cases, of the utmost importance.

The establishment, upstream, of extensive irrigation zones may deprive a downstream State of the flow of water required for traditional shipping activities, for existing uses in agriculture and industry, or for the supply of the population.

Carrying out river projects downstream may deprive an upstream State of the possibility of using the river for shipping or timber floating.

**Question H.** *Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?*

**Bangladesh**

No. The uses of waters come first, and pollution is to be considered as a result of the uses. It will be difficult to study the two questions even simultaneously; so the study of uses should be taken up first, and the problem of pollution may be studied afterwards.

**Portugal**

Yes. This should be one of the points considered since it is of undoubted importance and current relevance.

**Question I.** *Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?*

**Bangladesh**

Yes, the establishment of a Committee of Experts will be useful.

**Portugal**

We believe this could be done if need be; but it seems to us that the Commission should consider the matter itself in the course of its work.



# JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 6]

DOCUMENT A/CN.4/357\*

## Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[Original: English]  
[31 March 1982]

### CONTENTS

	Paragraphs	Page
INTRODUCTORY NOTE .....	1-9	200
DRAFT ARTICLES ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY ( <i>continued</i> ) .....	10-121	202
PART III. EXCEPTIONS TO STATE IMMUNITY .....	10-121	202
Article 11 (Scope of the present part) .....	10-29	202
A. General considerations of the scope of the present part .....	10-28	202
1. Linkage between general principles and exceptions to State immunity ..	10	202
(a) Source materials .....	10	203
(b) Concentration on general principles .....	10	203
(c) Extent of the application of State immunities .....	10	203
(d) The inductive method .....	10	203
2. Observations made in the Sixth Committee of the General Assembly ...	11-28	203
(a) The principle of State immunity as a general rule .....	14	203
(b) The scope of the topic .....	15	204
(c) The relevance of lack of consent as a matter of principle .....	16-19	204
(d) The interrelations between competence and State immunity .....	20-21	205
(e) The relative flexibility of State immunity .....	22-23	205
(f) The dual approach .....	24-26	206
(g) The relations between the rules and the general exceptions .....	27-28	206
B. Text of draft article 11 .....	29	207
Article 12 (Trading or commercial activity) .....	30-121	207
A. General considerations of the exceptions .....	30-45	207
1. Limitative nature of the exceptions .....	30-31	207
2. Legal basis for limiting State immunity .....	32-34	207
3. The various distinctions .....	35-45	208
(a) Dual personality of the State .....	36	208
(b) Dual capacity of the State .....	37	208
(c) <i>Acta jure imperii</i> and <i>acta jure gestionis</i> .....	38-39	208
(d) Public and private nature of State acts or activities .....	40-42	209
(e) Commercial and non-commercial activities .....	43-45	209
B. Trading or commercial activity as an exception to State immunity .....	46-119	210
1. Identifiability of trading or commercial activity .....	46-48	210
2. The current practice of States regarding trading or commercial activity	49-107	211
(a) Judicial practice .....	52-92	212
(i) International adjudication .....	52	212
(ii) Judicial decisions of municipal courts .....	53-92	212
Italy .....	56-57	213
Belgium .....	58-59	214
Egypt .....	60-61	214
France .....	62-66	215
Federal Republic of Germany .....	67-68	216
Netherlands .....	69-71	217
Austria .....	72-73	218
United States of America .....	74-79	218
United Kingdom .....	80-87	220
Pakistan .....	88-89	221
Argentina .....	90	222
Chile .....	91	222
Philippines .....	92	222

\* Incorporating document A/CN.4/357/Corr.1.

	Paragraphs	Page
(b) Governmental practice .....	93-107	222
(i) The role of the executive .....	94-95	223
(ii) Views of Governments .....	96-97	223
(iii) Treaty practice .....	98-102	223
(iv) National legislation .....	103-107	224
3. International conventions and efforts towards codification .....	108-111	225
(a) The European Convention on State Immunity (1972) .....	109	225
(b) The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) ...	110	225
(c) Regional intergovernmental bodies .....	111	226
4. Contributions from non-governmental circles .....	112-116	226
(a) Resolutions of the Institute of International Law .....	113	226
(b) Draft code of the International Law Association .....	114	226
(c) Harvard draft convention on competence of courts in regard to foreign States, 1932 .....	115	226
(d) Resolution of the International Bar Association .....	116	227
5. Opinions of writers .....	117-119	227
C. Formulation of draft article 12 .....	120-121	228
1. Essential elements .....	120	228
2. Text of draft article 12 .....	121	229

## Introductory note

1. This is the fourth of a series of reports on the topic of jurisdictional immunities of States and their property, prepared and submitted by the Special Rapporteur for consideration and deliberation by the International Law Commission. The series was preceded by an earlier study presented by the Working Group on the topic in July 1978 in the form of an exploratory report.<sup>1</sup>

2. It may be helpful to recall briefly that the first of the series of reports on the subject was a preliminary report<sup>2</sup> giving a historical sketch of international efforts towards codification examining the sources of international law and possible contents of the law of State immunities, including the practice of States, international conventions, international adjudication, and opinions of writers as source materials, and an inquiry into initial questions, definitions, a viable inductive approach, the general rule of State immunity and possible exceptions to the general rule or limitations of State immunities, immunities from attachment and execution as well as other procedural questions and related matters.

3. The second report of the Special Rapporteur, submitted to the Commission at its thirty-second session, in 1980,<sup>3</sup> and the third report, to its thirty-third session, in 1981,<sup>4</sup> have each in turn been discussed by members of the Commission and have also received extensive consideration and been the object of deliberation the Sixth Committee during the thirty-fifth

and thirty-sixth sessions of the General Assembly.<sup>5</sup> They have each been prepared with the guidance of the Commission<sup>6</sup> on the basis of comments and observations of its members, as well as the views expressed by representatives of Governments within the Sixth Committee.<sup>7</sup>

4. The second and third reports contain altogether eleven draft articles, of which articles 1-5 form part I, entitled "Introduction", and articles 6-11—now reconstituted in five articles numbered 6-10—form part II, entitled "General principles". Of these eleven draft articles, the Commission has adopted provisionally, with the commentaries thereto,<sup>8</sup> article 1 (Scope of the present articles) and article 6 (State immunity), as follows:

### PART I

#### INTRODUCTION

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

**The present articles apply to questions relating to the immunity of one State and its property from the jurisdiction of another State.**

...

<sup>1</sup> A/CN.4/L.279/Rev.1, reproduced in part in *Yearbook* . . . 1978, vol. II (Part Two), pp. 153-155.

<sup>2</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323.

<sup>3</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; for the discussion in the Commission, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 138-141, paras. 111-122.

<sup>4</sup> *Yearbook* . . . 1981, vol. II (Part One), p. 125, document A/CN.4/340 and Add.1; for the discussion in the Commission, see *Yearbook* . . . 1981, vol. II (Part Two), pp. 154 *et seq.*, paras. 208-227.

<sup>5</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), paras. 311-326; and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 156-179.

<sup>6</sup> See *Yearbook* . . . 1979, vol. II (Part Two), pp. 185-186, paras. 166-183; *Yearbook* . . . 1980, vol. II (Part Two), pp. 139-141, paras. 114-122.

<sup>7</sup> See footnote 5 above.

<sup>8</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 141 *et seq.*, chap. VI, sect. B.

PART II  
GENERAL PRINCIPLES

*Article 6. State immunity*

1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

2. Effect shall be given to State immunity in accordance with the provisions of the present articles.

5. Other draft articles in part I (Introduction) are article 2 (Use of terms),<sup>9</sup> article 3 (Interpretative provisions),<sup>10</sup> article 4 (Jurisdictional immunities not within the scope of the present articles)<sup>11</sup> and article 5 (Non-retroactivity of the present articles).<sup>12</sup>

<sup>9</sup>

*"Article 2. Use of terms"*

"1. For the purposes of the present articles:

"(a) 'immunity' means the privilege of exemption from, or suspension of, or non-amenability to, the exercise of jurisdiction by the competent authorities of a territorial State;

"(b) 'jurisdictional immunities' means immunities from the jurisdiction of the judicial or administrative authorities of a territorial State;

"(c) 'territorial State' means a State from whose territorial jurisdiction immunities are claimed by a foreign State in respect of itself or its property;

"(d) 'foreign State' means a State against which legal proceedings have been initiated within the jurisdiction and under the internal law of a territorial State;

"(e) 'State property' means property, rights and interests which are owned by a State according to its internal law;

"(f) 'trading or commercial activity' means:

"(i) a regular course of commercial conduct, or

"(ii) a particular commercial transaction or act;

"(g) 'jurisdiction' means the competence or power of a territorial State to entertain legal proceedings, to settle disputes, or to adjudicate litigations, as well as the power to administer justice in all its aspects.

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

<sup>10</sup>

*"Article 3. Interpretative provisions"*

1. "In the context of the present articles, unless otherwise provided,

"(a) the expression 'foreign State', as defined in article 2, paragraph 1(d) above, includes:

"(i) the sovereign or head of State,

"(ii) the central government and its various organs or departments,

"(iii) political subdivisions of a foreign State in the exercise of its sovereign authority, and

"(iv) agencies or instrumentalities acting as organs of a foreign State in the exercise of its sovereign authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central government.

"(b) the expression 'jurisdiction', as defined in article 2, paragraph 1(g) above, includes:

"(i) the power to adjudicate,

"(ii) the power to determine questions of law and of fact,

"(iii) the power to administer justice and to take appropriate measures at all stages of legal proceedings, and

"(iv) such other administrative and executive powers as are normally exercised by the judicial, or administrative and police authorities of the territorial State.

"2. In determining the commercial character of a trading or commercial activity as defined in article 2, paragraph 1(f) above, reference shall be made to the nature of the course of conduct or particular transaction or act, rather than to its purpose."

<sup>11</sup>

*"Article 4. Jurisdictional immunities not within the scope of the present articles"*

"The fact that the present articles do not apply to jurisdictional immunities accorded or extended to

"(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

"(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

"(iii) special missions under the Convention on Special Missions of 1969,

6. In addition to the commentaries thereto included in the report of the Commission,<sup>13</sup> draft articles 1 and 6 have drawn some further comments. The compromise formulas such as the expression "*Questions relating to*" in draft article 1 and the phrase "*in accordance with the provisions of the present articles*" in draft article 6, paragraphs 1-2, are open to review at a subsequent stage, as the draft articles have been adopted provisionally to allow the work of the Special Rapporteur to proceed. At the suggestion of the Special Rapporteur, the Commission agreed to defer consideration of draft articles 2-5 until it was in a position to examine the remainder of the draft articles to be proposed on the topic. It was noted that draft articles 4-5 were submitted to serve as temporary signposts for the framework of the projected plan of the draft articles.<sup>14</sup> It has also become apparent from subsequent debate and decisions of the Commission that some of the provisions of draft article 2 (Use of terms), especially the expressions "territorial State" and "foreign State", have been abandoned, while the need for further clarification in draft article 3 (Interpretative provisions) may depend on the desirability of putting some of its provisions elsewhere, such as in the revised draft article 7, paragraph 3.<sup>15</sup>

7. Draft article 6 (State immunity), provisionally adopted by the Commission with commentary as the first article in part II (General principles), has continued to draw further comments in the Sixth Committee during subsequent sessions of the General Assembly,<sup>16</sup> especially as the main general principle preceding further draft articles in part II. Many suggestions have been made regarding alternative formulation of the draft article, and these should be considered by the Drafting Committee and the Commission itself in the course of its thirty-fourth session.

8. The new wording of draft article 7 (Obligation to give effect to State immunity),<sup>17</sup> article 8 (Consent of

"(iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,

"(v) permanent missions or delegations of States to international organizations in general.

"shall not affect:

"(a) the legal status and the extent of jurisdictional immunities recognized and accorded to such missions and representation of States under the above-mentioned conventions;

"(b) the application to such missions or representation of States or international organizations of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles;

"(c) the application of any of the rules set forth in the present articles to States and international organizations, non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles."

<sup>12</sup>

*"Article 5. Non-retroactivity of the present articles"*

"Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to foreign States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby."

<sup>13</sup> See footnote 8 above.

<sup>14</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 139-140, para. 117.

<sup>15</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 157, para. 225.

<sup>16</sup> See footnote 5 above.

<sup>17</sup> "Article 7. Obligation to give effect to State immunity

"Paragraph 1—Alternative A

"1. A State shall give effect to State immunity under [as stipu-

(Continued on next page.)

State),<sup>18</sup> article 9 (Expression of consent),<sup>19</sup> and article 10 (Counter-claims)<sup>20</sup> is awaiting consideration by the Drafting Committee and the Commission. The revised versions of draft articles 7–10 were recast by the Special Rapporteur in the light of the rich and helpful debate at the various meetings of the Commission on the topic<sup>21</sup> and at the request of the Chairman of the Drafting Committee, with a view to assisting the Drafting Committee in the expedition of its consideration.

9. It should be noted at this juncture that draft articles 7–11, in their original versions as well as in their revised forms, have been the subject of extensive discussion and comments in the Sixth Committee,<sup>22</sup> even in the still unfinished or half-finished stage of the drafting exercise. The comments and observations within the Sixth Committee, even at this early stage of the draft articles, are so pertinent and serviceable for the current task awaiting the Drafting Committee and the Commission that it would appear useful to include a brief reference to them in this fourth report, which may provide a useful bridge between part II (General principles) and part III (Exceptions to State immunity) of the draft articles.

(Footnote 17 continued)

lated in] article 6 by refraining from subjecting another State to the jurisdiction of its otherwise competent judicial and administrative authorities, [or] and by disallowing the [conduct] continuance of legal proceedings against another State.

*"Paragraph 1—Alternative B"*

"1. A State shall give effect to State immunity under article 6 by refraining from subjecting another State to its jurisdiction [and] or from allowing legal proceedings to be conducted against another State, notwithstanding the existing competence of the authority before which the proceedings are pending.

"2. For the purpose of paragraph 1, a legal proceeding is considered [deemed] to be one against another State, whether or not named as a party, so long as the proceeding in effect seeks to compel that other State either to submit to local jurisdiction or else to bear the consequences of judicial determination by the competent authority which may [involve] affect the sovereign rights, interests, properties or activities of the State.

"3. In particular, a proceeding may be considered to be one against another State [when] if it is instituted against one of its organs, agencies or instrumentalities acting as a sovereign authority; or against one of its representatives in respect of acts performed by them as State representatives, or [if] it is designed to deprive another State of its public property or the use of such property in its possession or control."

NOTE: Paragraph 3 would constitute an alternative to the text of draft article 3, subparagraph 1(a).

<sup>18</sup>

*"Article 8. Consent of State"*

"1. [Subject to part III of the draft articles] Unless otherwise provided in the present articles, a State shall not exercise jurisdiction in any legal proceeding against another State [as defined in article 7] without the consent of that other State.

"2. Jurisdiction may be exercised in a legal proceeding against a State which consents to its exercise."

<sup>19</sup>

*"Article 9. Expression of consent"*

"1. A State may give its consent to the exercise of jurisdiction by the court of another State under article 8, paragraph 2, either expressly or by necessary implication from its own conduct in relation to the proceeding in progress.

"2. Such consent may be given in advance by an express provision in a treaty or an international agreement or a written contract, expressly undertaking to submit to the jurisdiction or to waive State immunity in respect of one or more types of activities.

"3. Such consent may also be given after a dispute has arisen by actual submission to the jurisdiction of the court or by an express waiver of immunity, [in writing, or otherwise] for a specific case before the court.

"4. A State is deemed to have given consent to the exercise of jurisdiction by the court of another State by voluntary submission if it has instituted a legal proceeding or taken part or a step in the proceeding relating to the merit, without raising a plea of immunity.

"5. A State is not deemed to have given such consent by voluntary submission or waiver if it appears before the court of another State in order specifically to assert immunity or its rights to property and the circumstances are such that the State would have been entitled to immunity, had the proceeding been brought against it.

"6. Failure on the part of a State to enter appearance in a proceeding before the court of another State does not imply consent to the exercise of jurisdiction by that court. Nor is waiver of State immunity to be implied from such non-appearance or any conduct other than an express indication of consent as provided in paragraphs 2 and 3.

"7. A State may claim or waive immunity at any time before or during any stage of the proceedings. However, a State cannot claim immunity from the jurisdiction of the court of another State after it has taken steps in the proceedings relating to the merit, unless it can satisfy the court that it could not have acquired knowledge of the facts on which a claim of immunity can be based, in which event it can claim immunity based on those facts if it does so at the earliest possible moment."

<sup>20</sup>

*"Article 10. Counter-claims"*

"1. In any legal proceedings instituted by a State, or in which a State has taken part or a step relating to the merit, in a court of another State, jurisdiction may be exercised in respect of any counter-claim arising out of the same legal relationship or facts as the principal claim, or if, in accordance with the provisions of the present articles, jurisdiction could be exercised, had separate proceedings been instituted before that court.

"2. A State making a counter-claim in proceedings before a court of another State is deemed to have given consent to the exercise of jurisdiction by that court with respect not only to the counter-claim but also to the principal claim, arising out of the same legal relationship of facts [as the counter-claim]."

<sup>21</sup> *Yearbook . . . 1981*, vol. I, pp. 55 *et seq.*, 1653rd to 1657th meetings, and pp. 110 *et seq.*, 1663rd to 1665th meetings; see especially the summing-up by the Special Rapporteur, pp. 76–79, 1657th meeting, paras. 2–24, and pp. 120–121, 1665th meeting, paras. 1–3 and 5.

<sup>22</sup> See *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 45th to 52nd meetings; and "Topical summary . . . thirty-sixth session" (A/CN.4/L.339), paras. 156–179.

## Draft articles on jurisdictional immunities of States and their property (continued)

### PART III. EXCEPTIONS TO STATE IMMUNITY

#### ARTICLE 11 (Scope of the present part)

##### A. General considerations of the scope of the present part

##### 1. LINKAGE BETWEEN GENERAL PRINCIPLES AND EXCEPTIONS TO STATE IMMUNITY

10. To proceed from part II (General principles) to part III (Exceptions to State immunity) without hav-

ing the final texts of all the draft articles in part II in hand is inevitably to presume and presuppose a number of propositions. While the draft articles in part II which were the subject of preliminary as well as substantive discussion by the Commission in the course of the thirty-third session may be pending consideration and final adoption by the Drafting Committee and provisional approval by the Commission, it is useful to recall some of the instructions and guidance given by the Commission and approved by the General Assem-



bly for past, current and future work on the topic to be completed and presented by the Special Rapporteur.

(a) *Source materials*

There can be no mistake as to the source materials to be consulted, which include not only national legislations, conventions, judicial decisions, State practice and opinions of writers, but also an important volume of information supplied by member Governments and their replies to the questionnaire.<sup>23</sup> These are the accepted sources of materials to be used and relied upon.<sup>24</sup>

(b) *Concentration on general principles*

The Special Rapporteur has been directed to concentrate first and foremost on the general principles<sup>25</sup> which he has endeavoured to incorporate in part II of the study on the topic, and are now included in the second and third reports. The areas of initial interest relating to the substantive contents and constitutive elements of the general rules of jurisdictional immunities of States are therefore treated in part II.

(c) *Extent of the application of State immunities*

It was also understood that the question of the extent of, or limitations on, the application of the rules of State immunity, which is the subject of current examination in part III, required an extremely careful and balanced approach, and that the exceptions identified in the preliminary report<sup>26</sup> were merely noted as possible exceptions, without any assessment or evaluation of their significance in State practice. As a timely reminder, these possible exceptions to the general rule of State immunity include:

1. Trading or commercial activity;
2. Contracts of employment;
3. Personal injuries and damage to property;
4. Ownership, possession and use of property;
5. Patents, trade marks and other intellectual property;
6. Fiscal liabilities and customs duties;
7. Shareholdings and membership of bodies corporate;
8. Ships employed in commercial service;
9. Arbitration.

(d) *The inductive method*

An inductive approach to the topic initially proposed and adopted by the Commission has received general approval by the General Assembly. Accordingly, the method and techniques employed in the preparation and presentation of reports and draft articles have been inductive in the sense that conclusions and propositions of law are to be drawn from the practice of States and

not in isolation from the living realities of customary international law. The task before the Commission includes a process of codification of existing practice and progressive development of rules of international law designed to reconcile, if not to resolve, the various conflicts of interests in the exercise of sovereign rights and powers by States. The Special Rapporteur has therefore endeavoured to proceed with the greatest caution, following the direction and guidance furnished by the Commission and the General Assembly. Deviation from the guidelines indicated would promote even greater theoretical controversies and divergencies of opinions which are more academic than practical.

2. OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

11. Without submitting an article-by-article analysis of the comments and observations made by representatives of Governments in the General Assembly at its thirty-sixth session,<sup>27</sup> it might be useful to make succinct references to some of the salient points covered.

12. Most of the representatives who spoke on the topic considered it one of the most important subjects in the current programme of work of the Commission. They appreciated the useful synthesis of the abundant material concerning State practice found in the preliminary and second reports to the Commission. While a number of representatives noted with satisfaction the progress so far made by the Commission towards elaborating a set of draft articles on the topic on the basis of the reports submitted, some difficulties were expressed in an effort to assess the Commission's work at this stage. Some reservation of judgment has been sounded while awaiting submission of the draft articles contained in part III, which are intended to deal with exceptions or limitations upon the general principles of State immunity. This was not unnatural, owing to the unfinished nature of the draft articles in part II, still to be finalized by the Commission after consideration by the Drafting Committee.

13. Several views were expressed with respect to the nature and the scope of the topic, in an effort to identify problem areas facing the Commission which it must endeavour to avoid, circumvent or obviate in order to achieve progress in dealing with the subject. The main issues to be resolved in the treatment of part II (General principles) are many and varied.

(a) *The principle of State immunity as a general rule*

14. The question has been put time and again whether State immunity is a rule, a general rule, a general principle of international law, or rather an exception to a more fundamental norm of State sovereignty of which one aspect covers the exercise of various sovereign powers, territorial, national and jurisdictional. Differences of opinion continue to exist in this particular area. Reconciliation is possible, depending on how far back one wishes to trace the origin of State immunity. When dealing with principles of sovereignty—territorial, national or personal—immunity from jurisdiction can be viewed without hesitation as an exception to the general rule of State jurisdiction. But if one starts from the topic of State immunity, taking into account the

<sup>23</sup> The replies of Governments to the questionnaire which the Secretariat addressed to them on 2 October 1979, originally distributed as document A/CN.4/343 and Add.1-4, are reproduced in volume 20 of the United Nations Legislative Series, entitled *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 557 *et seq.*

<sup>24</sup> See the preliminary report, paras. 22-45 (*Yearbook . . . 1979*, vol. II (Part One), pp. 231 *et seq.*, document A/CN.4/323).

<sup>25</sup> See *Yearbook . . . 1979*, vol. II (Part Two), p. 186, para. 178.

<sup>26</sup> *Yearbook . . . 1979*, vol. II (Part One), pp. 241-243, document A/CN.4/323, paras. 68-81.

<sup>27</sup> See "Topical summary . . . thirty-sixth session" (A/CN.4/L.339), paras. 156-179.

general practice of States as evidence of customary international law, jurisdictional immunity of States could be viewed either as a rule, a general rule or a general principle which itself admits of some exceptions in State practice. Since the topic is entitled "Jurisdictional immunities of States and their property", the proposition is warranted that State immunity is a general rule, rather than an exception to a more fundamental norm of sovereignty, which it also inevitably is. It depends on the point of view from which the question under examination is being treated. Dispute as to the nature of State immunity as a general rule or an exception to the general rule could be resolved by reference to its context. Treating the topic of State immunity as such, it cannot appear otherwise than as a rule and not an exception to the rule. Indeed, even in dealing with aspects of State sovereignty, from the standpoint of the State claiming jurisdictional immunity it is asserting its own sovereignty and not an exception or waiver of its sovereign power. Viewed in that context, the application or non-application of State immunity represents the resolution of a conflict of sovereignties between States, an effort to harmonize conflicts of interests in the assurance of respect for national sovereignty. The maxim *par in parem imperium non habet* is a valid starting point and a convincing legal basis for the doctrine of State immunity.

(b) *The scope of the topic*

15. The question of scope has given rise to undue concern over the widening concept of immunities from jurisdiction, a situation which did not appear to be extraordinary since the definitional problems had not yet been fully discussed. Reference to draft article 2 (Use of terms) could afford some helpful guidance. The scope of the topic in this particular respect does not extend beyond the judicial jurisdiction, or adjudicatory jurisdiction, which could include the exercise of some administrative power in connection with pre-trial procedures and post-judgment execution orders. The apprehension that the draft articles in part II (General principles) could be regarded as recognition of wider immunities than hitherto admissible in State practice would appear to be without any valid ground or justification. No one is discussing the possibility, however remote, of immunity of one State from the overall sovereign power of another State. Even the maxim *par in parem imperium non habet* has never been interpreted with such liberality as to give a State unregulated freedom to exercise its sovereignty wherever it pleases and regardless of international law. Out of the context of adjudication, jurisdictional immunities would not appear to be very meaningful. A State does not normally exercise its sovereign power over another State without being responsible for its acts of domination. Nor can it exercise *imperium* within the territory of another State without the latter's consent. Such sovereign power, as adjudication of litigation, is being exercised by the court within and over its own territory, or territorial jurisdiction, or over everything found on its own territory or within its territorial limits, rather than being an exercise of sovereignty over or against another State, unless it is present there by mutual consent. In such event, the exercise of territorial judicial jurisdiction could be regulated by mutual agreement. This does not preclude the possibility of a

State performing activities not in the exercise of *imperium*, but on the same footing as any other person, national or foreign, natural or juridical, which are generally amenable or subject to the local or territorial jurisdiction. The fact that the activities are attributable to a foreign sovereign State does not necessarily imply the application of State immunity, especially where such activities bear no relation to the exercise of any sovereign power by that State.

(c) *The relevance of lack of consent as a matter of principle*

16. Doubts were expressed regarding the relevance of consent as a matter of principle. Fear was voiced lest State immunity could be regarded as more absolute and unqualified than it has hitherto been admitted even in the most generous State practice. A more thorough examination of the draft articles in part II will reveal the true identity of the relevance of lack of consent, which was presented not so much in the positive aspect of consent as in that of a requirement of jurisdiction, nor was consent as such put forward as the only admissible exception to State immunity, nor indeed was consent to be viewed as a sound basis upon which to found and exercise jurisdiction, territorial, national or otherwise. The draft articles, in particular articles 8-10, tend to support general principles which are stated diametrically differently from the proposition which could prompt such apprehension. While consent of State is not necessarily the foundation of jurisdiction, let alone an exception to the exercise of existing territorial jurisdiction, its absence has been put forward as an essential element of State immunity. This is practically the converse of the assertion that consent of the defendant State permits the exercise of jurisdiction, although it would as a consequence exclude or negate the application of State immunity. The reverse was actually suggested. Lack of consent is an ingredient or constitutive element of State immunity. It follows from this proposition that, conversely, the existence or expression or proof of consent precludes the claim of State immunity without itself constituting a basis for jurisdiction.

17. There could be varying degrees of consent, as there are several ways of expressing it: by words or by conduct, in advance or *in facie curiae*, generally or *ad hoc*. Consent is a neutral term, colourless but sufficiently positive to exclude immunity in case of its presence, although not necessarily adequate to found jurisdiction in every case. A more colourful and active expression of consent could take the form of actual initiation of a legal proceeding by a State. Bringing a counter-claim is a less aggressive form of expressing consent. Without taking the initiative of itself instituting a proceeding first, a State could nevertheless initiate a counter-claim in answer to the principal claim instituted against it. Such positive action by the State is tantamount to its submission to the jurisdiction of the forum of another State, although the extent of its volition is obviously far less than voluntary submission by the State instituting the initial proceedings.

18. While lip-service abounds in the writings of publicists and in judicial decisions with respect to significant consensual theories or the various theories of consent, such aspects have not been considered in part II since they belong more appropriately to part III. However,

the inductive approach has pre-empted premature treatment of any doctrine before an analytical examination of State practice has been made. As will be seen, the theories of consent, express and implied, have been advanced in explanation of, or as justification for, several instances of rejection or denial of State immunity, and as additional doctrinal or theoretical basis for an exception to State immunity in certain areas of State activities.

19. Consent of the State as such has never been regarded as a prerequisite for the exercise of jurisdiction by the court of another State, let alone a foundation of its jurisdiction. Rather it is its absence, or lack of consent, which is a prerequisite of State immunity. The presence, admission or expression in any form or manifestation of consent which is recognizable will operate to eliminate, exclude or remove the possibility of jurisdictional immunity. For this reason the question of the establishment of consent of State, which can be expressed by different methods and in different forms, such as voluntary submission, waiver, agreement and counter-claims, clearly forms part of the general principles of State immunities, and these methods are not truly exceptions to the general rule of State immunity, although by analogy they may have been so considered in the judicial practice of some States or in some national legislations or even international conventions or agreements, for consent could lead to the same result as exceptions, that is to say, the exercise of jurisdiction or denial of immunity. Nevertheless, in the ultimate analysis, in the present study lack of consent and not consent of State as such is treated as part and parcel of the general principles of State immunities. The question of consent of State in connection with the creation, constitution or scope of jurisdiction has not been studied in part II in the second and third reports, notwithstanding the expression of some reservation or even hesitating reactions to some aspects of consensual doctrine which could lend itself to strengthening "absolutism", long forsaken and exploded in the annals of international practice of States.

(d) *The interrelations between competence and State immunity*

20. Differences of view were also expressed regarding the relativity or relevance of competence in the sense of judicial or adjudicatory jurisdiction. In strict logic, the question of jurisdictional immunity of States does not and should not arise in cases where there is no jurisdiction in the circumstances to begin with. This proposition did not draw any objections from representatives of civil-law systems, where the court may declare itself incompetent in the face of a plea of jurisdictional immunity, declining jurisdiction either on the ground that the defendant is entitled to immunity or that the court is otherwise *incompétent*, that is, lacking the necessary jurisdiction or *compétence*. The distinction between *incompétence d'attribution* and *immunité de juridiction*, for instance, is not always drawn, and when it is, is often too fine to admit of adequate expression or precision, whereas logic tends to support the proposition that, in all cases where the courts have no jurisdiction, there is no need to question the possibility or legitimacy of a claim of State immunity. In actual practice, however, the pragmatic approach of the common-law tradition could not accord any priority to the

establishment of *compétence* or jurisdiction before proceeding to determine the applicability of the rule of State immunity. There is no established order of priority among the various grounds on which the litigant could challenge the exercise of jurisdiction by the court.

21. Without in any way attempting to establish or even suggest any order of priority, it is nevertheless submitted that the rules of competence of the court are very relevant in all cases, whether or not the question of State immunity is also involved. *A fortiori*, where there is a claim of State immunity, jurisdiction is highly relevant. Owing to the pre-eminent importance of the rule of State immunity, involving considerations not only of internal laws and national jurisprudence, but often also principles of international law and comity of nations or even diplomacy, the court is not particularly reluctant to examine a plea of State immunity in any given case, even if it were to reach the ultimate conclusion of jurisdiction negatively or positively. The court could uphold its jurisdiction in such a case by denying immunity. On the other hand, it could also decline jurisdiction on the ground of State immunity or on other grounds of lack of competence, or on the doctrine of "act of State", which involves an examination of the merits of the case.<sup>28</sup> Thus, a choice remains open in draft article 7 as to whether or not to add, in paragraph 1, alternative B, the phrase "notwithstanding the existing competence of the authority before which the proceedings are pending". The usefulness of such a phrase is indeed relative, according to whether or not it is included as a reminder of the relatively logical necessity of competence or the existence of jurisdiction so essentially relevant to jurisdictional immunity. Without the necessary jurisdiction, immunity would seem to hang in the air and could be upheld or confirmed only in principle or hypothetically, as there would in such a case be no jurisdiction from which the foreign State would or would not be immune.

(e) *The relative flexibility of State immunity*

22. Because of the relativity of consent, or rather expression thereof, which could at any time operate to frustrate a claim of State immunity, the rule or principles of State immunity must maintain a liberal measure of flexibility. It was noted that State immunity was never claimed to be a rule of *jus cogens*, and this is not unsupported in practice. There is no breach of international obligation for a State to over-extend the courtesy of non-exercise of jurisdiction or to accord State immunity beyond the extent recognized or required by international law. Indeed, several international instruments even provide for such latitude or flexibility, leaving the choice open to States in certain specified areas of the activities involved to withhold or uphold a claim of immunity. In point of fact, in the course of progressive evolution of State practice there has been no strong protest or international complaint or litigation by a State adjudged a debtor after its claim of immunity was denied, duly or otherwise.

<sup>28</sup> See, for instance, the case *Libyan-American Oil Company v. Socialist People's Libyan Arab Jamahiriya* (1980), U.S. Court of Appeals for the District of Columbia Circuit (*International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 161).

23. It is also true that a State is buffered or cushioned by two phases of jurisdictional immunity, each being independent of the other, namely immunity from pre-trial jurisdiction, which extends to the trial up to final decision, and immunity from post-judgment measures of execution, in satisfaction of the judgment. A separate waiver is required in each case, so as to delay the effect of possible enforcement measures affecting a foreign State or its property. Both of these could conveniently be maintained so as to allow further moments of reflection and a breathing space for negotiations to achieve a meaningful settlement of a dispute involving a foreign State by pacific means that could be extrajudicial, or even extralegal. Far from being a rule of *jus cogens*, there is thus ample room for flexibility in the field of jurisdictional immunity of States.

(f) *The dual approach*

24. In an endeavour to verify the division or separation of areas of activities conducted by States which are immune from the jurisdiction and others which are amenable or subject to the jurisdiction of the competent authorities, a novel suggestion was made by a representative. Without having to predetermine the existence of a general rule of State immunities, it would not be impossible to proceed to examine State practice which could provide definite evidence of the two types of circumstances: cases where State immunity operates and cases of non-immunity. In other words, a search could be made at the same time to identify activities which are *acta jure imperii*, where State immunity applies, and activities which are *acta jure gestionis*, where State immunity is not applicable.

25. At first glance, this two-pronged or dual approach appears promising and deserves consideration in greater depth. The suggestion seems worthy of experiment, if not ultimate pursuit. It is respectfully submitted, however, without wishing to abandon any worthwhile suggestion, that the dual approach need not necessarily result in time-saving, although efforts would have to be redoubled. It could be likened to an endeavour "to burn the candle at both ends", indeed without being certain that it is the same candle and that "both ends" would eventually meet. Nor is it assured that there would be no overlapping or gap, or twilight zone or borderland where existing uncertainties would not only linger but would continue to be preserved and even to grow.

26. The dual approach would not appear to be consistent either with State practice or international agreements and conventions, which tend to recognize a general rule of State immunity, as adopted in draft article 6, while admitting the possibility of qualifications as to principles, and limitations as to exceptions to the general principles. Without ensuring greater speed or expedition in the progress of the Commission's work, since the expression *acta jure imperii* is not free from ambiguities, ambivalence and equivocation, such a two-pronged undertaking would in fact increase the burden of the task by more than doubling it. To increase the workload without essentially saving time would not appear to be a fruitful pursuit. Besides, the existing structure, half-way completed, would have to be completely dismantled and structured anew to prepare for results that do not seem to be any more certain or concrete than the path now mapped out and well

sign-posted, which is relatively assured to lead to tangible and positive results, whatever they may be.

(g) *The relations between the rules and the general exceptions*

27. The transition from part II (General principles) to part III (Exceptions to State immunity) could be made more harmonious by a provision establishing or clarifying the connecting link between the general principles set out in part II and the general exceptions contained in part III. This could further obviate the difficulties mentioned by one representative with regard to the formulation of draft article 6, which was stated in normative form on account of the phrase "in accordance with the provisions of the present articles". In his opinion, a rule of State immunity could be stated in more definite form, as in article 15 of the European Convention on State Immunity.<sup>29</sup> This formulation had the advantage of clarity, in the sense that the Convention stated all possible exceptions before the statement of a general rule. It should be observed, however, that the reverse could achieve the same result, as appears to be the case in article 1, "Immunity from jurisdiction", of the United Kingdom State Immunity Act 1978<sup>30</sup> and also in section 1604, "Immunity of a foreign State from jurisdiction", of the United States Foreign Sovereign Immunities Act of 1976.<sup>31</sup> The link between the general rule and the exceptions appears to have been missing only because the exceptions have not yet been fully stated, as consideration of part III is only starting. It was thus understandable that some reluctance was voiced before seeing or identifying and verifying the acceptability of the possible exceptions listed, which require careful and delicate consideration. The formulation of article 6 as adopted by the Commission, "in accordance with the provisions of the present articles", was intended to establish beyond doubt that the applicable law would be the law of the convention being elaborated and not the customary law. Indeed, if the draft articles envisaged are formulated to reflect accurately State practice on the subject, then the phrase in question would not have the effect of disqualifying the

<sup>29</sup>

"Article 15

"A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear." Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972).

<sup>30</sup> The British Act of 1978 provides:

"PART I

"PROCEEDINGS IN UNITED KINGDOM BY  
OR AGAINST OTHER STATES

"Immunity from jurisdiction

"1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

"..."  
(United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715.)

<sup>31</sup> The United States Act of 1976 provides:

"Section 1604: Immunity of a foreign State  
from jurisdiction

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." (*United States Code, 1976 Edition*, vol. 8, title 28, chap. 97, p. 207).

norm stated in draft article 6 from being a basic rule of international law. All these preoccupations would disappear once the entire draft articles, including the provisions of part III, are completed.

28. In the meantime, these lingering doubts and hesitations could be eliminated by inserting a transitional provision to bridge the relationship between the general principles stated in part II and the general exceptions to be discussed in part III. In response to the concerns expressed and for the sake of greater clarity, an introductory provision might be in order to preface the ensuing provisions of part III.

## B. Text of draft article 11

29. Draft article 11 reads as follows:

### *Article 11. Scope of the present part*

**Except as provided in the following articles of the present part, effect shall be given to the general principles of State immunity as contained in part II of the present articles.**

## ARTICLE 12 (Trading or commercial activity)

### A. General considerations of the exceptions

#### 1. LIMITATIVE NATURE OF THE EXCEPTIONS

30. As has been recalled, the general rule of State immunity is formulated in draft article 6 in relative terms, since its application is qualified by the phrase "in accordance with the provisions of the draft articles" and is clearly limited by the exceptions contained in part III. Other general principles as stated in part II are equally subject in their application to the exceptions listed in part III. Thus, the obligation to give effect to State immunity in draft article 7, as a corollary to the general rule of State immunity, is also subject to each and every exception provided in part III. Similarly, lack of consent as an element of State immunity as mentioned in draft article 8, as well as the various methods of expressing consent illustrated in draft articles 9-10 which, if established, would operate to disqualify or nullify any claim of State immunity, would have no application in regard to any of the circumstances which constitute an exception to the general rule or principles of State immunities. Thus, according to the present formulation of rules and exceptions, the establishment of consent, which is inconsistent with State immunity, is not viewed as an exception to immunity; rather, in cases where there is clearly no consent or there is an apparent lack of consent which is a constitutive element of State immunity (draft article 8), the rule of State immunity still has no application if the circumstances fall within one of the exceptions to be examined in part III.

31. The exceptions appear to be limitative in nature; that is to say, they serve to restrict or limit the operation or application of a general rule of State immunity, whether it is the active rule for the State claiming immunity or its corollary, the obligation to give effect to immunity, or to implement the first general rule, or indeed the requirement of absence of consent or unwillingness to submit to jurisdiction. In the last instance, in spite of lack of consent and against the will of the foreign sovereign State, the exceptions to State immunities, when established, serve to clear the

path for the court to exercise its normal jurisdiction even in regard to an unwilling foreign sovereign State. In the circumstances falling within any of the accepted exceptions, the rule of State immunity as an obstacle to the exercise of jurisdiction is overcome or obviated or removed, regardless of the state of mind of the defendant and irrespective of its unwillingness or absence of consent to the institution or continuation of the proceedings.

## 2. LEGAL BASIS FOR LIMITING STATE IMMUNITY

32. It is only in a manner of speaking that State immunity may be said to be restricted or limited, in the sense that it is not "absolute" or accorded in every type of circumstances, regardless of the capacity in which the State has acted or irrespective of the category of activities attributable to the State. The juridical basis for "non-immunity" may be described as the counterpart of the legal basis for "State immunity". If the exercise of *imperium* by a State was the basis for immunity, then the absence of connection with *imperium*, or the non-exercise of sovereign power by the State, would afford the *raison d'être* for cases of "non-immunity". If it can be said that a State is immune on account of, or because of, or in respect of its acts or activities in the exercise of its sovereign power, or in the performance of its sovereign functions, then likewise that immunity ceases where no such sovereign act or activity or power or function of a State is involved or affected by the exercise or resumption or continuation of judicial authority by the court of another State. The criteria which may serve to circumscribe or limit the field of operation or to narrow or delineate the scope of application of the doctrine or rule of State immunity are many. It is the purpose of the present part of the articles to examine each of these criteria which tend to restrict the application of immunity in State practice.

33. Whatever the legal basis or justification for State immunity or for the corresponding obligation to recognize and to give effect to State immunity as earlier discussed in part II, it seems clear that the scope and extent of its application is limited thereby. Immunity operates as long as there is a legal basis for it. In the absence of such basis, there is no immunity. Thus, the reverse of legal justification for "immunity" is the legal basis for "non-immunity". For each and every type of limitation on State immunity or for each exception to the general rule of immunity, there appears to be an opposite case or a converse set of circumstances in which State immunity is not recognized and immunity need not be accorded. The justification for denial of State immunity in each of the cases of exceptions to State immunities is to be found accordingly in the nature of the activities of the State in question or the field of activities undertaken by or attributable to that State, in relation to which or in connection with which a dispute or cause of action has arisen.

34. These "opposites" or "converse cases" are often not as clear-cut as would be desirable. Yet in State practice they have been employed to distinguish between cases of "immunity" and those of "non-immunity". One way of justifying non-recognition of State immunity in a given case is the absence or non-existence of reasons or valid grounds for allowing State immunity in such a case. State immunity has therefore

been denied on several grounds, including, *inter alia*, the fact that the case concerned exclusively private-law activities or private acts which bear no relation to the public image or public and official functions of a State, or acts which can be performed and activities which are normally conducted by individuals or by States and individuals alike in the same or indistinguishable capacity or manner. The legal basis for "non-immunity" is to be found therefore in one or several of the distinctions which appear to have been worked out and countenanced in the judicial and governmental practice of States.

### 3. THE VARIOUS DISTINCTIONS

35. If the absence of State immunity can be based on several grounds which relate to the nature and types of activities attributable to a State, it is useful to examine even briefly some of the distinctions drawn between acts or activities to which State immunity is applicable and those not covered by immunity.

#### (a) *Dual personality of the State*

36. A State is sometimes said to be endowed with a double or dual personality. A State may assume the role of an *ente politico*,<sup>32</sup> or political entity, just as it can also do all other things like any other corporate entity vested with legal or juridical personality, *corpo morale*, "it being incumbent upon [the State] to provide for the administration of the public body and for the material interests of the individual citizens, it must acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as any other juristic person or private individual" ("*un altro corpo morale o privato individuo qualunque*").<sup>33</sup>

#### (b) *Dual capacity of the State*

37. In a decision rendered by the Court of Appeals of Florence, a distinction has been recognized in the practice of States between the State as political power, *potere politico*, and as *persona civile*, or juristic person.<sup>34</sup> Denying immunity in an action for services rendered, while recognizing the principle of immunity based on the independence of States, the Corte di Cassazione of Florence said:

...; however, when these high prerogatives are not involved, when the Government, as a civil body, descends into the sphere of contracts and transactions so as to acquire rights and to assume obligations like any private person, then its independence is not pertinent. The State, when dealing solely with private transactions and obligations, must follow the rules of the common law.<sup>35</sup>

<sup>32</sup> See, for instance, a decision by the Corte di Cassazione of Turin in *Morellet v. Governo Danese* (1882) (*Giurisprudenza Italiana* (Turin), vol. XXXV, part 1 (1883), pp. 125 and 130-131).

<sup>33</sup> *Ibid.*, pp. 130-131, cited and trans. in the Harvard Law School draft convention on competence of courts in regard to foreign States, hereinafter called "the Harvard draft" (Harvard Law School, *Research in International Law*, part III, "Competence of Courts in regard to Foreign States" (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 481-482). See also *Hampson v. Bey di Tunisi* (1887) (*Il Foro Italiano* (Rome), vol. XII (1887), part 1, pp. 485-486), cited and trans. in the Harvard draft, *op. cit.*, pp. 480-481.

<sup>34</sup> *Gutierrez v. Elmilik* (1886) (*Il Foro Italiano* (Rome), vol. XI, part 1 (1886), pp. 913 and 919-921), a decision confirming that of the Court of Appeal of Lucca (1886) (*ibid.*, p. 490).

<sup>35</sup> Passage cited *in extenso* by the Court of Appeal of Lucca in *Hampson v. Bey di Tunisi* (1887) (see footnote 33 above).

...  
In truth, once the distinction between the Government as a body politic [*Governo ente politico*] and the Government as a civil entity [*Governo ente civile*] is admitted, once it is recognized that even a State may by reason of acts of purely administrative nature, without offence to its political sovereignty, be made subject to the jurisdiction of foreign courts, there can be nothing more correct than that the foreign State against whom in this capacity a proceeding is instituted, must be included in the category of foreigners contemplated... the States being, in this respect, assimilated to other persons, physical or juristic, not forming part of the Italian Kingdom.<sup>36</sup>

#### (c) *Acta jure imperii and acta jure gestionis*

38. Allusion has earlier been made to the distinction that has become a catchword in State practice between *acta jure imperii*, on the one hand, for which States are immune, and *acta jure gestionis*, *jure privatorum*, on the other, for which no immunity is accorded. Thus, in a case involving a contract concluded by the consul as a State agent for the maintenance of a Greek subject sheltered in the asylum of Aversa, the Corte di Cassazione of Naples held that:

... the State does become subject to courts insofar as it operates within the sphere of civil transactions, and it has never been objected that the sovereignty of the State has been injured thereby; whereas the rationality of the law would suffer from the opposite theory whereby it [i.e. the State] would claim the power to pursue its rights as plaintiff, while remaining beyond the reach of such action on the part of others.<sup>37</sup>

This distinction between *atti d'impero* and *atti di gestione* has also been recognized in the practice of other States.<sup>38</sup> Expressions such as "*acts de gestion privée*" or activities "*jure et more privatorum*" and "*actes de puissance publique*" or "*actes de pouvoir*" have also

<sup>36</sup> *Ibid.*, pp. 920 and 922; cited and trans. in the Harvard draft, *op. cit.*, pp. 622-623. Cf. the decision of the Tribunal civil of Brussels in *Société pour la fabrication de cartouches v. Colonel Mutkuroff, Ministre de la guerre de la principauté de Bulgarie* (1888) (*Pandectes périodiques*, 1889 (Liege), p. 350, case No. 309), in which the court assumed jurisdiction against Bulgaria in respect of a contract for the purchase of bullets. It was held that, in making contracts with the Belgian company, Bulgaria acted as a private person, and as such submitted itself to all the civil consequences of the contracts.

<sup>37</sup> *Typaldos, Console di Grecia v. Manicomio di Aversa* (1886) (*Giurisprudenza Italiana* (Turin), vol. I (1886), p. 229); cited and trans. in the Harvard draft, *op. cit.*, pp. 624-625.

<sup>38</sup> See, for example, for Belgium, *Feldman v. Etat de Bahia* (1907) (*Pasicrisie belge*, 1908 (Brussels), part 2, p. 55), cited in the Harvard draft, *op. cit.*, p. 484; and *Monnoyer et Bernard v. Etat français* (1927) (*Pasicrisie belge*, 1927 (Brussels), part 3, pp. 129-132); cited in the Harvard draft, *op. cit.*, p. 615; in that case the Charleroi Tribunal civil observed that:

"... in operating these services [the Office of Reconstruction at Valenciennes], the [French] State does not bring public authority ('la puissance publique') into play, but is doing something that can be done by individuals, and therefore acts as a civil or private person... having dealt with its contracting partner as an equal..."

"In giving judgment in the present case, although it involves the French State, the court in no way impairs the sovereignty of that country; it is simply giving judgment, as it would with respect to a French citizen, since in fact the action has been brought against the State as a result of acts performed by it, not *jure imperiae*, but *jure gestionis*, as so aptly expressed by Mr. Gianzana, an Italian author quoted by Rolin in his work *Traité du droit international* (vol. I, p. 219)."

Cf. the Egyptian cases cited by S. Sucharitkul in "Immunities of foreign States before national authorities", *Recueil des cours de l'Académie de droit international de La Haye*, 1976-I, vol. 149 (Leyden, Sijthoff, 1977), p. 138.



been used.<sup>39</sup> Others such as "*actes de gouvernement*", "*actes d'autorité*" and "*actes de souveraineté*" are not unfamiliar to those conversant with the French system of administrative law.<sup>40</sup>

39. In actual practice, the line of distinction to be drawn between *acta jure imperii* and *acta jure gestionis* does not appear to be readily visible in every case. Borderline cases are not infrequent, particularly since the traditional concept of State functions or governmental functions has fundamentally changed in consequence of the continuous extensions of functions performed or assumed by States.<sup>41</sup> It is in this borderland that controversy flourishes.

(d) *Public and private nature of State acts or activities*

40. Another type of distinction well known in the practice of States relates to the nature or character of the acts or activities performed by the States or their agencies, or otherwise attributable to the governmental authorities. Several similar terminologies have been used, such as "public" and "private" activities, "public-law authority" and "private-law transactions". Activities can be "governmental" or "non-governmental". Thus, in a jurisdiction, immunity was denied to a foreign sovereign on the ground that "even the national sovereign is subject to ordinary law for his obligations of a proprietary nature" and that the proceeding did not relate to acts done by the reigning sovereign "as head of his own State", for the engagements in question had their origin in "contracts and acts of a private nature".<sup>42</sup> Similarly, in another case involving a contract concluded by an accredited ambassador as agent of a foreign government for the purchase of property to be used as embassy buildings, the court assumed jurisdiction in respect of an act performed by the ambassador during his term of office as State agent. Although the contract touched an *instrumentum legati*, it was held to be "a private-law transaction for the acquisition of private rights".<sup>43</sup>

<sup>39</sup>See, for instance, a case concerning the S.S. "*Sumatra*": *Capitaine Hall, commandant le "Sumatra" v. Capitaine Bengoa, commandant le "Mercedes"* (1920) (*Journal du droit international* (Clunet) (Paris), vol. 48, p. 270), a vessel belonging to the British Crown but operated by a private individual for commercial voyages, where the Mixed Court of Appeal of Alexandria used the expressions "*dans la gestion de ses intérêts privés*" and "*complètement en dehors de son action politique*"; cited in the Harvard draft, *op. cit.*, p. 616. In the case *Zaki bey Gabra v. R.E. Moore Esq. et autre* (1927) (*Gazette des tribunaux mixtes d'Egypte* (Alexandria), vol. 17, No. 198 (April 1927), p. 104), the court opposed an "*acte de puissance publique*" to a "*contrat du droit privé*"; cited in the Harvard draft, *op. cit.*, p. 616.

<sup>40</sup>The terms "*acte d'autorité*" and "*acte de gouvernement*" are known to French jurists as being the criterion for the division of competence between administrative and civil tribunals and for designating government acts which are not subject to review by any court. See C. J. Hamson, "Immunity of foreign States: The practice of the French courts", *The British Year Book of International Law*, 1950 (London), vol. 27, p. 293.

<sup>41</sup>See, for example, a Netherlands decision in *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (*Weekblad van het Recht* (The Hague, 1923), No. 11088); *Annual Digest of Public International Law Cases, 1923-1924* (London), vol. 2 (1933), case No. 69, pp. 133-134), accepting the distinction between acts *jure gestionis* and acts *jure imperii*, but which still held a public tug service to be a governmental function.

<sup>42</sup>*Carlo d'Austria v. Nobili* (1921) (*Giurisprudenza Italiana* (Turin), vol. 1 (1921), p. 472; summary and trans. in *Annual Digest* . . . , 1919-1922, vol. 1 (1932), case No. 90, p. 136).

41. This type of distinction as to the nature of the acts attributable to the State is not necessarily dissimilar from the distinction between *acta jure imperii* and *acta jure gestionis*, and may be considered as a different expression of the same kind of distinction with emphasis on the nature of the activities, public or private, governmental or non-governmental, while the characteristics of *jure imperii* may relate more generally to the sovereign authority or the governmental character of the State function or public capacity in which the State has acted. Accordingly, the distinction between *acta jure imperii* (public acts) and *acta jure gestionis* (private acts) could be said to be more comprehensive, or a collective division of State acts, whereas other variations found in State practice could be viewed as a "nuance" or a shade of difference in emphasis.<sup>44</sup>

42. Such distinctions have also been made regarding the "public" and "non-public" purposes of an act or property attributable to the State, *publicis usibus destinata*. In the actual application of such a distinction, which relates more to the ultimate objective or purpose and thereby depends on a subjective test rather than an objective criterion, difficulties and confusion have occurred.<sup>45</sup> The distinctions between the "governmental" and "non-governmental" nature of the acts or services or purposes have been drawn, although they in fact constitute but further variations of this same type of division of State acts.<sup>46</sup>

(e) *Commercial and non-commercial activities*

43. Another type of distinction has been drawn between acts or activities of a State of a "commercial nature" or "non-governmental nature" and those of "non-commercial" and/or "governmental" nature, or for commercial and non-commercial purposes. This distinction has opposed trading activities to non-trading

<sup>43</sup>See, for example, *Perucchetti v. Puig y Casaurano* (1928) (*Rivista di diritto internazionale* (Rome), XXth year, series III, vol. VII (1928), p. 521; *Annual Digest* . . . , 1927-1928 (London), vol. 4 (1931), case No. 247, p. 365). Compare recent jurisprudence in the Federal Republic of Germany where, in the case *X v. Empire of* . . . [Iran] (1963) (*Entscheidungen des Bundesverfassungsgericht* (Tubingen), vol. 16 (1964), p. 27; English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , (*op. cit.*), pp. 282 *et seq.*), a repair contract for an embassy heating system was held by the Federal Constitutional Court to lie outside the sphere of public authority and was to be regarded as a "non-sovereign act". See also the reply of the Federal Republic of Germany (*ibid.*, pp. 571-572) to question 6 of the questionnaire sent to Governments in 1979 (see footnote 23 above). See also C. C. A. Voskuil, "Decisions of Netherlands courts involving State immunity", *Netherlands International Law Review* (Leyden), vol. XX (1973), p. 302.

<sup>44</sup>See, for example, the reply of the United Kingdom to question 6 of the questionnaire addressed to Governments in 1979 (United Nations, *Materials on Jurisdictional Immunities* . . . , p. 624); the United Kingdom State Immunity Act 1978 distinguishes between acts which are performed in the exercise of sovereign authority and other acts not so performed. Cf. the reply of the United States of America to the same question, indicating that immunity does not extend to private acts (*ibid.*, pp. 630-631).

<sup>45</sup>This distinction was used in the practice of some common-law countries, especially the United Kingdom, and has proved less workable since in the ultimate analysis State property and all activities of States are "destined to public uses". Intentions, motives and purposes are often not distinguishable.

<sup>46</sup>The expression "used . . . on Governmental and non-commercial service" has been employed in some conventions, for example in article 3, para. 1, of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) with Additional Protocol (Brussels, 24 May 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199).



activities of the State, and contrasted "commercial transactions" to the acts in the exercise of the governmental or sovereign authority of the State. Thus, in a case before the civil Court of Rome, a judgment was given in favour of an Italian merchant for goods sold and delivered to an aviation base in Gallipoli for the French Government.<sup>47</sup> This distinction has been further reinforced by a theory of implied consent to submit to the exercise of jurisdiction by the sovereignty controlling the territory into which a foreign State has transplanted itself.<sup>48</sup> A contract for the delivery of silk cocoons by a commercial agency of a foreign Government was held to "retain the character of trading operation" involving all its consequences, not excluding that of an implied renunciation.<sup>49</sup>

44. This distinction between "commercial" and "non-commercial" acts or activities of a State is sometimes associated with another more general type of distinction between "government or governmental and non-commercial" activities, on the one hand, and "commercial and non-governmental" activities on the other. The use of this double criterion indicates a sense of uncertainty and urgency in the search for some such distinctions to serve as a basis for limiting or restricting State immunities in a given set of circumstances. The opposition between "trading" and "non-trading" operations tends to cater for a similar solution in support of a restrictive trend which appears to have recently prevailed. Several expressions have also been used and adopted in the case laws of many jurisdictions as well as in national legislations—"commercial transaction", "trading operation", "trading activities", "*acte de commerce*" in the sense of "*opération commerciale*", or an "*acte*" having a "*but commercial et d'intérêt privé*", or a "*recherche de bénéfices*" inspired by an "*idée de lucre et de spéculation*" as distinguished from an "*acte politique*" having a "*but d'intérêt international et politique*".<sup>50</sup>

<sup>47</sup> *Storelli v. Governo della Repubblica Francese* (1924) (*Rivista di diritto internazionale* (Rome), XVIIth year, series III, vol. IV (1925), p. 236; and *Annual Digest* . . . 1923-1924 (London), vol. 2 (1933), case No. 66, p. 129).

<sup>48</sup> *Rivista* . . . , p. 239.

<sup>49</sup> *Tesini case: Rappresentanza commerciale dell'Unione Repubbliche Soviete v. Ditta Tesini e Malvezzi ed altri* (1924) (*Il Foro Italiano* (Rome), vol. L (1925), pp. 830, 835; and *Annual Digest* . . . 1925-1926 (London), vol. 3 (1929), case No. 127, p. 176). See also *Rappresentanza commerciale dell'URSS v. Società di Navigazione Generale "Gerolimich"* (1936) (*Il Foro Italiano*, vol. LXIII (1938), p. 1216; and *Annual Digest* . . . 1938-1940 (London), vol. 9 (1942), case No. 84, p. 247).

<sup>50</sup> See, for example, the case of the "*Hungerford*", where the decision of the Tribunal de Commerce of Nantes, in *Société maritime auxiliaire de transports v. Capitaine du vapeur anglais "Hungerford"* (1918) (*Revue de droit international privé* (Darras) (Paris), vol. XV (1919), p. 510), was reversed by the Court of Appeal of Rennes in *Capitaine Seabrook v. Société maritime auxiliaire de transports* (1919) (*ibid.*, vol. XVIII (1922-1923), p. 743), which found that the *Hungerford* was employed "dans un but d'intérêt politique, pour les besoins de la défense nationale, en dehors de toute idée de lucre et de spéculation . . ." (*ibid.*, p. 744); summary in *Annual Digest* . . . 1919-1922 (*op. cit.*), case No. 83, pp. 122-124. Cf. *Lakhowsky v. Office suisse des transports extérieurs* (1921) (*ibid.*, pp. 745 et seq.), where the Court of Appeal of Paris reversed the decision of the Tribunal de commerce de la Seine that a contract for the supply of goods to be imported into Switzerland was a commercial transaction ("*acte de gestion*") (*ibid.*, p. 746). Such hesitations persist throughout the historical development of French case-law; see an interesting commentary by D. Yiannopoulos in regard to the case *Corporación del Cobre v. Braden Copper Corporation et Société Le groupement d'importation des métaux* (1972), in *Revue générale de droit international public* (Paris), vol. 77 (1973), p. 1240. See also, for summary of

45. This distinction, which differentiates between commercial activities or trading operations conducted by a State in respect of which there is no jurisdictional immunity and other activities of a State of non-commercial or non-trading nature for which there could be State immunity, serves to restrict or limit the scope and extent of State immunity, rather than to extend it to every imaginable type of non-commercial activity which may still fall within the ambit of other categories of exceptions to the general rule of jurisdictional immunity. The various distinctions so far considered could each, or in combination, serve as a basis for denying or rejecting a claim of State immunity. Thus, an act or operation or activities performed or conducted by or on behalf of a State could answer the definition of "commercial transactions" or "trading activities", for which no immunity need be accorded. The grounds for "non-immunity" in cases of commercial transactions could equally be based on any one or two or more of the distinctions between the various types of activities of State, such as the dual personality of a State, as political entity and as a civil or corporate entity; "*Etat commerçant*", or the dual capacity in which a State may act as a sovereign authority or as a private person. Immunity could be denied in respect of commercial activities on the ground that such activities form part of a series of acts *jure gestionis*, or "*actes de gestion privée*" or "*actes d'administration*". Immunity could indeed be withheld in respect of trading activities on the basis of the private or private-law nature of the activities involved. A narrower but perhaps a more widely recognizable ground for disallowing a claim of State immunity appears to be, first and foremost, that of trading activities or commercial transactions.

## B. Trading or commercial activity as an exception to State immunity

### 1. IDENTIFIABILITY OF TRADING OR COMMERCIAL ACTIVITY

46. The most common place or common ground for an apparent exception to the rule of State immunity is likely to be classified as trading or commercial activities. An activity attributable to a State which could be qualified as "trading" or "commercial" is readily identifiable as acts, transactions, operation or course of conduct which may, with sufficient clarity, be generally visible, easily understood and as such, practically meaningful in the light of past experience. Because of the relative ease with which its content is understood and comprehensible, the term "trading or commercial activity" has been adopted for convenience' sake as a starting point. Not unlike other terms which require precise definition, the expression has to be further clarified, as it has earlier received some clarification in connection with the use of terms in draft article 2, para. 1(f) (Use of terms)<sup>51</sup> and further practical guidance in draft article 3, para. 2 (Interpretative provisions).<sup>52</sup>

47. "Trading or commercial activity" has been defined as including not only a particular commercial transaction or a particular commercial act having a

this case in English, *International Legal Materials* (Washington, D.C.), vol. XII, No. 1 (1973), p. 182.

<sup>51</sup> See footnote 9 above.

<sup>52</sup> See footnote 10 above.

sufficiently close connection with the State of the forum but also an entire series of acts or transactions which constitute a regular course of commercial conduct. Thus a commercial transaction or operation or act or contract, or the combination of several of such activities, will be considered as forming part of conduct traditionally associated with trade or commerce. The idea of profit or speculation is not foreign to trading. It has sometimes been suggested that a criterion to be used in identifying or determining a "trading or commercial activity" is the objective nature or character of the particular act or transaction or course of conduct or activity, rather than its motivation or purpose. This objective criterion has been proposed as an initial step, since in most cases its application is decisive in determining the availability or applicability of State immunity. This is designed to promote precision, to ensure clarity and to remove uncertainties. It will be seen in the course of the examination of State practice whether this initial criterion will need further ramifications, and to what extent reference to the motive or purpose of a particular act or transaction will be needed to clarify what otherwise could appear to be doubtful cases of State activities that are predominantly non-commercial in essence and substance, although clearly commercial in regard to the nature of the transaction involved. A more detailed examination and the analysis of concrete cases in actual State practice will afford further guidance in the study of this topic.

48. It will be seen through the evolution of various case-laws that the same court at different periods and various courts of different systems have reached different conclusions regarding State immunities in the context of the exception which is entitled "trading and commercial activity". It is difficult for the courts to overlook completely the motivation of a particular transaction or contract, although its nature is clearly commercial or that of private law, especially when it is a contract for the purchase or supply of, for instance, materials for the establishment of an embassy,<sup>53</sup> construction materials for an army or navy or air force,<sup>54</sup> supplies for the maintenance of an army or a military base<sup>55</sup> or food supplies to relieve famine in an area suffering from natural calamity, for instance, to assist victims of flood or earthquake.<sup>56</sup> Hard cases need not

make bad law, although they may serve to obscure some of the finer lines of delineation between cases where immunity is applicable and those where the court has preferred to exercise jurisdiction, particularly in the field of trading. A caveat is therefore lodged to emphasize the need to approach certain sensitive areas with the greatest caution, lest an important act of sovereign authority to ensure the safety and security of nationals of a State be misconstrued as a simple commercial activity unclothed with jurisdictional immunity. This objective criterion tends to be formal, and at times mechanical. Although useful and serviceable in most cases, it may need re-examination at closer range, since circumstances might require penetration of this test.

## 2. THE CURRENT PRACTICE OF STATES REGARDING TRADING OR COMMERCIAL ACTIVITY

49. An inductive approach requires an examination of State practice on this particular point of "trading or commercial activity", which is regarded as a first exception to State immunity. In any examination of State practice it is necessary to observe the evolutionary character of the practice of States in all related fields through the passage of time. State practice, like the evolution of legal principles and norms of international law, cannot be considered out of context of the time dimension. Time is an essential dimension, a constituent element of legal rules which are applicable only during a period which could have a more or less definite duration. The relativity of temporal existence and the application of a legal norm cannot be overlooked. As will be seen, in a particular legal system State practice changes, develops and evolves through time and with the passage of time. The practice of several countries does not necessarily follow the same pattern of evolution within the same time-frame. On the whole, the emerging trends represent the overall picture of State practice, judicial and governmental, as well as legislative and treaty practice. The application of the rule on State immunity is a two-way street in the sense that each State, each Government, is a potential recipient or beneficiary of State immunity as well as being in the position of having to fulfil the obligation to give effect to jurisdictional immunity enjoyed by another State.

50. The practice of States, in various forms, reflects the various factors, elements and developments in the extensions of functions or roles assumed by States in the field of economic activities. It will be seen that even from the very beginning, when the doctrine of State immunity was first conceived and applied, concern was voiced and reservation expressed with regard to trading or commercial activities. This was the case even in the most traditional of State practice favouring what could be viewed as the most unqualified recognition and application of State immunity.<sup>57</sup> One of the reasons for

<sup>53</sup> See, for example, the ruling by the Federal Constitutional Court in the Federal Republic of Germany in the case *X v. Empire of . . . [Iran]* (1963) (see footnote 43 above).

<sup>54</sup> See, for example, the case *Gouvernement espagnol v. Casaux* (1849) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1849 (Paris), part 1, p. 9), concerning the purchase of boots by the Spanish Government for the Spanish army. Cf. *Hanukiew case* (1933) (*Annual Digest . . . 1933-1934* (London), vol. 7 (1940), case No. 66, pp. 174-175), concerning the purchase of arms; and various loan cases, such as the Moroccan Loan, *Laurans v. Gouvernement du Maroc* (1934) (Sirey, *Recueil général des lois et des arrêts*, 1935 (Paris), part 1, pp. 103-104, and *Revue critique de droit international* (Darras) (Paris), vol. XXX (1935), p. 795). See also *Vavasour v. Krupp* (1878) (United Kingdom, *The Law Reports, Chancery Division*, vol. IX (1878), p. 351).

<sup>55</sup> See, for example, the case *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (1977) (*The All England Law Reports*, 1977, vol. 1, p. 881) concerning the order of cement for the construction of barracks in Nigeria. Cf. *Gugenheim v. State of Vietnam* (Appeals Court, Paris, 1955) (*International Law Reports*, 1955 (London), vol. 22 (1958), pp. 224-225) (judgment upheld by the Cour de Cassation, 1961 (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654)) concerning the purchase of cigarettes for the Vietnamese national army.

<sup>56</sup> See, for example, *Egyptian Delta Rice Mills Co. v. Comisaria*

*General de Abastecimientos y Transportes de Madrid* (1943) (*Annual Digest . . . 1943-1945* (London), vol. 12 (1949), case No. 27, pp. 103-104), cited in Sucharitkul, *loc. cit.*, p. 138 (see footnote 38 above, *in fine*).

<sup>57</sup> See, for example, the dictum of Lord Stowell in *The "Swift"* (1813) (J. Dodson, *Reports of Cases argued and determined in the High Court of Admiralty* (London, Butterworth, 1815), vol. I, p. 320):

"The utmost that I can venture to admit is, that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes [Navigation Acts]. Some sovereigns have a monopoly of certain commodities, in which they traffick on the

(Continued on next page.)

allowing immunity to operate even in the earliest cases has been the absence of commercial nature of the act or activities involved.<sup>58</sup> A taint of commercial activity has been known to disqualify or nullify a claim of State immunity. In one of the earliest cases in which the exception of trading was recognized and applied in State practice,<sup>59</sup> the judge, Sir Robert Phillimore, observed:

... No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far as to authorize a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs an obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.<sup>60</sup>

51. It will also be seen that while the proposition that trading constitutes an exception to State immunity has encountered relatively little opposition, the actual application of that proposition has not been without doubts and hesitations. The same set of facts could be construed differently by different courts at various levels with surprisingly divergent or even opposing results. The same activity could be viewed as trading not entitled to State immunity or as non-commercial and therefore covered by State immunity.<sup>61</sup>

#### (a) Judicial practice

##### (i) International adjudication

52. As has been noted, the relativity and uncertainty of rules of State immunity, especially in respect of the scope and extent of their application in State practice, are in some measure accountable for the relative silence of judicial pronouncements on an international level. The only case recently decided by the International Court of Justice, in 1980,<sup>62</sup> which has a direct

bearing on the question of inviolability rather than the usual type of jurisdictional immunity of State property, did not touch upon the exception of trading or commercial activity connected with the premises of the embassy or the consulate. This may serve to illustrate the flexible nature of attitudes and positions of Governments. By not pursuing the matter on the international level, a State affected by an adverse judicial decision of a foreign court may remain silent at the risk of acquiescing in the judgment or the treatment given. States are none the less further protected by the second-stage immunity from seizure, attachment and execution in respect of their property once a judgment has been rendered or obtained which may affect them adversely. The relative paucity of judicial orders requiring execution may account for the absence of international litigation or adjudication. This does not preclude the existence of a rule of law on the subject.

##### (ii) Judicial decisions of municipal courts

53. An inductive approach to State practice on this particular issue of "trading or commercial activity" as an exception to State immunity has to be systematic as well as analytical, rather than historical or chronological. Inescapably, however, the relevance of time-span or time-frame, the temporal dimension, is often indicative if not determinative of the progressive phase of legal developments. An examination of the practice of each State may indicate a progressive development at different paces, backward as well as forward, not altogether uninfluenced by other relevant and material factors such as economic restructuring or political upheavals in a particular State or region. Case-law in each country tends to grow and evolve, bringing about changes and novelties that may for a time prevail. The current judicial practice may be said to point towards a clear reaffirmation of the exception of "trading or commercial activity" as fully endorsed by judicial decisions, and firmly reinforced if not directly assisted sometimes by national legislation, or even bilateral treaties and international or regional conventions.

54. State practice has continued to move in favour of a generally restrictive trend since the advent of State trading and the continuing expansion of State activities in the field of economic development. The epithet "absolute" in respect of immunity was unknown at the inception of the principles of State immunity. State practice, even at the very beginning, was never absolute, but carefully selected the categories of cases in which foreign States were immune, viz., foreign sovereigns, ambassadors, the passage of foreign armed forces or warships.<sup>63</sup> Trading was theoretically outside

(Footnote 57 continued.)

common principles that other traders traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated." (*Ibid.*, p. 339.)

<sup>58</sup>For instance, neither in *The Schooner "Exchange" v. McFaddon and others* (1812) (W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116) nor in *The "Prins Frederik"* (1820) (Dodson, *op. cit.*, vol. II (1815-1822), p. 451) was the ship in question a commercial vessel employed in commercial services.

<sup>59</sup>*The "Charkieh"* (1873) (United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 59) was the first case where the commercial nature of the service or employment of a public ship was held to disentitle her from State immunities.

<sup>60</sup>*Ibid.*, pp. 99-100. This decision, with Sir Robert Phillimore's instructive judgment, was cited with approval by an absolutist writer, C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal de droit international privé* (Clunet) (Paris), vol. 16 (1889), p. 539, and *ibid.*, vol. 17 (1890), p. 41. Cf. also his decision in *The "Parlement belge"* (1879) (United Kingdom, *The Law Reports, Probate Division*, 1879, vol. IV, p. 129).

<sup>61</sup>The *Parlement belge* itself (see footnote 60 above) was considered by Sir Robert Phillimore, after reviewing English and American cases, as being "neither a public ship of war nor a private vessel of pleasure", and thus not entitled to immunity. This decision was reversed by the Court of Appeal (1880) (United Kingdom, *The Law Reports, Probate Division*, 1880, vol. V, p. 197); see Lord Justice Brett (*ibid.*, p. 203).

<sup>62</sup>See the Judgment of the ICJ of 24 May 1980, *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, mentioned in the Special Rapporteur's second report (*Yearbook*...

1980, vol. II (Part One), p. 227, document A/CN.4/331 and Add.1, para. 114); cf. the Permanent Court's decision of 15 June 1939 in *Société commerciale de Belgique, P.C.I.J., Series A/B*, No. 78, p. 160.

<sup>63</sup>See, e.g., Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (Cranch, *op. cit.*, pp. 137-139, (see footnote 58 above)), who gave three instances of exception to the exercise of territorial jurisdiction:

(1) The exemption of the person of the sovereign from arrest and detention within a foreign territory;

(2) The immunity which all civilized nations allowed to foreign ministers; and

(3) The implied cession of a portion of his territorial jurisdiction where he allows the troops of a foreign prince to pass through his dominion.

the operation of the doctrine of State immunity even at the very start,<sup>64</sup> although in the actual application of the general rule of State immunity, differing interpretations have been given to the same or similar type of State activities by various courts in the same and other countries at various times. The movement of State practice in its progressive evolution may be likened to that of a snake, which can move sideways by swinging and swaying its body to the left and right, with intermittent ups-and-downs in zig-zagging pattern.

55. Thus the case-law of countries such as Italy, Belgium and Egypt, which could be said to have led the field of "restrictive immunity", denying immunity in regard to trading activities, may now have been overtaken by the recent practice of countries traditionally for a more unqualified doctrine of State immunity, such as the Federal Republic of Germany, the United States of America and the United Kingdom. The restrictive trends appear to prevail in every direction, with the result that the exception of "trading or commercial activity" may be said to have become firmly ensconced as a well-settled and established practice of customary international law. It is the first step of minimum exception, although not always unchallenged as a matter of practical necessity nor generally free from theoretical and doctrinal controversies. It should be emphasized, none the less, that the challenge to "trading or commercial activity" as an exception to State immunity has come from certain quarters as a matter of policy or principle without any evidence of contrary practice in terms of judicial decisions. Views of Governments are certainly relevant, and could influence legal developments in their own right. They may indeed provide a lead for judicial decisions in certain areas, as they have done in some countries where consent and reciprocity play a prominent role or where the determination of State immunity is considered as a responsibility shared by the courts and the political arms of the Government. The primary concern of this particular section of the report is the current evidence of judicial practice, a brief general survey of which on this point deserves close attention and careful examination. It should be observed at this point that the present inquiry is not confined to the practice of industrialized countries of the Western world, but is intended to cover all States generally. In any event, the Special Rapporteur is not expected to supplement want of judicial decisions with his own inventions or speculations.

### Italy

56. The States which in practice appear to have recognized trading or commercial activity as an exception to State immunity from the very beginning include Italy, Belgium and Egypt. The courts of Italy were the first, in 1882, to limit the application of State immunity to cases where the foreign State has acted as an "ente

*politico*" as opposed to a "*corpo morale*",<sup>65</sup> or in the capacity of a sovereign authority or political power (*potere politico*) as distinguished from a *persona civile*. State immunity was accorded only in respect of "*atti d'impero*", and not "*atti di gestione*".<sup>66</sup> The public nature of a State act was a criterion by which immunity was determined. Immunity was not recognized for private acts or acts of private law nature.<sup>67</sup> It was not unnatural that commercial activities of a foreign Government answering various denominations of the types of activities not covered by State immunity on the basis of the various distinctions made were held to constitute an exception to State immunity.<sup>68</sup>

57. In a case decided by the Court of Appeal of Genoa in 1925, the French Government was held responsible in respect of a contract to tow ships from Cattaro to La Spezia, apparently one of private law nature to be performed in Italy. "*When a foreign State engages in a purely commercial activity,\** and, in the administration of its property, operates *more et jure privatorum*", said the Court, "it appears to be no different from any foreign juristic person."<sup>69</sup> The current practice of Italian courts follows the same line of restrictive principles, confining immunity to *atti di sovranità*. Thus, in a more recent case decided in 1955 concerning a United States military base established in Italy in accordance with the North Atlantic Treaty, the Court of Cassation granted immunity in respect of "*l'attività pubblicistica*" connected with the "*funzioni pubbliche o politiche*" of the United States Government.<sup>70</sup> Later decisions confirmed the application of such distinctions, holding, in one case, an employee of an overseas office of the United States Information Agency to be "*un ente od ufficio statale americano . . . che agisce all'estero sotto la direzione ed il controllo del Segretario di Stato . . . per la persecuzione di fini pubblici sovrani dello Stato americano come tale*" to be an "*impiegato di uno Stato*" and "*per definizione impiegato pubblico*"<sup>71</sup> and, in another case, holding the employment by the Romanian Government of an employee of an economic agency forming an

<sup>65</sup> *Morellet v. Governo Danese* (1882) (see footnote 32 above); cited in the Harvard draft, *op. cit.*, pp. 481-482.

<sup>66</sup> *Gutierrez v. Elmilik* (1886) (see footnote 34 above). See also *Hampohn v. Bey di Tunisi* (1887) (see footnote 35 above) and *Typaldos, Console di Grecia v. Manicomio di Aversa* (1886) (see footnote 37 above).

<sup>67</sup> *Carlo d'Austria v. Nobili* (1921) (see footnote 42 above). Cf. *Perucchetti v. Puig y Casarauno* (1928) (see footnote 43 above).

<sup>68</sup> *Storelli v. Governo della Repubblica Francese* (1924) (see footnote 47 above) and the *Tesini* case (1924) (see footnote 49 above).

<sup>69</sup> *Governo Francese v. Serra ed altri* (1925) (*Rivista di diritto internazionale* (Rome), 17th year, series III, vol. IV (1925), p. 540): "Quando uno Stato estero estrinseca una attività meramente patrimoniale, e, amministrando i suoi beni, opera *more et jure privatorum*, non altrimenti esso appare che quale persona giuridica straniera" (cited and trans. in the Harvard draft, *op. cit.*, p. 480). Cf., on the other hand, *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (see footnote 41 above), where the Netherlands court held a service of tug boats to be an act of public administration.

<sup>70</sup> *Department of the Army of the United States of America v. Gori Savellini* (1955) (*Rivista di diritto internazionale* (Milan), vol. XXXIX (1956), pp. 91-92, and *International Law Reports*, 1956 (London), vol. 23 (1960), p. 201). Cf. *La Mercantile v. Regno di Grecia* (1955) (*Rivista di diritto internazionale* (Milan), vol. XXXVIII (1955), p. 376, and *International Law Reports*, 1955 (London), vol. 22 (1958), p. 240).

<sup>71</sup> *De Riiti v. Governo degli Stati Uniti d'America* (1971) (*Rivista di diritto internazionale* (Milan), vol. LV (1972), pp. 483, at 485-486).

<sup>64</sup> According to Chief Justice Marshall (*ibid.*, p. 145): "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction". When a sovereign "descended into the market place, he should be treated on a par with a private trader" (quoted in the Harvard draft, *op. cit.*, p. 473). See also *Bank of the United States v. Planters' Bank of Georgia* (1824) (H. Wheaton, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. IX, 4th ed., pp. 904 and 907).

integral part of the Romanian Embassy in Italy to be of a non-commercial character.<sup>72</sup>

### Belgium

58. The Belgian case-law was settled as early as 1857 in a trilogy of cases involving the guano monopoly of Peru.<sup>73</sup> A distinction was drawn between public and private activities of the State, and the Court of Appeal of Brussels was able to deny immunity in respect of activities connected with the business enterprise of Peru. Trading activities have since been regarded as an area where no immunity would be allowed. Thus, in another later case decided by the Court of Appeal of Gent in 1879,<sup>74</sup> the court refused the claim of immunity in an action for freight on guano shipped for Ostend. The principles on which sovereign immunity was based were not considered violated if the foreign Government engaged in commercial contracts. The court said:

... this principle [of the sovereignty of nations] may indeed be applicable when a government, within the limit of its *functions as a government*,\* takes measures in the interest of its preservation or for activities dictated by the general interest, but there can no longer be any question of it being applicable when a government sells guano and, either directly or through intermediaries, takes actions and enters into contracts which, always and everywhere, have been considered to be *commercial contracts*,\* subject to the jurisdiction of commercial courts; . . .<sup>75</sup>

59. This limitation concerning State trading has been followed in a number of subsequent decisions, such as one in a case concerning the selling of supplies to the Ottoman Government in 1910<sup>76</sup> and, another, the purchase of goods by a foreign Government for the purpose of resale on commercial lines to its nationals, in 1927.<sup>77</sup> Like the Italian courts, the Belgian courts since 1888 also have adopted the distinction between acts of the State in its sovereign (public) and civil (private) capacity, holding that, in concluding a contract for the purchase of bullets, Bulgaria acted as a private person and subjected itself to all the civil consequences of the contract.<sup>78</sup> Similarly, a contract to enlarge a railway station in Holland was held amenable to Belgian jurisdiction in 1903, not so much on account of any theory of consent, express or implied, but on the

"nature of the act" and the capacity in which the State is involved in it".<sup>79</sup> The distinction between *acta jure imperii* and *acta jure gestionis* has been recognized by Belgian courts since 1907<sup>80</sup> and has been consistently applied in subsequent cases.<sup>81</sup>

### Egypt

60. The Mixed Courts of Egypt were consistent in their adherence to the Italo-Belgian practice of limited immunity. As early as 1920, a distinction between *acta jure gestionis* and *acta jure imperii* was recognized. In an action for damages for maritime collision involving a vessel belonging to the British Crown, the Mixed Court of Appeal of Alexandria denied the plea of immunity "invoked by the State", which acted "purely as a simple individual or a civil person".<sup>82</sup> In a long line of cases, immunity was not allowed in respect of commercial transactions. Thus the renting of a furnished villa was held, in a 1927 case, to be a "*contrat de droit privé*" as opposed to an "*acte de puissance publique*".<sup>83</sup> The operation of a State Railways Administration was also considered in a 1942 case to be an act of private administration as opposed to an "*acte de souveraineté*".<sup>84</sup> The courts applied an objective criterion of the "nature of the transaction" very strictly in denying immunity in respect of trading activities, holding the activities of the two organs of the Spanish Government to be "undertakings of a commercial character."<sup>85</sup> A contract for the purchase of an immovable property to be used as an "*hôtel diplomatique*" was also regarded as an "*acte de gestion*" and therefore subject to local jurisdiction.<sup>86</sup> Whether a State enterprise was separately incorporated or was integrated into the machinery of government of the foreign State, if its activity was that of a commercial enterprise having the character of a private undertaking, such as the

<sup>72</sup> *Luna v. Repubblica socialista di Romania* (1974) (*ibid.*, vol. LVIII (1975), p. 597).

<sup>73</sup> The three cases were the following:

(1) *Etat du Pérou v. Kreglinger* (1857) (*La Belgique judiciaire* (Brussels), vol. XVII (1859), p. 331). Cf. E. W. Allen, *The Position of Foreign States before Belgian Courts* (New York, Macmillan, 1929). See also the decision of the Court of Appeal of Brussels of 30 December 1840 in the case *Société générale pour favoriser l'industrie nationale v. Syndicat d'amortissement, Gouvernement néerlandais et Gouvernement belge* (*Pasicrisie belge*, 1841 (Brussels), part 2, p. 33).

(2) "Peruvian Loans" case (1877) (*La Belgique judiciaire* (Brussels), vol. XXV (1877), p. 1185). The case was brought not against Peru but its exclusive agent for the sale of guano in Europe, the Dreyfus Brothers, of Paris.

(3) *Peruvian Guano Company v. Dreyfus et consorts et le Gouvernement du Pérou* (1880) (*ibid.*, vol. XXXIX (1881), p. 1394).

<sup>74</sup> *The Havre case: Rau, Vanden Abeele et Cie v. Duruty* (1879) (*Pasicrisie belge*, 1879 (Brussels), part 2, p. 175).

<sup>75</sup> *Ibid.*, p. 176: cited in the Harvard draft, *op. cit.*, p. 613.

<sup>76</sup> *Gouvernement imperial ottoman v. Gaspary* (1910) (*Pasicrisie belge*, 1911 (Brussels), part 3, p. 105).

<sup>77</sup> *Monnoyer et Bernard v. Etat français* (1927) (see footnote 38 above).

<sup>78</sup> *Société pour la fabrication de cartouches v. Colonel Mutkuroff*,

*ministre de la guerre de la principauté de Bulgarie* (1888) (see footnote 36 above).

<sup>79</sup> *Société anonyme des chemins de fer liégeois-luxembourgeois v. Etat néerlandais* (*Ministère du Waterstaat*) (1903) (*Pasicrisie belge*, 1903 (Brussels), part 1, p. 294); cited in the Harvard draft, *op. cit.*, pp. 613-614. See also the decision of the Tribunal civil de Bruxelles of 22 May 1901 (*Journal des tribunaux belges* (Brussels), 1901, p. 1127), where the court upheld jurisdiction and applied article 92 of the Constitution.

<sup>80</sup> *Feldman v. Etat de Bahia* (1907) (see footnote 38 above).

<sup>81</sup> See, for example, *Dhellemes et Masurel v. Banque centrale de la République de Turquie* (1963) (*Journal des tribunaux belges* (Brussels), 19 January 1964, p. 44); and *Socobélge et Etat belge v. Etat hellénique, Banque de Grèce, et Banque de Bruxelles* (1951) (*Journal du droit international* (Clunet) (Paris), vol. 79 (1952), pp. 244-266, notes of A. Devèze and M. R. Hennebicq). See also E. Suy, "L'immunité des États dans la jurisprudence belge", *L'immunité de juridiction et d'exécution des États* (Brussels, Institut de sociologie, 1971), pp. 279 *et seq.*; and L. Plouvier, "L'immunité de contrainte des Communautés européennes", *Revue belge de droit international* (Brussels), vol. IX (1973), p. 471.

<sup>82</sup> The *S.S. "Sumatra"* case (1920) (see footnote 39 above).

<sup>83</sup> *Zaki bey Gabra v. R. E. Moore Esq. et autre* (1927) (see footnote 39 above).

<sup>84</sup> *Gouvernement égyptien v. Chemins de fer de l'Etat palestinien* (1942) (*Bulletin de législation et de jurisprudence égyptiennes* (Alexandria), vol. 54 (1941-1942), part 2, p. 242).

<sup>85</sup> *Egyptian Delta Rice Mills Co. v. Comisaria General de Abastecimientos y Transportes de Madrid* (1943) (see footnote 56 above). The Mixed Courts were wound up in 1949.

<sup>86</sup> *S. E. Echref Badnjević es qualité de Ministre de Yougoslavie en Egypte v. W. R. Fanner* (1947) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 113).

National Saving Bank of France, the courts were prepared to exercise jurisdiction.<sup>87</sup>

61. The current case-law of post-war Egypt has confirmed the jurisprudence of the Mixed Courts. Jurisdictional immunities of foreign States constitute a question of "*ordre public*", or a matter of public policy.<sup>88</sup> Immunity is only accorded in respect of acts of sovereign authority<sup>89</sup> and does not extend to "ordinary acts" which are not related to the exercise of sovereignty and "commercial acts".<sup>90</sup>

#### France

62. Earlier French case-law was more inclined towards unlimited immunity. In the famous case decided in 1849 concerning the purchase of boots by the Spanish Government for the Spanish army, the court, basing immunity on the reciprocal independence of sovereign States, defined jurisdiction as "a right inherent in its sovereign authority, which another government cannot arrogate to itself without running the risk of adversely affecting their respective relations".<sup>91</sup> The attempted distinction between "*Etat puissance publique*" and "*Etat personne privée*" was rejected throughout the 19th century.<sup>92</sup> As late as 1912, the Court of Appeal of Paris still rejected the dual personality of the State. The court said:

No distinction should be made between the . . . public personality which would not be subject to foreign jurisdiction and the legal personality which would, on the contrary, be subject to it, since all the acts of a State can have only one goal and one end, which are always political, and its unity precludes such dualism.<sup>93</sup>

63. Amidst a general confusion created by long-standing controversies of theoretical importance between the Cour de Cassation and inferior courts, notably the Cour d'Appel de Paris, as regards the true nature of State immunity<sup>94</sup> as "*immunité de juridiction*"

or "*incompétence d'attribution*", later French case-law attempted to qualify "*immunité de juridiction*" by confining immunity to cases in which the defendant acted in a capacity different from that of a State, such as an agent or mandataire of one of its nationals,<sup>95</sup> or a universal legatee,<sup>96</sup> and to restrict "*incompétence d'attribution*" on account of the function fulfilled, granting immunity only "*ratione materiae*".<sup>97</sup> French courts have in fact applied both theories concurrently so that immunity has been denied either *ratione personae* because of the non-sovereign capacity or quality in which the State acts, or *ratione materiae* because of the nature of the act in question. The overriding test preferred by the Cour de Cassation of "*incompétence d'attribution*", or "the nature of the act", has served to confine State immunity to State acts commonly designated as "*actes de puissance publique, de gouvernement, d'autorité, de souveraineté, d'imperium*" or "*actes politiques*" as opposed to "*actes de commerce*".<sup>98</sup>

64. Traces of certain limitations based on the distinction between the State as "*puissance publique*" and as "*personne privée*", and between "*acte d'autorité*" and "*acte de gestion*" or "*acte de commerce*" could be found in the judgments of lower courts as early as 1890.<sup>99</sup> It was not until 1918 that a restrictive theory of immunity was formulated and adopted by French tribunals. Accepting the functional limitation of State immunity, the Cour d'Appel de Rennes declined jurisdiction in a case on the ground that the vessel was employed "not for a commercial purpose and for private interests, but . . . for the requirements of national defence, beyond any idea of profit or speculation . . .".<sup>100</sup> The first case in which the restrictive theory was applied with the result of non-immunity was the *Lakhowsky* case, decided in 1919, concerning the activities of the Office Suisse des Transports Extérieurs, holding the contract for the purchase of goods to be transported into Switzerland to be a commercial transaction, an "*acte de*

<sup>87</sup> *Borg v. Caisse nationale d'épargne française* (1926) (*Gazette des tribunaux mixtes d'Egypte* (Alexandria), vol. 16, No. 185 (March 1926), p. 123); (*Annual Digest 1925-1926* (London), vol. 3 (1929), case No. 122, p. 171).

<sup>88</sup> See the reply of Egypt to question 3 of the questionnaire addressed to Governments in 1979, in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 569; and decision 1173 of 1963 of the Cairo Court of First Instance, published on 8 June 1964.

<sup>89</sup> *Idem*, and the decisions of 29 March 1943 of the Tribunal de Commerce of Alexandria, of 12 May 1951 of the Civil Court of Alexandria and of 10 March 1960 of the Giza Court of First Instance.

<sup>90</sup> See the reply of Egypt to question 7 of the questionnaire, in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 569.

<sup>91</sup> *Gouvernement espagnol v. Casaux* (1849) (see footnote 54 above). See, for example, E. W. Allen, *The Position of Foreign States before French Courts* (New York, Macmillan, 1929); and Hamson, *loc. cit.*, p. 293 (see footnote 40 above).

<sup>92</sup> See, for example, *Ministère public v. Demoiselle Masset* (1870) (Dalloz, *Recueil périodique et critique de jurisprudence* 1871 (Paris), part 2, p. 9), concerning the Tsar of Russia; *Héritiers de l'empereur Maximilien v. Lemaître* (1872) (*ibid.*, 1873, part 2, p. 24), concerning the Emperor Maximilien of Mexico; *Isabelle de Bourbon v. Mellerio* (1872) (*ibid.*, 1872, part 2, p. 124), concerning the ex-Queen of Spain Isabella II; *Wiercinski v. Seyyid Ali ben Hamond* (1916) (*Journal du droit international* (Clunet) (Paris), vol. 44 (1917), p. 1465), concerning the ex-Sultan of Zanzibar.

<sup>93</sup> *Gamen-Humbert v. Etat russe* (1912) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1913 (Paris), part 2, p. 201, note by G. Gidel); the judgment was no doubt inspired by the decision of the Prussian Court of Jurisdictional Conflicts in *Helfeld v. den Fiskus des russischen Reiches* (*Zeitschrift für Internationales Recht* (see footnote 120 below)).

<sup>94</sup> See J. P. Niboyet, "Immunité de juridiction et incompétence d'attribution", *Revue critique de droit international privé* (Paris), vol. XXXIX (1950), p. 139.

<sup>95</sup> See the *Vestwig* case: *Procureur général près la Cour de cassation v. Vestwig et autres* (1946) (Sirey, *Recueil général des lois et des arrêts*, 1947 (Paris), part 1, p. 137); *Crédit foncier d'Algérie et de Tunisie v. Restrepo et département d'Antioquia* (1922) (*Annual Digest* . . . 1919-1922 (London), vol. 1 (1932), case No. 201, p. 285), for an action against the chargé d'affaires of Colombia; see also the conclusions of Judge L. Lyon-Caen (*La Gazette du Palais* (Paris, 1923), 1st semester, p. 439).

<sup>96</sup> *Etat roumain v. Demoiselle Arricastre et autres* (Tribunal civil of Bordeaux, 1937) (*Revue critique de droit international* (Paris), vol. XXXIII (1938), p. 297, with a note by H. Batiffol, p. 300); (Court of Appeal of Poitiers, 1946) (*Journal du droit international* (Clunet) (Paris), vols. 73-76 (1946-1949), p. 6); *Héritiers de Plessis-Bellière v. Léon XIII, pape, comte Rampolla* . . . (Tribunal civil of Montdidier, 1892) (*Journal de droit international privé* (Clunet) (Paris), vol. 19 (1892), p. 447); (Cour d'appel of Amiens, 1893) (*ibid.*, vol. 20 (1893), p. 384); (Cour de cassation, 1894) (*ibid.*, vol. 21 (1894), p. 835).

<sup>97</sup> *Epoux Martin v. Banque d'Espagne* (1952) (*ibid.*, vol. 80 (1953), p. 654); see also *Banque d'Espagne de Burgos v. Banque d'Espagne de Barcelone et Banque de France* (1938) (*ibid.*, vol. 66 (1939), p. 70).

<sup>98</sup> See, for example, a note by J. B. Sialelli concerning the case *Epoux Martin v. Banque d'Espagne* (1952) (*loc. cit.*, pp. 656-657—see footnote 97 above); the article of J. P. Niboyet, *loc. cit.*, p. 139 (see footnote 94 above); a note by C. Rousseau concerning the *Hanukiew* case (1933) (*loc. cit.*, p. 249—see footnote 54 above); and a note by N. Politis concerning the case *Epoux Dessus v. Epoux Ricoy* (1907) (Dalloz, *Recueil périodique et critique de jurisprudence*, 1907 (Paris), part 2, p. 281).

<sup>99</sup> *Faucon et Cie v. Gouvernement grec* (1890) (*Journal du droit international privé* (Clunet) (Paris), vol. 17 (1890), p. 288).

<sup>100</sup> "*Hungerford*" case (1918) (1919) (see footnote 50 above).



commerce" subject to local jurisdiction.<sup>101</sup> On appeal, in 1921, the Cour d'Appel de Paris did not find the contract to be of commercial nature, not having a "but commercial", and that the transaction "was motivated by concerns of international interest and domestic policy excluding any profit-seeking and any idea of speculation\* . . .".<sup>102</sup> It was not until 1924, however, that the Tribunal de Commerce de Marseille was able to hold the activities of a foreign Government amenable to French jurisdiction, characterizing the contract of purchase of goods to be resold to its nationals on ordinary commercial lines as a "commercial transaction", forming part of the trading activities of the foreign Government. The operation of acts denominated "actes de commerce" "excludes any consideration concerning the exercise of the State's public authority, its independence and its sovereignty".<sup>103</sup>

65. The expression "actes de commerce" was used in this connection not in its technical sense of French procedure allocating jurisdiction between civil and commercial cases, but in the sense of "commercial transaction" or "trading activity". French courts as well as contemporary French commentators appear to have preferred this term because it is convenient, appropriate and familiar: "with it one is on relatively firm and familiar ground".<sup>104</sup> This theory of "acte de commerce" has influenced the main development in French case-law. A restrictive view of immunity based on this theory has been adopted in a long line of cases decided by the upper courts, especially in the so-called "Soviet cases",<sup>105</sup> starting in 1926 with the authorization of a saisie-arêt by the Cour de Cassation against the assets of the Soviet Trade Delegation.<sup>106</sup> The Court observed:

Transactions of a commercial character extending to all fields can only be regarded as ordinary commercial transactions having nothing in common with the principle of sovereignty of States.<sup>107</sup>

66. The current jurisprudence of France may be said to be settled in its adherence to the restrictive principle

based on "trading activities". The more recent decisions of the last two or three decades serve to illustrate the difficulties inherent in the actual application of the theory of the "acte de commerce", with curiously divergent results. Thus, the purchase of cigarettes for a foreign army<sup>108</sup> and a contract for the survey of water distribution in Pakistan<sup>109</sup> were held to be "actes de puissance publique" for "service public", while a contract of commercial lease of an office for a tourist organization of a foreign Government<sup>110</sup> and the method of raising of public loans<sup>111</sup> gave rise to unending doubts and hesitations. Government guarantee of rents was regarded as an exercise of public authority,<sup>112</sup> as was the regulation of exchange control by a central bank.<sup>113</sup> Clearly, in principle, immunity was confined to acts of public authority, "actes de puissance publique", or acts performed in the interest of a public service. It is based on the nature of activity as distinct from the status of the entity which performs it. A rail transport was held to be within the category of "commercial activities" not entitled to State immunity.<sup>114</sup> The practical difficulty is likely to continue, with fluctuating results ranging from the exercise of jurisdiction to assess the adequacy of compensation given by a foreign government for expropriation<sup>115</sup> to the leasing of immovable properties and the floating of public loans.<sup>116</sup>

#### Federal Republic of Germany

67. The practice of German courts has followed a somewhat zigzag course. It began as early as 1885 with restrictive immunity based on the distinction between public and private law activities, holding State immunity to "suffer at least certain exceptions".<sup>117</sup> Between 1905 and 1938, a more unlimited doctrine of immunity prevailed. The restrictive trend was reversed in a case concerning the Belgian State Railway in 1905<sup>118</sup> and the Finnish State Railway in 1925,<sup>119</sup> and the distinction

<sup>101</sup> *Lakhowsky v. Office suisse des transports extérieurs* (Tribunal de commerce de la Seine, 1919) (*Revue de droit international privé* (Darras) (Paris), vol. XVII (1921), p. 70). Immunity was limited to "activities being sovereign in nature or administrative activities, activities of public authority" (*ibid.*, p. 72).

<sup>102</sup> *Ibid.*, vol. XVIII (1922-1923), pp. 746-747.

<sup>103</sup> *Etat roumain v. Pascalet et Cie* (1924) (*Journal du droit international* (Clunet) (Paris), vol. 52 (1925), p. 113; J. P. Niboyet, *Traité de droit international privé français* (Paris, Sirey, 1949), vol. VI, part 1, p. 346).

<sup>104</sup> Thus Niboyet observed in his *Traité* (*op. cit.*), vol. VI, part 1, p. 350. He also said, in reply to E. Lémonon, Rapporteur for the topic of immunity of foreign States from jurisdiction and measures of execution at the Sienna meeting of the Institute of International Law (April 1952): "I feel it would be better to use the term *acte de commerce*, which is more in keeping with the modern activity of the State . . ." (*Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, pp. 130-131).

<sup>105</sup> See, for example, S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959), pp. 152-161; Hamson, *loc. cit.*, pp. 309 *et seq.* (see footnote 40 above); and A. Stoupinitzky, "Le statut de l'URSS—commerçant dans le droit conventionnel soviétique", *Revue de droit international et de législation comparée* (Paris), vol. XVII (1936), p. 801.

<sup>106</sup> *Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export* (1926) (Sirey, *Recueil général des lois et des arrêts*, 1930 (Paris), part 1, p. 49; summary and trans. in *Annual Digest* . . ., 1925-1926 (London), vol. 3 (1929), case No. 125, p. 174).

<sup>107</sup> *Ibid.*, p. 175; see also Sirey, *Recueil général* . . . pp. 49-50 for a note by Niboyet; and *Dalloz périodique* . . . 1929 (Paris), part 1, p. 75, for a note by R. Savatier. See also J. G. Castel, "Immunity of a foreign State from execution: French practice", *The American Journal of International Law* (Washington, D.C.), vol. 46 (1952), p. 520.

<sup>108</sup> *Gugenheim v. State of Vietnam* (1955) (1961); see footnote 55 above.

<sup>109</sup> *Société Transshipping v. Federation of Pakistan* (1966) (*International Law Reports* (London), vol. 47 (1974), p. 150).

<sup>110</sup> *Etat espagnol v. Société anonyme de l'Hôtel George V* (1970) (*ibid.*, vol. 52 (Cambridge, 1979), p. 317).

<sup>111</sup> *Montefiore v. Congo belge* (1955) (*ibid.*, 1955 (London), vol. 22 (1958), p. 226).

<sup>112</sup> *Société immobilière des Cités fleuries Lafayette v. United States of America* (1960) (*International Law Reports* (London), vol. 42 (1971), pp. 123-124).

<sup>113</sup> *Zavicha Blagojević v. Banque du Japon* (1974) (*Annuaire français de droit international*, 1975 (Paris), vol. XXI, p. 1040).

<sup>114</sup> *Administration des chemins de fer du Gouvernement iranien v. Société Levant Express Transport* (1969) (*International Law Reports* (Cambridge), vol. 52 (1979), p. 315).

<sup>115</sup> *Corporación del Cobre v. Braden Copper Corporation et Société Le groupement d'importation des métaux* (1972) and commentary by D. Yiannopoulos (see footnote 50 above, *in fine*).

<sup>116</sup> See, for example, Sir Ian Sinclair, "The law of sovereign immunity: Recent developments", *Recueil des cours* . . . 1980-II (Alphen aan den Rijn, Sijthoff and Noordhoff, 1981), vol. 167, pp. 170-175.

<sup>117</sup> *Heizer v. Kaiser-Franz-Joseph-Bahn A. G.* (1885) (*Gesetz-und Verordnungsblatt für das Königreich Bayern* (Munich), vol. I (1885), pp. 15-16), cited in the Harvard draft, *op. cit.*, pp. 533-534. See also E. W. Allen, *The Position of Foreign States before German Courts* (New York, Macmillan, 1928).

<sup>118</sup> *Bardorf v. Belgische Staats-und Eisenbahnfiskus* (1905) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Leipzig), vol. 62 (1906), p. 165).

<sup>119</sup> *Gehrckens v. Järnvägsstyrelsen* (1925) (*Hanseatische Rechts-*



between public and private activities was discarded in 1910.<sup>120</sup> The restrictive trend returned to Germany after ratification of the Brussels Convention of 1926 and Additional Protocol of 1934.<sup>121</sup> The turning point came in 1938 in maritime cases.<sup>122</sup> The distinction between "the exercise of sovereign rights" and activities "in private law fields" was again reconfirmed in 1951<sup>123</sup> and applied in subsequent cases.<sup>124</sup>

68. Following the recent restrictive trend, the Restitution Chamber of the Kammergericht of West Berlin denied immunity in respect of the Republic of Latvia in 1953 on the grounds that

... this rule does not apply where the foreign State enters into commercial relations . . . viz. where it does not act in its sovereign capacity but exclusively in the field of *private law*,\* by engaging in purely private business, and more *especially*\* in commercial intercourse.<sup>125</sup>

This restrictive trend was reaffirmed in two subsequent cases decided by the Federal Constitutional Court (*Bundesverfassungsgericht*), one in 1962<sup>126</sup> and the other in 1963.<sup>127</sup> In the latter case, the court held a contract for the repair of the heating system of the Iranian Embassy to be a "non-sovereign" activity not entitled to immunity. The Federal Constitutional Court took occasion to examine the comparative case-law of some 18 countries before reaching the final conclusion. The nature of the act, rather than its purpose, was regarded as determinative of immunity. The qualification of State activity as "sovereign" and "non-sovereign" must in principle be made by national law of the forum, since international law contains no criteria for making this distinction.<sup>128</sup>

und *Gerichtszeitschrift* (Hamburg), vol. 8 (1925), p. 904, cited in the Harvard draft, *op. cit.*, p. 621.

<sup>120</sup> *Hellfeld v. den Fiskus des russischen Reiches* (1910) (*Zeitschrift für Internationales Recht* (Erlangen), vol. XX (1910), p. 416), cited in the Harvard draft, *op. cit.*, p. 620; also note by A. de Lapradelle in Sirey, *Recueil général des lois et des arrêts*, 1912 (Paris), part 4, pp. 1-5.

<sup>121</sup> See footnote 46 above.

<sup>122</sup> *The "Visurgis" and the "Siena"* (1938) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 157 (1938), p. 389; *Annual Digest . . . 1938-1940* (London), vol. 9 (1942), case No. 94, p. 284).

<sup>123</sup> *Restitution of Property (Republic of Italy)* case: decision of the Court of Appeal of Hamm of 4 April 1951, reversing a decision dismissing an action for restitution of real property in Germany which had been sold to the Italian State during the Third Reich (*Rechtsprechung zum Wiedergutmachungsrecht* (Munich), vol. 2 (1951), p. 258); see also M. Domke, "Immunity of foreign States from German jurisdiction", *The American Journal of International Law* (Washington, D.C.), vol. 48 (1954), p. 303.

<sup>124</sup> See, for example, the case *Danish State Railways in Germany* (1953) (*Monatsschrift für deutsches Recht* (Hamburg), No. 364 (1953), p. 489; *International Law Reports*, 1953 (London), vol. 20 (1957), p. 178).

<sup>125</sup> *Republic of Latvia* case (1953) (*Rechtsprechung zum Wiedergutmachungsrecht* (Munich), vol. 4 (1953), p. 368; *International Law Reports*, 1953 (London), vol. 20 (1957), pp. 180-181; see also the decisions of the Supreme Restitution Court for West Berlin in *Weinmann v. Republic of Latvia* (1959) (*ibid.*, vol. 28 (1963), p. 385), and in *Tietz et al. v. People's Republic of Bulgaria* (1959) (*ibid.*, p. 369).

<sup>126</sup> *X v. Yugoslavia* (1962) (*Entscheidungen des Bundesverfassungsgerichts* (Tübingen), vol. 15 (1964), p. 25; English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 272 et seq.).

<sup>127</sup> *X v. Empire of . . . [Iran]* (1963) (see footnote 43 above).

<sup>128</sup> See the note of 7 August 1979 to the Secretary-General of the United Nations from the Chargé d'affaires of the Permanent Mission of the Federal Republic of Germany, stating that the decisions of the Federal Constitutional Court 15/25 of 30 October 1962 (*X v.*

## Netherlands

69. The practice of courts in the Netherlands has been guided by intermittent interpositions of the executive either directly or through the legislature. Before and during the First World War, foreign States were in the same position as the domestic Government. They were equally subject to local jurisdiction to the extent of attachment and execution.<sup>129</sup> Since the passage of a bill in 1917,<sup>130</sup> immunity was introduced and applied by the courts with special reference to acts *jure imperii*.<sup>131</sup> Earlier cases left open the question of acts *jure gestionis*. A distinction was made in 1923 between acts *jure gestionis* and acts *jure imperii*, but the courts were reluctant to consider any activities performed by Governments to be otherwise than an exercise of a governmental function. Thus, the public service of tug boats,<sup>132</sup> State loans raised by public subscription<sup>133</sup> and the operation of a State ship<sup>134</sup> were considered to be acts *jure imperii*. Later cases before and during the Second World War confirmed the distinction, without the actual finding that activities of the foreign Government in question were acts *jure gestionis*.<sup>135</sup>

70. It was not until 1947 that courts in the Netherlands were able to find and apply a more workable criterion for restricting State immunity, holding that "the principles of international law concerning the immunity of States from foreign jurisdiction did not apply to State conducted undertakings in the commer-

*Yugoslavia*), and 16/27 of 30 April 1967 (*X v. Empire of . . . [Iran]*), have the force of law (reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 88); and the circular note of 20 December 1973 addressed to diplomatic missions and consular posts in the Federal Republic of Germany by the Federal Ministry of Foreign Affairs to draw their attention to this legal situation (*ibid.*, p. 86); see also decision 46/342 of the Federal Constitutional Court of 13 December 1977 (*X v. Republic of the Philippines*), holding immunity to be functionally limited to sovereign activities (*ibid.*, pp. 297 et seq.).

<sup>129</sup> *De Belgische Staat v. Société de chemins de fer international* (1900) (*Weekblad van het Recht* (The Hague, 1902), No. 7812).

<sup>130</sup> Act of Parliament of 26 April 1917 (*Staatblad van het Koninkrijk der Nederlanden* (The Hague, 1917), No. 303), Royal Decree of 29 May 1917 (*ibid.*, No. 446).

<sup>131</sup> See for example *Bergverksaktiebolaget Kosmai v. Militär Liquidierungsamt* (Vienna) (1921) (*Weekblad van het Recht* (The Hague, 1921), No. 10750; *ibid.*, (1922), No. 10928; *Annual Digest . . . 1919-1922* (London), vol. 1 (1932), case No. 86, p. 130); *Union of South Africa v. Herman Grote* (1921) (*Nederlandse Jurisprudentie* (Zwollen, 1921), p. 849; *Annual Digest . . . 1919-1922* (*op. cit.*), case No. 8, p. 22); *The State of Belgium v. E. A. G. de Badts* (1922) (*Weekblad van het Recht* (The Hague, 1922), No. 10978; *Annual Digest . . . 1919-1922* (*op. cit.*), case No. 85, p. 129).

<sup>132</sup> *F. Advokaat v. I. Schuddinck & den Belgischen Staat* (1923) (see footnote 41 above), cited in the Harvard draft, *op. cit.*, pp. 630-631; see also the critical note by G. van Slooten in *Bulletin de l'Institut intermédiaire international* (The Hague), vol. 10 (1924), p. 2.

<sup>133</sup> *E.C.E. de Froe v. USSR* (1932) (*Weekblad van het Recht* (The Hague, 1932), No. 12453, with a comment by J. H. W. Verzijl; *Annual Digest . . . 1931-1932* (London), vol. 6 (1938), case No. 87, p. 170).

<sup>134</sup> *The "Garbi"* (1938) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1939), No. 96; *Annual Digest . . . 1919-1942* (London), vol. 11 (1947), case No. 83, p. 155).

<sup>135</sup> *Weber v. USSR* (1942) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1942), No. 757; *Annual Digest . . . 1919-1942* (*op. cit.*), case No. 74, p. 140); *The Bank of the Netherlands v. The State Trust Arktikugol* (Moscow); *The Trade Delegation of the USSR in Germany* (Berlin); *The State Bank of the USSR* (Moscow) (1943) (*Weekblad van het Recht en Nederlandse Jurisprudentie* (Zwollen, 1943), No. 600; *Annual Digest . . . 1943-1945* (London), vol. 12 (1949), case No. 26, p. 101).

cial, industrial or financial fields\*’’.<sup>136</sup> The type of practical difficulties encountered by the courts was illustrated in the judgment of a more recent case decided in 1968,<sup>137</sup> where the Court of Appeal of The Hague reversed the decision of the District Court and upheld jurisdiction, holding that the National Iranian Oil Company (NIOC) did not perform an act which *ex jure* must be regarded as a pure act of government.

71. The exception of trading activities was more clearly stated by the Hoge Raad (Netherlands Supreme Court) in 1973.<sup>138</sup> It was identified with relative ease in cases where “a foreign State engages in trade as an ordinary enterprise”. The Supreme Court explained that the restrictive trend has been induced by the fact “that in many States the Government has increasingly deployed its activities in areas of society where the relations are governed by private law, and where, consequently, the State enters into a legal relationship on an equal footing with individuals”.<sup>139</sup>

#### Austria

72. The practice of Austrian courts has followed a distinct zigzag path, starting with unqualified immunity in the nineteenth century, and changing over to restrictive immunity from 1907 until 1926, when unrestricted immunity was once again revived and followed, until 1950, when a more solid doctrine of restricted immunity was adopted which has been applied with consistency ever since. The Supreme Court of Austria, in a case decided in 1950,<sup>140</sup> reviewed existing authorities on international law before reaching a conclusion denying immunity, stating that “these authorities show that the exemption from national jurisdiction of *acta gestionis* of foreign States is no longer generally recognized and consequently no longer part of international law”. The Court went on to say:

This subjection of the *acta gestionis* to the jurisdiction of States has its basis in the development of the commercial activity of States. The classic doctrine of immunity arose at a time when all the commercial activities of States in foreign countries were connected with their political activities . . . Today the position is entirely different; States engage in commercial activities and . . . enter into competition with their own nationals and with foreigners. Accordingly, the classic

doctrine of immunity has lost its meaning, and, *ratione cessante*, can no longer be recognized as a rule of international law.<sup>141</sup>

73. The principles enunciated in 1950 have been further refined in subsequent decisions of the Supreme Court.<sup>142</sup> A business undertaking owned by a foreign Government was obliged to conform its activities to local regulations. State immunity was not available.<sup>143</sup> In a case decided in 1961<sup>144</sup> the Supreme Court, citing practice of States and *opiniones doctorum*, concluded that the distinction between the performance of sovereign rights by the State and its entry into “a private legal relationship” was practical and not too difficult to make. “The solution . . . would be to take as a criterion not the ultimate purpose of the act but its inherent nature. In order for the nature of the act to be such as will afford its complete jurisdictional immunity, the act must be one which could not be performed by a private individual.”<sup>145</sup> It is the act itself and not its purpose that is decisive of the question of State immunity.

#### United States of America

74. It has sometimes been said that the practice of the courts of the United States of America started with an unqualified principle of State immunity. The truth might appear to be the opposite upon closer examination of the dictum of Chief Justice Marshall in *The Schooner “Exchange” v. McFaddon and others* (1812).<sup>146</sup> Initially, immunities of States were recognized only in respect of certain specified areas: (a) the immunity of the sovereigns from arrest and detention; (b) the immunity granted to foreign ministers; and (c) the immunity in respect of foreign troops passing through the territorial dominion. The territorial jurisdiction was exempted as a matter of implied consent on the part of the local sovereign, and immunity was accordingly considered to be an exception to the attributes of every sovereign power. As such, it should be restrictively construed from the point of view of the territorial sovereign. The same Chief Justice, in another case decided in 1824, supported the soundness of the principle “that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its

<sup>136</sup> *Nederlandse Rijnbank, Amsterdam v. Mühlly Union, Teplitz-Schönau* (1947) (*Na-oorlogse Rechtspraak* (Zwollen), vol. 3 (1947), No. 990; *Annual Digest* . . . , 1947 (London), vol. 14 (1951), case No. 27, p. 78).

<sup>137</sup> *N. V. Cabolent v. National Iranian Oil Company* (1968) (*Nederlandse Jurisprudentie* (Zwollen, 1969), No. 484; English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 344 et seq.).

<sup>138</sup> *Société européenne d'études et d'entreprises en liquidation volontaire v. Socialist Federal Republic of Yugoslavia* (1973) (*Netherlands Yearbook of International Law*, 1974 (Leyden), vol. V, p. 290, reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 355 et seq.).

<sup>139</sup> *Netherlands Yearbook* . . . , p. 293; United Nations, *Materials* . . . , p. 357. See also Voskuil, *loc. cit.*, p. 306 (see footnote 43 above, *in fine*).

<sup>140</sup> *Dralle v. Republic of Czechoslovakia* (*Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; *International Law Reports*, 1950 (London), vol. 17 (1956), p. 155, case No. 41; *Journal du droit international* (Clunet) (Paris), vol. 77 (1950), p. 747); this case has become a leading case cited outside Austria. The text of the decision of the Austrian Supreme Court is reproduced in English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 183 et seq.

<sup>141</sup> *Österreichische Juristen Zeitung* . . . , p. 347; and United Nations, *Materials* . . . , p. 195.

<sup>142</sup> See footnotes 144 and 145 below.

<sup>143</sup> Decision of the Administrative Tribunal of 13 January 1954 (*Amtliche Sammlung*, No. 869; summary (in English) in *Journal du droit international* (Clunet) (Paris), vol. 83 (1956), p. 86), whereby immunity was refused to a business undertaking owned in Austria by a foreign Government for making and selling alcohol in violation of regulations concerning the State hard liquor monopoly.

<sup>144</sup> Decision of the Austrian Supreme Court of 10 February 1961 in *X [Holubek] v. Government of the United States* (*Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; text reproduced in English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 203 et seq.).

<sup>145</sup> Extract of a note of 23 April 1928 addressed to the League of Nations by Switzerland, cited by the Court (*Juristische Blätter* . . . , p. 44; United Nations, *Materials* . . . , p. 205). See also the decision of the Austrian Supreme Court of 14 February 1963 in the case *X v. the Government of the Federal Republic of Germany* (*Entscheidungen des Österreichischen Obersten Gerichtshof in Zivilsachen*, 1963 (Vienna), vol. XXXVI, p. 71, No. 26; text reproduced in English trans. in United Nations, *Materials* . . . , pp. 207–209).

<sup>146</sup> See footnote 58 above.

sovereign character, and takes that of a private citizen".<sup>147</sup>

75. The first emphatic pronouncement of restrictive immunity based on the distinction between acts which are essentially private in nature and acts which have been generally characterized as public or governmental was made in 1921 by Judge Julian Mack<sup>148</sup> in a famous case concerning the "*Pesaro*". This distinction was supported by the State Department,<sup>149</sup> but was rejected by the Supreme Court in 1926,<sup>150</sup> revising Judge Mack's decision and favouring the view expressed by the Department of Justice.<sup>151</sup> The courts in later cases preferred to follow the suggestion of the political department of government.<sup>152</sup> It was not until the Tate Letter of 1952 that the official policy of the State Department was restated in general and in the clearest language in favour of a restrictive theory of immunity based upon a distinction between *acta imperii* and *acta gestionis*, and denying immunity in respect of *acta gestionis*.

76. Trading activities of a foreign State conducted by a trading corporation with separate legal personality have been denied sovereign immunity. Trading corporations owned or controlled by a foreign Government have been held amenable to the jurisdiction of United States courts regardless of the assertion by the foreign Government that they have been performing government functions,<sup>153</sup> and indeed even irrespective of the court's holding that the foreign corporations were performing essentially "public" duties as opposed to ordinary commercial operations<sup>154</sup> that are included in the category of activities for which the rule of immunity is not applicable. In most cases, such cor-

porations not identified as agents, organs or instrumentalities of government have been engaged in trading activities. Immunity has been refused, regardless of the extent of government interest in the trading corporations.<sup>155</sup>

77. An interesting trend was initiated in a more recent case decided in 1964,<sup>156</sup> where the Federal District Court rejected immunity in an action arising out of a contract for the carriage of wheat. According to this trend, the courts are disposed to deny immunity unless it is plain that the activity in question falls within one of the following categories of strictly political and public acts: (a) internal administrative acts, such as expulsion of aliens; (b) legislative acts, such as nationalization; (c) acts concerning the armed forces; (d) acts concerning diplomatic activity; (e) public loans.<sup>157</sup>

78. Since the adoption of the Foreign Immunities Act of 1976,<sup>158</sup> the courts have been left on their own without specific guidance or suggestion of immunity in a particular case from the State department. Pre-1976 judicial practice has thus been to a greater or lesser extent influenced by the "views" or "suggestion" of the executive branch of the government, especially if it is one favourable to the granting of immunity.<sup>159</sup> Even before the 1976 Act, the courts had to determine the question of State immunity raised by the parties to the dispute without any guidance or "suggestion" from the executive. In such cases,<sup>160</sup> the courts have faithfully followed the guidelines set out in the Tate Letter and subsequent case-law.

79. The Foreign Sovereign Immunities Act of 1976 provides legislative guidance for the courts with regard to the application of the exception of commercial activity carried on in the United States, or an act performed in the United States in connection with a commercial activity elsewhere, or an act outside the territory of the United States in connection with a commercial activity, causing a direct effect in the United States. "Commercial activity" is defined as either a regular course of conduct or a particular

<sup>147</sup> *Bank of the United States v. Planters' Bank of Georgia* (1824) (Wheaton, *op. cit.*, p. 907 (see footnote 64 above)); see also *State of Georgia v. City of Chattanooga, Tennessee* (1924) (*United States Reports*, vol. 264 (1924), pp. 472, at 482-483, opinion of the Court delivered by Justice Butler).

<sup>148</sup> The "*Pesaro*" (1921) (*United States of America, The Federal Reporter*, vol. 277 (1922), pp. 473, at 479-480, footnote 3); see also E. D. Dickinson, "The immunity of public ships employed in trade", *The American Journal of International Law* (Washington, D.C.), vol. 21 (January 1927), p. 108.

<sup>149</sup> Letter of 2 August 1921 from Mr. Nielsen, Solicitor for the Department of State, to Judge Julian W. Mack (see G. H. Hackworth, *Digest of International Law* (Washington, D.C.), U.S. Government Printing Office, 1941, vol. II, pp. 438-439).

<sup>150</sup> *Berizzi Brothers Co. v. S.S. "Pesaro"* (1926) (*United States Reports*, vol. 271 (1927), p. 562).

<sup>151</sup> See, for example, the letter of Attorney General Gregory of 25 November 1918, refusing to adopt Secretary of State Lansing's suggestion in his letter of 8 November 1918 (Hackworth, *op. cit.*, vol. II, p. 430).

<sup>152</sup> See Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945):

"It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." (*United States Reports*, vol. 324 (1946), p. 35.)

<sup>153</sup> See, for example, *Coale et al. v. Société coopérative suisse des charbons, Basle et al.* (1921) (*Annual Digest* . . . , 1919-1922 (London), vol. 1 (1932), case No. 88, p. 133); *Dexter & Carpenter, Inc. v. Kunglig Järnvägsstyrelsen et al.* (1930) (*Annual Digest* . . . , 1929-1930 (London), vol. 5 (1935), case No. 70, p. 109); *United States v. Deutsches Kalisyndikat Gesellschaft et al.* (1929) (*ibid.*, case No. 71, p. 110).

<sup>154</sup> See, for example, *Hannes v. Kingdom of Romania Monopolies Institute* (1940) (*Annual Digest* . . . , 1938-1940 (London), vol. 9 (1942), case No. 72, pp. 198 *et seq.*); and *Compañía Española de Navegación, Marítima, S.A. v. The "Navemar" et al.* (1938) (*United States Reports*, vol. 303 (1938), p. 68).

<sup>155</sup> See, for example, *United States v. Deutsches Kalisyndikat Gesellschaft et al.* (1929) (see footnote 153 above); and *Ulen & Co. v. Bank Gospodarstwa Krajowego* (1940) (*Annual Digest* . . . , 1938-1940 (*op. cit.*), case No. 74, p. 214).

<sup>156</sup> *Victory Transport Inc. v. Comisaría General de Abastecimientos y Transportes* (1964) (*United States of America, Federal Reporter, 2nd Series*, vol. 336 (1965), p. 354; *International Law Reports* (London), vol. 35 (1967), p. 110).

<sup>157</sup> Cf. the categories proposed by H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law*, 1951 (London), vol. 28, pp. 236-238; and J. F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *Recueil des cours* . . . , 1953-III (Leyden, Sijthoff, 1955), vol. 84, pp. 285-286).

<sup>158</sup> *United States Code, 1976 Edition*, vol. 8, title 28, sect. 97, p. 206 (text reproduced in *United Nations, Materials on Jurisdictional Immunities* . . . , pp. 55 *et seq.*).

<sup>159</sup> *Chemical Natural Resources v. Republic of Venezuela* (1966) (*International Law Reports* (London), vol. 42 (1971), p. 119); *Isbrandtsen Tankers v. President of India* (1970) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1046); *Amkor Corporation v. Bank of Korea* (1969) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 291).

<sup>160</sup> See, for example, *Heaney v. Government of Spain and Gomero* (1971) (*International Legal Materials* (Washington, D.C.), vol. X, No. 5 (September 1971), p. 1038), where publicity was held to be a "strictly political or public act" (p. 1042); *Alfred Dunhill of London, Inc. v. Republic of Cuba* (1976) (*ibid.*, vol. XV, No. 4 (July 1976), p. 735), where four Justices of the United States Supreme Court noted: "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns." (pp. 746-747).

commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction, rather than by reference to its purpose. Subsequent litigations amply illustrate the difficulties inherent in the application of this exception of "trading activity", especially in borderline cases.<sup>161</sup>

### United Kingdom

80. In view of the recent reversal of a long line of cases allowing State immunity even in respect of trading activity of a foreign Government, it is no longer fashionable to state that British courts have consistently upheld jurisdictional immunity in any circumstance. In actual fact, British practice can now be said to have adopted a restrictive theory of immunity, particularly in respect of "commercial transactions" and "contracts to be performed in the United Kingdom" or "an industrial, commercial or financial activity". In connection with commercial activities of foreign States, notably in the field of shipping or maritime transport, the case-law fluctuated throughout the nineteenth century.<sup>162</sup> The decision that went furthest in the direction of restriction was *The "Charkieh"* (1873),<sup>163</sup> and in the opposite direction was *The "Porto Alexandre"* (1920).<sup>164</sup> The principle of unqualified immunity was applied in subsequent cases in respect of commercial shipping in 1924<sup>165</sup> and other trading activities, such as the ordinary commercial sale of a quantity of rye in 1957.<sup>166</sup>

81. Long before the final *coup de grâce* given by the House of Lords in the "*I Congreso del Partido*" case (1981),<sup>167</sup> judicial decisions of British courts abounded with opinions and dicta pronounced by members of the courts at all levels. Even in the House of Lords in *The "Cristina"* case (1938),<sup>168</sup> considerable doubts were

thrown upon the soundness of the doctrine of immunity when applied to trading vessels. While Lord Atkin and Lord Wright<sup>169</sup> favoured an unrestricted rule of immunity, Lord Thankerton<sup>170</sup> and Lord Maugham declared themselves free to reconsider the decision in *The "Porto Alexandre"*. Lord Maugham was prepared to subject *The "Cristina"* to the jurisdiction of English courts, had she been a vessel employed by the Spanish Government in commercial voyages, and stated that "if *The Parlement Belge* had been used solely for trading purposes, the decision would have been the other way . . .". Lord Maugham concluded that there was practical unanimity of opinion "that, if Governments or corporations formed by them choose to navigate or trade as shipowners, they ought to submit to the same legal remedies and actions as any ship owner".<sup>171</sup>

82. Lord Maugham's misgivings about the decisions of *The "Porto Alexandre"* case (1920) have been widely quoted and followed in common-law countries outside the United Kingdom.<sup>172</sup> In *Dollfus Mieg et Cie S.A. v. Bank of England* (1950),<sup>173</sup> Sir Raymond Evershed M.R. agreed with Lord Maugham that "extent of the rule of immunity should be jealously watched".<sup>174</sup> On further appeal to the House of Lords in 1952, three out of four Law Lords concurred in the observation of Lord Maugham that the doctrine of immunity should not be extended.<sup>175</sup> Viscount Simon is another exponent of a restrictive theory of immunity. In *Sultan of Johore v. Abubakar, Tunku Aris Bendahara and others* (1952), Lord Simon in the Privy Council gave an opinion *per curiam* denying "that there has been finally established in England . . . any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances".<sup>176</sup> Another proponent of restrictive immunity is Lord Denning, who after a search among the accepted sources of international law concluded that there was no uniform rule in *Rahimtoola v. Nizam of Hyderabad* (1957),<sup>177</sup> where he observed:

. . . If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have such a dispute canvassed in the domestic court of another country but if the dispute concerns, for instance, the *commercial transactions* of the foreign Government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.<sup>178</sup>

<sup>169</sup> United Kingdom, *The Law Reports, House of Lords* . . . , 1938, pp. 490 and 512, respectively.

<sup>170</sup> *Ibid.*, pp. 494-496; see also the opinion of Lord Macmillan, p. 498.

<sup>171</sup> *Ibid.*, pp. 519 and 522.

<sup>172</sup> See, for example, *The "Ramava"* (1941) (*Annual Digest* . . . , 1941-1942 (London), vol. 10 (1945), case No. 20, p. 91). In this Irish case, immunity was denied, Justice Hanna having thought that the decision of Sir Robert Phillimore in *The "Charkieh"* (1873) (see footnote 59 above) was never overruled.

<sup>173</sup> United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333.

<sup>174</sup> *Ibid.*, p. 356.

<sup>175</sup> *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports*, 1952, vol. 1, p. 572).

<sup>176</sup> *Ibid.*, p. 1261, opinion of the Council at p. 1268; see also *The Law Quarterly Review* (London), vol. 68 (1952), p. 293.

<sup>177</sup> United Kingdom, *The Law Reports, House of Lords*, 1958, p. 379.

<sup>178</sup> *Ibid.*, p. 422.

<sup>161</sup> See, for example, *International Association of Machinists and Aerospace Workers v. The Organization of the Petroleum Exporting Countries* (1979) (United States of America, *Federal Supplement*, vol. 477 (1979), p. 553; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 503 *et seq.*); and cases compiled by the State Department: *Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya* (1980) (see footnote 28 above), *Letelier v. Republic of Chile* (1980) (United States of America, *Federal Supplement*, vol. 488 (1980), p. 665), *New England Merchants National Bank v. Iran Power Generation and Transmission Co. et al.* (1980) (*ibid.*, vol. 495 (1981), p. 73).

<sup>162</sup> See Sucharitkul, *State Immunities and Trading Activities* . . . (op. cit., footnote 105 above), pp. 53-71.

<sup>163</sup> See footnote 59 above; compare Sir Robert Phillimore's judgment in *The "Parlement belge"* case (1879) (see footnote 60 above).

<sup>164</sup> United Kingdom, *The Law Reports, Probate Division*, 1920, p. 30.

<sup>165</sup> *Compañía Mercantil Argentina v. United States Shipping Board* (1924) (*Annual Digest* . . . , 1923-1924 (London), vol. 2 (1933), case No. 73, p. 138).

<sup>166</sup> *Baccus S. R. L. v. Servicio Nacional del Trigo* (1956) (United Kingdom, *The Law Reports, Queen's Bench Division*, 1957, vol. 1, p. 438).

<sup>167</sup> *The All England Law Reports*, 1981, vol. 2, p. 1064 (Lord Wilberforce, Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Bridge of Harwich); see also the decision of the Court of Appeal in 1980 (Lord Denning and Lord Waller) (*ibid.*, vol. 1, p. 1092).

<sup>168</sup> United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council*, 1938, p. 485; *Annual Digest* . . . , 1938-1940 (London), vol. 9 (1942) case No. 86, p. 250. See H. Lauterpacht, "*The Cristina*", *The Law Quarterly Review* (London), vol. LIV (1938), p. 339; F. A. Mann, "Immunity of foreign States", *The Modern Law Review* (London), vol. II (1938), p. 57; R. Y. Jennings, "Recognition and government immunities", *ibid.*, vol. II (1939), p. 288.

83. Lord Denning reiterated his restrictive theory in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies* (1975).<sup>179</sup> Apart from consent, he outlined four exceptions:

First, [there is] no immunity in respect of land situate in England.

Second . . . in respect of trust funds here or money lodged for the payment of creditors. . . .

Third . . . in respect of debts incurred here for services rendered to . . . property here. . . .

Fourth, [when] a foreign sovereign . . . enters into a commercial transaction\* with a trader here and a dispute arises which is properly within the territorial jurisdiction of [English] courts.<sup>180</sup>

84. Lord Denning's dicta and observations have been very well received outside the United Kingdom.<sup>181</sup> Finally, a forerunner of the ultimate reversal came with the decision of the Privy Council in the "*Philippine Admiral*" case in 1975.<sup>182</sup> The Judicial Committee of the Privy Council, for the first time, refused to follow the Court of Appeal in *The "Porto Alexandre"* case, and gave the following weighty reasons:

. . . In the first place, the Court decided the case as it did because its members thought they were bound to so decide by *The Parlement Belge*, whereas—as their Lordships think—the decision in *The Parlement Belge* did not cover the case at all. Secondly, although Lord Atkin and Lord Wright approved the decision in *The Porto Alexandre*, the other three Law Lords who took part in *The Cristina* case thought it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce. Moreover this Board in the case of *The Sultan of Johore* made it clear that it considered that the question was an open one. Thirdly, the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. Lastly, their Lordships themselves think that it is wrong that they should be so applied.<sup>183</sup>

85. In 1977, the Court of Appeal in *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria*<sup>184</sup> held unanimously that the Central Bank was a separate entity and, by a majority of two to one, that the doctrine of sovereign immunity no longer applied to ordinary trading transactions and that the restrictive doctrine should be applied to actions *in personam* as well as actions *in rem*.<sup>185</sup> This emerging trend away from unlimited immunity culminated in the long-over-

due decision of the House of Lords in the "*I Congreso del Partido*" (1981).<sup>186</sup> Apart from the interesting peculiarities and niceties of English Admiralty rules and procedures such as sister ship jurisdiction, which will be examined in a separate connection,<sup>187</sup> this decision of the House of Lords put an end to some of the doubts and hesitations on matters of principle. Reinforced by the State Immunity Act 1978,<sup>188</sup> the judicial practice of British courts must now be said to be well settled in relation to the exception of trading activities of foreign Governments.

86. Although the law or judicial practice may have been settled in principle with regard to the exception of trading activity, the courts are still confronted in each case with the task of determining whether the element of governmental authority exercised in relation to the set of facts involved is such as to render the activity in question governmental and non-commercial. The courts still have to decide in a particular case whether in the application of the restrictive rule to follow an objective test of the "nature of the transaction" or the more subjective test of "public purpose" or the combination of both, or indeed the more formal test of "legislative intervention" by the foreign Government.

87. The dramatic change in the judicial practice of the United Kingdom as a principal common-law system is apt to produce changes in other common-law jurisdictions, especially within the Commonwealth of Nations. Such changes may take time to materialize. In Australia<sup>189</sup> and New Zealand, the repercussions of the English decision in the "*I Congreso del Partido*" case will be felt. Recently the Canadian case-law<sup>190</sup> has tended to follow the examples set by the United Kingdom and the United States<sup>191</sup> by adopting appropriate legislation to assist the courts to ensure a practice that will be more harmonious and consistent with the current trend.<sup>192</sup> Likewise, recent developments in the case-law of India deserve a close examination.<sup>193</sup>

#### Pakistan

88. Pakistan and India share a similar Code of Civil Procedure—section 86, paragraph 1 of which provides that:

<sup>179</sup> *The All England Law Reports*, 1975, vol. 3, p. 961.  
<sup>180</sup> *Ibid.*, pp. 965–966. See also the Supreme Court of Ontario in *Harold W. M. Smith v. United States Securities and Exchange Commission* (1976) (*International Legal Materials* (Washington, D.C.), vol. XV, No. 2 (March 1976), p. 319 and particularly pp. 323–324).

<sup>181</sup> See, for example, the opinion of Justice Owen in the Court of Appeal of Quebec in *Venne v. Democratic Republic of the Congo* (1969) (Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p. 128): an action to recover fees for services provided in designing a pavilion at Expo-67 was allowed to proceed.

<sup>182</sup> *Owners of the ship "Philippine Admiral" v. Wallem Shipping (Hong Kong), Ltd.* (1975) (*The All England Law Reports*, 1976, vol. 1, p. 78).

<sup>183</sup> *Ibid.*, p. 95.

<sup>184</sup> See footnote 55 above. The *Trendtex* case was settled before it reached the House of Lords, so that many issues remained unresolved. The case *Uganda Co. (Holdings) Ltd. v. Government of Uganda* (1978) (*Lloyd's Law Reports*, 1979 (London), vol. 1, p. 481) illustrates one such unsatisfactory result.

<sup>185</sup> See the difference between the incorporation theory and the transformation theory of international law as part of English law. See also A. O. Adede, "The United Kingdom abandons the doctrine of absolute sovereign immunity", *Brooklyn Journal of International Law*, vol. VI, No. 2 (1980), p. 197.

<sup>186</sup> See footnote 167 above; see the judgment pronounced by Lord Wilberforce (*loc. cit.*, pp. 1066–1078), Lord Edmund-Davies concurring in favour of dismissing the appeal in the "*Marble Islands*" case (pp. 1080–1082), and dissenting opinions of Lord Diplock (pp. 1078–1080), on the one hand, and of Lord Keith and Lord Bridge (pp. 1082–1083), on the other, both in favour of allowing the appeal.

<sup>187</sup> Immunities of public vessels or State-owned ships employed in commerce will be considered under a separate heading.

<sup>188</sup> United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715 (reproduced in United Nations, *Materials on Jurisdictional Immunities of States* . . . , pp. 41 *et seq.*); see the reply of the United Kingdom to question 3 of the questionnaire sent to Governments in 1979 (United Nations, *Materials* . . . , pp. 621–622). See also F. A. Mann, "The State Immunity Act 1978", *The British Year Book of International Law*, 1978 (London), vol. 49, p. 43.

<sup>189</sup> See, for example, Sinclair, *loc. cit.*, pp. 190–192 (see footnote 116 above).

<sup>190</sup> *Ibid.*, pp. 192–193.

<sup>191</sup> See the United Kingdom State Immunity Act 1978 (see footnote 188 above) and the United States of America Foreign Sovereign Immunities Act of 1976 (see footnote 158 above).

<sup>192</sup> See footnote 221 below.

<sup>193</sup> See, for example, Sinclair, *loc. cit.*, pp. 194–195.

No rulers of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government in writing by a Secretary to that Government.<sup>194</sup>

The courts in Pakistan, like those in India,<sup>195</sup> had occasions to consider the relationship between this provision and general international law. In 1971, the Court of Karachi was not inclined to follow the rules of interpretation adopted by English courts, but rather to have recourse to prevalent religious and spiritual standards in interpreting and enforcing laws.<sup>196</sup> It was regarded as permissible and not uncommon, even in secular States, to fill the gaps in international law by normal considerations and taking recourse to Islamic law.

89. The Supreme Court of Pakistan, in a breathtaking decision in *A. M. Qureshi v. Union of Soviet Socialist Republics and another* (1981),<sup>197</sup> took occasion to review and survey the laws and practice of other jurisdictions as well as relevant international conventions and opinions of writers, and confirming with approval the distinction between *acta jure imperii* and *acta jure gestionis*, held that the courts of Pakistan had jurisdiction in respect of commercial acts of a foreign Government. It was observed in conclusion by Justice Karam Elahie Chauhan (with four other judges concurring):

The upshot, in my view, of this discussion is that:

(1) Section 86 of the Civil Procedure Code does not bar the suit filed by the appellant against the respondents;

(2) That there is no positive rule of Customary International [law] which can be pleaded as a bar of jurisdiction to the maintainability of the suit. On the other hand, the rule of International Law followed by most States at present and which rule, in my view, should be followed by the Courts of Pakistan is that acts of a commercial nature are not immune from the jurisdiction of the Municipal Courts. Therefore, the plaintiff's suit was maintainable and the decision to dismiss it as incompetent is erroneous and deserves to be set aside.<sup>198</sup>

### Argentina

90. An examination of the case-law of Argentina reveals a trend in favour of a restrictive doctrine of State immunity. The courts recognized and applied the principle of sovereign immunity in various cases with regard to sovereign acts of a foreign Government.<sup>199</sup> The exception of trading activity was confirmed in *The*

"*Aguila*"<sup>200</sup> in respect of a contract of sale to be performed and complied with within the jurisdictional limits of the Argentine Republic. The court declared itself competent and ordered the case to proceed on the grounds "that the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters".<sup>201</sup>

### Chile

91. The case-law of Chile appears to have firmly recognized the principle of sovereign immunity without drawing any distinction between the various acts or activities of a foreign State. Recent decisions have confirmed a uniform doctrine on broad and practically unrestricted recognition of the jurisdictional immunities of foreign States.<sup>202</sup> The Supreme Court of Justice in 1975 annulled the final judgment of 16 January 1969 rendered by the Fifth Santiago Superior Departmental Court in *A. Senerman v. Republic of Cuba*, on the ground that "... in regulating the jurisdictional activity of different States the limit imposed on this activity, in regard to the subjects, is that which determines that a sovereign State must not be subject to the jurisdictional power of the courts of another State".<sup>203</sup> There has been no decision directly on the possibility of an exception in respect of trading activities.

### Philippines

92. The Supreme Court of the Philippines has had several occasions to consider and give judgments on various general aspects of State immunities. However, the question directly in point, namely the possible exception of trading activity, has not yet come before the Supreme Court.<sup>204</sup>

#### (b) Governmental practice

93. An examination of the governmental practice of States in regard to the application of State immunities and trading activities should cover several aspects, including the role played by the executive in influencing judicial decisions, and the views of the Governments on the subject and not only in connection with a plea of sovereign immunity submitted by a foreign Government, but also the extent to which a State is prepared to forego the privilege of sovereign immunity and to

<sup>194</sup> India, Ministry of Law, Justice and Company Affairs, *The Code of Civil Procedure, 1908* (as modified up to 1 May 1977), p. 32; Pakistan, Ministry of Law and Parliamentary Affairs, *The Pakistan Code* (Karachi), vol. V (1908-1910), p. 53.

<sup>195</sup> See, for example, *Kashani v. United Arab Republic* (1965) (*The Indian Journal of International Law* (New Delhi), vol. 6 (1966), p. 51; *The American Journal of International Law* (Washington, D.C.), vol. 60 (1966), p. 861); see also Sinclair, *loc. cit.*, p. 194.

<sup>196</sup> *The Secretary of State of the United States of America v. Messrs. Gammon-Layton* (1971) (*All Pakistan Legal Decisions* (Lahore), vol. XXIII (1971), p. 314).

<sup>197</sup> *Ibid.*, vol. XXXIII (1981), p. 377.

<sup>198</sup> *Ibid.*, p. 453.

<sup>199</sup> See, for example, *Baima y Bessolino v. Gobierno del Paraguay* (1916) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), vol. 123, p. 58); *United States Shipping Board v. Dodero Hermanos* (1924) (*ibid.*, vol. 141, p. 127); and *Zubiaurre v. Gobierno de Bolivia* (1899) (*ibid.*, vol. 79, p. 124); also documentation submitted by Argentina concerning its national legislation (English trans. in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 3-4) and the decisions of national courts (*ibid.*, pp. 73-74).

<sup>200</sup> *Ministro Plenipotenciario de Chile v. Fratelli Lavarello* (1892) (Argentina, *Fallos de la Corte Suprema de Justicia de la Nación* (Buenos Aires), vol. 47, p. 248).

<sup>201</sup> Extract of the decision in United Nations, *Materials on Jurisdictional Immunities* . . . , p. 73; see also I. Ruiz Moreno, *El Derecho Internacional Público ante la Corte Suprema* (Editorial Universitaria de Buenos Aires, 1941).

<sup>202</sup> Three of the four cases cited in the documentation submitted by Chile (United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 250-251) concerned the years 1968 and 1969 and, respectively, a labour dispute and preventive injunctions.

<sup>203</sup> This decision of the Supreme Court of 2 June 1975 is more directly in point; it establishes a doctrine of sovereign immunity without delimiting its scope of application (*ibid.*, p. 251). Similarly, Brazil's reply to question 3 of the questionnaire sent to Governments in 1979 states that "Brazilian courts consider the doctrine of immunity of States as absolute" (*ibid.*, p. 562) but does not give any reference to a specific decision.

<sup>204</sup> See an interesting survey of decisions of the Philippines Supreme Court (*ibid.*, pp. 360 *et seq.*).



conclude such agreements in the form of bilateral or multilateral treaties.

(i) *The role of the executive*

94. Within a given jurisdiction, the political branch of the Government or the executive as represented by the Ministry of Foreign Affairs or the Ministry of Justice could have a part to play in the determination of questions of jurisdictional immunities of foreign States. The practice is well-known, for instance, in the United States, of "views" or "suggestions" given to the trial courts in particular instances. Whether or not and to what extent the "views" or "suggestions" of the executive will be followed in each case depends ultimately on the court itself. In the United States, the "Tate Letter" of 1952<sup>205</sup> may be considered a classic example of a general policy or guidelines given by the Government for the judiciary. After reviewing comparative case-law, the "Tate Letter" clearly indicated the intention of the Government "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity".<sup>206</sup>

95. Quite apart from the declaration of a policy or guidelines in general such as the "Tate Letter" and specific "views" or "suggestions of immunity" given in particular cases, the executive could bring about changes in legal decisions by introducing new rules in the form of legislation. As will be seen, this has been done in the United States of America in 1976, the United Kingdom in 1978, Pakistan in 1981, and is being done in Canada, and contemplated in Singapore and Barbados.

(ii) *Views of Governments*

96. The views of Governments on the topic can be deduced from the prevailing internal laws on the subject. In the absence of specific legislation, they could be expressed either in a particular case or as a general policy and guidelines as in the Tate Letter. The governmental practice as evidenced by the views of the executive can be found sometimes in the form of advices and legal opinions, such as is the practice in the United Kingdom,<sup>207</sup> the Federal Republic of

Germany<sup>208</sup> and other countries. Source materials are not readily available except in the official files of the ministries of foreign affairs or of justice or the Attorney General's office. They are to be found also in the materials submitted by Member Governments as well as in replies to the questionnaire on specific questions. For instance, the Governments of Czechoslovakia,<sup>209</sup> the German Democratic Republic<sup>210</sup> and Poland<sup>211</sup> have expressed their views favouring an unrestricted theory of immunity in preference to a distinction being made between *acta jure imperii* and *acta jure gestionis*, which is not always workable.

97. While the views of Governments on a particular question of international law clearly have a bearing on legal developments, they do not as such afford evidence of customary rules of international law, save to the extent that they have been incorporated in judicial decisions or legislation, or indeed, treaty provisions. None the less, the wishes of Governments are material and should be taken into consideration. They are certainly relevant in relation to the possibility of implied waiver or implied consent, and could be conditioned by differing results due to the application of the principle of reciprocity. Reciprocity appears to operate to limit or restrict immunity, rather than extend its application, in the wake of increasing tendencies to deny State immunity in several identified areas of activities such as trading.

(iii) *Treaty practice*

98. The attitude or views of a Government can be gathered from its established treaty practice. Bilateral treaties may contain provisions whereby parties agree in advance to submit to the jurisdiction of the local courts in respect of certain specified areas of activities such as trading. Thus, the treaty practice of the Soviet Union amply demonstrates its willingness to have the commercial relations carried on by separate enterprises or trading organizations regulated by competent territorial authorities.<sup>212</sup> While the fact that a State is consistent in its practice in this particular regard may be considered as proof of the absence of rules of international law on the subject, or the permissiveness of deviation or derogation from such rules through bilateral agreements, an accumulation of such bilateral treaty practices could combine to corroborate the evidence of existence of a general practice of States in support of the limitations agreed upon, which could ripen into accepted exceptions in international practice. This view was substantiated by a member of the

<sup>205</sup> Letter of 19 May 1952 to Acting Attorney General Perlman from the Acting Legal Adviser of the Department of State, J. B. Tate (United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XXVI, No. 678 (23 June 1952), pp. 984-985). See also W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *The American Journal of International Law* (Washington, D.C.), vol. 47 (1953), p. 93; and L. M. Draschler, "Some observations on the current status of the Tate Letter", *ibid.*, vol. 54 (1960), p. 790.

<sup>206</sup> See Sinclair, *loc. cit.*, pp. 161-162; Sucharitkul, *Recueil des cours* . . . , 1976-I, pp. 158-161 (see footnote 38 above, *in fine*). See the cases *United States of Mexico et al. v. Schmuck et al.* (1943) (*Annual Digest* . . . , 1943-1945 (London), vol. 12 (1949), case No. 21, p. 75); *Ex parte Republic of Peru* (1943) (*United States Reports*, vol. 318 (1943), p. 578); *The "Katingo Hadjipatera"* (1941) (United States of America, *Federal Supplement*, vol. 40 (1942), pp. 546-548; on appeal, *Federal Reporter, Second Series*, vol. 119 (1941), p. 1022; *certiorari denied*, *United States Reports*, vol. 313 (1941), p. 593); *Republic of Mexico et al. v. Hoffman* (1945) (see footnote 152 above); *The "Martin Behrman"* (1947) (*Annual Digest* . . . , 1947, vol. 14 (1951), case No. 26, p. 75); and *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes* (1964) (see footnote 156 above).

<sup>207</sup> See, for example, Lord McNair, *International Law Opinions* (Cambridge University Press, 1956), vol. I, p. 71.

<sup>208</sup> See, for example, the note of 24 August 1964 addressed to the Ambassador of Colombia in the Federal Republic of Germany by the Acting Legal Counsel of the Colombian Government, Mr. H. Ruiz Varela (English trans. in *United Nations, Materials on Jurisdictional Immunities* . . . , pp. 79 *et seq.*); and the note of 7 August 1979 to the Secretary-General of the United Nations from the Chargé d'affaires of the Permanent Mission of the Federal Republic of Germany (see footnote 128 above).

<sup>209</sup> *United Nations, Materials on Jurisdictional Immunities* . . . , pp. 82-83.

<sup>210</sup> *Ibid.*, pp. 84-85.

<sup>211</sup> *Ibid.*, pp. 90-91.

<sup>212</sup> See footnote 214 below for a list of treaties between socialist countries containing provisions on jurisdictional immunities of States.



Commission regarding the practice of his own country.<sup>213</sup>

99. An example typical of the provisions contained in a series of treaties concluded by the Soviet Union with socialist countries is furnished by the Treaty of Trade and Navigation with the People's Republic of China, signed at Peking on 23 April 1958.<sup>214</sup> With regard to the legal status of the Trade Delegation of the Union of Soviet Socialist Republics in China and the Chinese Trade Delegation in the Soviet Union, article 4 of the annex provides:

The Trade Delegation shall enjoy all the immunities to which a sovereign State is entitled and which relate also to foreign trade, with the following exceptions only, to which the Parties agree:

(a) Disputes regarding *foreign commercial contracts*\* concluded or guaranteed under article 3 by the Trade Delegation in the territory of the receiving State shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the courts of the said State. No interim court orders for the provision of security may be made;

(b) Final judicial decisions against the Trade Delegation in the aforementioned disputes which have become legally valid may be enforced by execution, but such execution may be levied only on the goods and claims outstanding to the credit of the Trade Delegation.

100. A comparable provision of article 10 of the Agreement with France of 1951,<sup>215</sup> typical of treaties concluded between the Soviet Union and developed countries, reads:

The Trade Delegation of the Union of Soviet Socialist Republics in France shall enjoy the privileges and immunities arising out of article 6 above, with the following exceptions:

Disputes regarding *commercial transactions*\* concluded or guaranteed in the territory of France by the Trade Delegation of the Union of Soviet Socialist Republics under the first paragraph of article 8 of this Agreement shall, in the absence of a reservation regarding arbitration or any other jurisdiction, be subject to the competence of the French courts and be settled in accordance with French law, save as otherwise provided by the terms of individual contracts or by French legislation.

No interim orders may, however, be made against the Trade Delegation.

101. Another set of treaties concluded by the Soviet

<sup>213</sup>See the statement by Mr. Tsuruoka during the thirty-third session of the Commission in which he referred to the trade treaties concluded by Japan with the United States in 1953 and with the USSR in 1957 (*Yearbook* . . . 1981, vol. I, p. 63, 1654th meeting, para. 23).

<sup>214</sup>United Nations, *Treaty Series*, vol. 313, p. 135. Cf. treaties signed by the USSR with Romania (1947) (*ibid.*, vol. 226, p. 79); Hungary (1947) (*ibid.*, vol. 216, p. 247); Czechoslovakia (1947) (*ibid.*, vol. 217, p. 35); Bulgaria (1948) (*ibid.*, p. 97); the German Democratic Republic (1957) (*ibid.*, vol. 292, p. 75); Mongolia (1957) (*ibid.*, vol. 687, p. 237); Albania (1958) (*ibid.*, vol. 313, p. 261); Viet Nam (1958) (*ibid.*, vol. 356, p. 149); the Democratic People's Republic of Korea (1960) (*ibid.*, vol. 399, p. 3); Czechoslovakia (1973) (*ibid.*, vol. 904, p. 17). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 134-139.

<sup>215</sup>United Nations, *Treaty Series*, vol. 221, p. 95. See, for example, the case *Société le Gostorg et Représentation commerciale de l'URSS v. Association France-Export* (1926) (see footnote 106 above). Cf. similar provisions in treaties concluded by the USSR with Denmark (1946) (United Nations, *Treaty Series*, vol. 8, p. 201); Finland (1947) (*ibid.*, vol. 217, p. 3); Italy (1948) (*ibid.*, p. 181); Austria (1955) (*ibid.*, vol. 240, p. 289); Japan (1957) (*ibid.*, vol. 325, p. 35); Federal Republic of Germany (1958) (*ibid.*, vol. 346, p. 71); the Netherlands (1971) (*Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1971), No. 163). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 140-144.

Union with developing countries also contain provisions recognizing the exception of commercial transactions. Thus, paragraph 3 of the exchange of letters of 2 December 1953 concerning the Trade Agreement between the Soviet Union and India<sup>216</sup> reads:

It was agreed that the commercial transactions entered into or guaranteed in India by the members of the Trade Representations including those stationed in New Delhi shall be subject to the jurisdiction of the courts of India and the laws thereof unless otherwise provided by agreement between the contracting parties to the said transactions. Only the goods, debt demands and other assets of the Trade Representation directly relating to the commercial transactions concluded or guaranteed by the Trade Representation shall be liable in execution of decrees and orders passed in respect of such transactions. It was understood that the Trade Representation will not be responsible for any transactions concluded by other Soviet organizations direct, without the Trade Representation's guarantee.

102. This limitation on State immunity in respect of commercial transactions is consistently maintained in practically all treaties and agreements concluded not only by the Soviet Union but also by a host of non-socialist countries. The conglomeration of such treaty provisions appears to suggest a clear evidence of emerging State practice in favour of the practicality of the exception of trading as a restriction on State immunity. The emerging rules of customary international law seem to have been crystallized in the direction of such an exception. This trend is further countenanced by international efforts towards codification of the subject under examination, some of which have already born fruit in the form of multilateral or regional conventions (see paras. 108-116 below).

#### (iv) *National legislation*

103. The question of jurisdiction of the courts of a particular country is provided for in a number of different types of legislation, statutes, basic law or constitutions.<sup>217</sup> Of greater relevancy to the current study is a special type of specific legislation, laws and decrees dealing with jurisdictional immunities of foreign States in particular. It is of the greatest interest to note that recent legislation of this category invariably contains a provision with regard to the exception of trading activity or commercial transaction. Thus, sections 1604 and 1605 of the Foreign Sovereign Immunities Act of 1976 of the United States<sup>218</sup> provide:

##### *Section 1604. Immunity of a foreign state from jurisdiction*

Subject to existing international agreements to which the United

<sup>216</sup>United Nations, *Treaty Series*, vol. 240, p. 157. See the corresponding provisions in treaties concluded by the USSR with other developing countries, such as Egypt (1956) (*ibid.*, vol. 687, p. 221); Iraq (1958) (*ibid.*, vol. 328, p. 118); Togo (1961) (*ibid.*, vol. 730, p. 187); Ghana (1961) (*ibid.*, vol. 655, p. 171); Yemen (1963) (*ibid.*, vol. 672, p. 315); Brazil (1963) (*ibid.*, vol. 646, p. 277); Singapore (1966) (*ibid.*, vol. 631, p. 125); Costa Rica (1970) (*ibid.*, vol. 957, p. 347); Bolivia (1970) (*ibid.*, p. 373). The relevant provisions of these treaties are reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 145-150.

<sup>217</sup>See, for example, Legislative Decree No. 189 of 1 April 1952 of the Syrian Arab Republic (A/CN.4/343/Add.1, pp. 1-3); and excerpts from relevant laws of Yugoslavia reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 69-70.

<sup>218</sup>See footnote 158 above. See also United States of America, Department of the Treasury, Internal Revenue Service, "Income of foreign governments: Notice of proposed rulemaking" (*Federal Register*, vol. 43, No. 158 (15 August 1978), pp. 36111-36114); reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 63 *et seq.*

States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

*Section 1605. General exceptions to the jurisdictional immunity of a foreign state*

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case:

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

104. Without commenting in detail on the above provision, which also delineates the questions of jurisdiction that could be exercised by the courts of the United States or of the states, it is interesting to compare the provisions of similar legislation in other countries. The State Immunity Act 1978 of the United Kingdom<sup>219</sup> contains the following provisions:

*Exceptions from immunity*

3. (1) A State is not immune as respects proceedings relating to:
- (a) a commercial transaction entered into by the State; or
  - (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

105. Pakistan also issued an ordinance, No. VI of 1981, entitled the State Immunity Ordinance, 1981<sup>220</sup> which, like the United Kingdom State Immunity Act 1978, contains several exceptions from immunity, one of which is "Commercial transactions and contracts to be performed in Pakistan". The relevant provision reads:

5. (1) A State is not immune as respects proceedings relating to:
- (a) a commercial transaction entered into by the State; or
  - (b) an obligation of the State which by virtue of a contract, which may or may not be a commercial transaction, falls to be performed wholly or partly in Pakistan.

106. The expression "commercial transaction" is defined in subsection (3) as meaning:

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity, whether of a commercial, industrial, financial, professional or other similar character, into which a State enters or in which it engages otherwise than in the exercise of its sovereign authority.

<sup>219</sup> See footnote 188 above. See also the *State Immunity (Overseas Territories) Order 1979* (United Kingdom, *Statutory Instruments 1979*, part I, p. 1130, No. 458; reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 53 *et seq.*), which gives added precision to the meaning of "territory" in connection with the contractual obligation to be performed by the State.

<sup>220</sup> *The Gazette of Pakistan* (Islamabad), 11 March 1981 (text reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 20 *et seq.*).

107. It should be noted that similar legislation has recently been adopted by the Canadian Parliament<sup>221</sup> and Singapore<sup>222</sup> and is being contemplated in Barbados<sup>223</sup> and St. Kitts.<sup>224</sup> Similarly, the States which have ratified the European Convention on State Immunity 1972 (Austria, Belgium, Cyprus and United Kingdom) have adopted internal legislation or made necessary declarations to give effect to the provisions of the Convention.<sup>225</sup>

### 3. INTERNATIONAL CONVENTIONS AND EFFORTS TOWARDS CODIFICATION

108. Under this heading, a brief survey will be made of efforts towards international codification of the topic or allied subject by private non-governmental circles as well as by governmental bodies. Recent efforts culminating in international conventions deserve an early mention.

#### (a) *The European Convention on State Immunity* (1972)<sup>226</sup>

109. The European Convention on State Immunity, 1972 came into force on 11 June 1976 following ratifications by Austria, Belgium and Cyprus. The United Kingdom is the fourth signatory to ratify. Article 7 of the Convention provides:

1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.

2. Paragraph 1 shall not apply if all the parties to the dispute are States, or if the parties have otherwise agreed in writing.

#### (b) *The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels* (Brussels, 1926)<sup>227</sup>

110. The Brussels Convention of 1926, as Gilbert Gidel, the Rapporteur, puts it, "avait pour raison

<sup>221</sup> See Canada, An Act to provide for State immunity in Canadian courts (*State Immunity Act*), entry into force 15 July 1982 (*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15 (22 June 1982), p. 2949, chap. 95); section 5 of the Act provides:

"A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state."

<sup>222</sup> *State Immunity Act 1979* (26 October 1979), reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 28 *et seq.*

<sup>223</sup> See the information communicated to the Secretariat by the Government of Barbados, *ibid.*, pp. 74-75.

<sup>224</sup> See Sinclair, *loc. cit.*, p. 266.

<sup>225</sup> See, for example, the declarations of Austria (reproduced in English in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 5-6).

<sup>226</sup> Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series, No. 74 (Strasbourg, 1972); and *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972).

See also M. O. Wiederkehr, "La Convention européenne sur l'immunité des Etats", *Annuaire français de droit international*, 1974, vol. XX, p. 925; I. M. Sinclair, "The European Convention on State immunity", *The International and Comparative Law Quarterly* (London), vol. 22 (1973), pp. 254.

<sup>227</sup> League of Nations, *Treaty Series*, vol. CLXXVI, p. 199, and Additional Protocol (Brussels, 1934) (*ibid.*, p. 215).

d'être essentielle les navires publics engagés dans des opérations commerciales".<sup>228</sup> Its main object was clearly to assimilate the position of State-exploited merchant ships to that of private vessels of commerce in regard to the question of immunities. Article 1 provides:

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

(c) *Regional intergovernmental bodies*

111. While the efforts of the Council of Europe culminated in the entry into force of the European Convention on State Immunity (1972), similar efforts have also been or are being pursued in other regions. The Central American States, the Inter-American Council and the Caribbean States have been considering similar projects.<sup>229</sup> It is not insignificant to note the contribution made in this field by the Asian-African Legal Consultative Committee, which set up a Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character. In 1960, the AALCC adopted the final report of the Committee. The final report records that all delegations except that of Indonesia "... were of the view that a distinction should be made between different types of state activity and immunity to foreign states should not be granted in respect of their activities which may be called commercial or of private nature". Although a final decision was postponed, the following recommendations were made:

(i) State Trading Organisations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the state in respect of any of its activities in a foreign state. Such organisations and their representatives could be sued in the Municipal Courts of a foreign state in respect of their transactions or activities in their State.

(ii) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts.<sup>230</sup>

#### 4. CONTRIBUTIONS FROM NON-GOVERNMENTAL CIRCLES

112. Reflecting in a way a clearly emerging trend in the opinions of writers are the results of efforts towards formulation of rules of international law on the subject by private non-governmental circles in the form of draft

codes, draft conventions and resolutions. The following endeavours have contributed substantially to the advancement of legal developments and should not escape present notice.

(a) *Resolutions of the Institute of International Law*

113. The Hamburg Draft Resolution of 1891 contains a provision limiting the application of immunities in certain cases, notably "actions relating to a commercial or industrial establishment or to a railway, operated by the foreign State in the territory".<sup>231</sup> A similar provision is contained in article 3 of the final draft resolution adopted by the Institute in 1951:

The courts of a State may hear cases involving a foreign State whenever the act giving rise to the case is an *acte de commerce*\*, similar to that of an ordinary individual, and within the meaning of the definition accepted in the countries involved in the case.<sup>232</sup>

On 30 April 1954, the Institute adopted new resolutions on the immunity of foreign States from jurisdiction and execution, confirming immunity in regard to acts of sovereignty but upholding jurisdiction relating to an act which under the *lex fori* is not an act of sovereign authority.

(b) *Draft code of the International Law Association*

114. Article III of the Strupp draft code of 1926, prepared for the International Law Association, also enumerates certain exceptions to the doctrine of State immunity, including "... especially for all cases where the State [or the sovereign] acts not as the holder of public authority, but as a person in private law, particularly if it engages in commerce\* ...".<sup>233</sup> More recently, the International Law Association took occasion to restudy the problem at its 45th Conference (Lucerne, 1952); the problem is under re-examination by the Association.

(c) *Harvard draft convention on competence of courts in regard to foreign States, 1932*

115. The Harvard Research Center has prepared a number of draft conventions and commentaries for the "Research in International Law" of the Harvard Law School. Article 11 of the Harvard draft convention on competence of courts in regard to foreign States of 1932 subjects a foreign State to local jurisdiction:

... when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection

<sup>228</sup> G. Gidel, *Le droit international public de la mer* (Chateauroux, Mellottée, 1932), vol. II, p. 362. See also the provisions of the 1958 Geneva Conventions on the Law of the Sea, especially section III of the Convention on the Territorial Sea and the Contiguous Zone (United Nations, *Treaty Series*, vol. 516, p. 214) and article 9 of the Convention on the High Seas (*ibid.*, vol. 450, p. 86).

<sup>229</sup> See, for example, the letter of the Government of Barbados to the Secretariat, stating that it was "in the process of considering such legislation [as the United Kingdom State Immunity Act 1978] and in addition is spearheading efforts for a Caribbean Convention on State Immunity" (reproduced in United Nations, *Materials on Jurisdictional Immunities* ..., pp. 74-75).

<sup>230</sup> Asian-African Legal Consultative Committee, *Report on the Third Session (Colombo, 20 January to 4 February 1960)* (New Delhi) [n.d.], p. 68. See also M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1968), vol. 6, pp. 572-574.

<sup>231</sup> Article 4, para. 3, of the "Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers" (Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), pp. 14-15).

<sup>232</sup> *Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, p. 37. The expression "*gestion patrimoniale*", used in the original draft, was replaced by the term "*actes de commerce*", which, according to Niboyet, was more in keeping with the modern activity of the State (*ibid.*, p. 131) and "with it, one is on relatively firm and familiar ground" (*Traité (op. cit.)*, vol. VI, part 1, p. 350); see also footnote 104 above.

<sup>233</sup> K. Strupp, "Réforme et codification du droit international: Projet d'une convention sur l'immunité en droit international", *International Law Association, Report of the Thirty-fourth Conference (Vienna, 1926)* (London, 1927), pp. 426 et seq.

with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.<sup>234</sup>

#### (d) Resolution of the International Bar Association

116. At the meeting of the International Bar Association in Cologne in 1958, the American Bar Association proposed a draft resolution incorporating a restrictive doctrine of State immunity. A resolution was adopted at its meeting in Salzburg in July 1960, spelling out the circumstances in which immunity might be limited. The resolution resembles closely the corresponding provisions of the Harvard draft convention,<sup>235</sup> while paragraph 1 clearly endorses the restrictive principle of the Brussels Convention of 1926.

#### 5. OPINIONS OF WRITERS

117. The preceding survey of State practice, national legislation, international conventions and efforts towards codification clearly reflects a parallel trend of legal opinions in favour of several exceptions, already adopted in current practice, to the applicable rules of State immunity. International and national efforts towards codification of principles of international law on sovereign immunity distinctly demonstrate a visible trend away from any theory of unqualified, unrestricted or unlimited immunity. If, at the time when State immunity was first established in the practice of States, opinions of writers were not directed towards the possibility of practical limitations, it was because during that period there were no causes for concern. States did not engage in trading or commercial activities to such an extent as is currently being practised. Unqualified immunity was widely held among writers in the nineteenth century.<sup>236</sup> Owing to the increasing extent of entry of State activities in the domains earlier reserved for individuals, such as commerce, industry and finance, supporters of an unqualified doctrine have become a diminishing minority ever since the dawn of the present century. Recent adherents of unrestricted immunity include older writers such as Nys,<sup>237</sup> de Louter,<sup>238</sup> Kohler,<sup>239</sup> Westlake,<sup>240</sup> Cobbett,<sup>241</sup> van

Praag,<sup>242</sup> Anzilotti,<sup>243</sup> Provinciali,<sup>244</sup> Fitzmaurice<sup>245</sup> and probably also Beckett.<sup>246</sup> Such unlimited doctrine can rarely find subscribers among the younger generation of contemporary writers, although this by no means precludes official views of some Governments which are still favouring a more unqualified or a comparatively absolute doctrine of sovereign immunity.

118. Indeed, a restrictive doctrine has found early supporters from the very outset. Older proponents of restrictive immunity include Heffter,<sup>247</sup> Gianzana,<sup>248</sup> Rolin,<sup>249</sup> Laurent,<sup>250</sup> de Paepe,<sup>251</sup> Spée,<sup>252</sup> Bar,<sup>253</sup> Fauchille,<sup>254</sup> Pradier-Fodéré,<sup>255</sup> Weiss,<sup>256</sup> Lapradelle,<sup>257</sup> Audinet,<sup>258</sup> and Fiore.<sup>259</sup> It is noteworthy that a restric-

<sup>240</sup> J. Westlake, *A Treatise on Private International Law*, 6th ed. (London, Sweet and Maxwell, 1922), pp. 256 *et seq.*, sects. 190–192.

<sup>241</sup> P. Cobbett, *Cases on International Law*, 6th ed. (London, Sweet and Maxwell, 1947), vol. I, pp. 102–104.

<sup>242</sup> L. van Praag, *Juridiction et droit international public* (The Hague, Belinfante, 1915); "La question de l'immunité de juridiction des Etats étrangers et celle de la possibilité de l'exécution des jugements qui les condamnent", *Revue de droit international et de législation comparée* (Brussels), vol. XV (1934), p. 652; *ibid.*, vol. XVI (1935), pp. 100 *et seq.* (see especially pp. 116 *et seq.*).

<sup>243</sup> D. Anzilotti, "L'esenzione degli stranieri dalla giurisdizione", *Rivista di diritto internazionale* (Rome), vol. V (1910), p. 477.

<sup>244</sup> R. Provinciali, *L'immunità giurisdizionale degli stati stranieri* (Padua, Milani, 1933), pp. 81 *et seq.*

<sup>245</sup> G. Fitzmaurice, "State immunity from proceedings in foreign courts", *The British Year Book of International Law 1933* (London), vol. 14, p. 101.

<sup>246</sup> See the observations by E. Beckett in *Annuaire de l'Institut de droit international*, 1952 (Basel) vol. 44, part I, p. 54. For a review of authorities before 1928, see C. Fairman, "Some disputed applications of the principle of State immunity", *The American Journal of International Law* (Washington, D.C.), vol. 22 (1928), p. 566.

<sup>247</sup> A. W. Heffter, *Das europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen*, 7th ed. (Berlin, Schroeder, 1881), p. 118.

<sup>248</sup> S. Gianzana, *Lo straniero nel diritto civile italiano* (Turin, Unione tipografico-editrice, 1884), vol. I, p. 81.

<sup>249</sup> A. Rolin, *Principes de droit international privé* (Paris, Chevalier-Marescq, 1897), vol. I, pp. 212–213.

<sup>250</sup> F. Laurent, *Le droit civil international* (Brussels, Bruylant-Christophe, 1881) vol. III, p. 44.

<sup>251</sup> De Paepe, *loc. cit.* (footnote 236 above, *in fine*).

<sup>252</sup> G. Spée, "De la compétence des tribunaux nationaux à l'égard des Gouvernements et des souverains étrangers", *Journal du droit international privé* (Clunet) (Paris), vol. 3 (1876), p. 329.

<sup>253</sup> L. von Bar, "De la compétence des tribunaux allemands pour connaître des actions intentées contre les Gouvernements et les souverains étrangers", *ibid.*, vol. 12 (1885), p. 645; *Das internationale Privat- und Strafrecht* (Hannover, Hahn, 1862), vol. II, pp. 412 and 502; *Theorie und Praxis des internationalen Privatrechts* (Hannover, Hahn, 1889), vol. II, pp. 660 *et seq.*

<sup>254</sup> P. Fauchille, *Traité de droit international public*, 8th ed. rev. of *Manuel de droit international public* of H. Bonfils (Paris, Rousseau, 1921), vol. I.

<sup>255</sup> P. Pradier-Fodéré, *Traité de droit international public* (Paris, Durand et Pedone-Lauriel, 1887), vol. III, p. 514, No. 1589.

<sup>256</sup> A. Weiss, *Traité théorique et pratique de droit international privé* (Paris, Sirey, 1913), vol. V, pp. 94 *et seq.*

<sup>257</sup> A. de Lapradelle, "La saisie des fonds russes à Berlin", *Revue de droit international privé et droit pénal international* (Paris), vol. 6 (1910), pp. 75 *et seq.* and 779 *et seq.*

<sup>258</sup> E. Audinet, "L'incompétence des tribunaux français à l'égard des Etats étrangers et la succession du duc de Brunswick", *Revue générale de droit international public* (Paris), vol. II (1895), p. 385.

<sup>259</sup> P. Fiore, *Nouveau droit international public* (Paris, Durand et Pedone-Lauriel, 1885), vol. I, p. 449, No. 514. See also C. Demangeat, "Les tribunaux français peuvent-ils valider la saisie-arrêt formée en France, par un Français, sur des fonds appartenant à un gouvernement étranger?", *Revue pratique de droit français* (Paris), vol. I (1856), p. 385; Conférence des avocats de Paris, 27 December

(Continued on next page)

<sup>234</sup> Harvard draft, *op. cit.*, p. 597 (see footnote 33 above).

<sup>235</sup> See W. H. Reeves, "Good fences and good neighbors: Restraints on immunity of sovereigns", *American Bar Association Journal* (Chicago, Ill.), vol. 44 (1958), p. 521.

<sup>236</sup> Older partisans of an absolute doctrine include:

C. F. Gabba, "De la compétence des tribunaux à l'égard des souverains et des Etats étrangers", *Journal du droit international privé* (Clunet) (Paris) vol. 15 (1888), p. 180 (see especially the opinions cited at pp. 184–185), and *ibid.*, vol. 17 (1890), p. 27.

W. B. Lawrence, *Commentaire sur les éléments du droit international et sur l'histoire des progrès du droit des gens de Henry Wheaton* (Leipzig, Brockhaus, 1873), vol. 3, p. 420.

J. G. Bluntschli, *Le droit international codifié* (Paris, Alcan, 1895), art. 139, p. 124.

A. Chrétien, *Principes de droit international public* (Paris, Chevalier-Marescq, 1893), p. 247.

See also authorities listed by P. de Paepe, "De la compétence civile à l'égard des Etats étrangers et de leurs agents politiques, diplomatiques ou consulaires", *Journal du droit international privé* (Clunet) (Paris), vol. 22 (1895), p. 31.

<sup>237</sup> E. Nys, *Le droit international* (Brussels, Weissenbruch, 1912), vol. I, part II, pp. 340 *et seq.*

<sup>238</sup> J. de Louter, *Het Stellig Volkenrecht* (The Hague, Nijhoff, 1910), part I, pp. 246–247.

<sup>239</sup> J. Kohler, "Klage und Vollstreckung gegen einen fremden Staat", *Zeitschrift für Völkerrecht* (Breslau), vol. IV (1910), pp. 309 *et seq.*; see also P. Laband, "Rechtsgutachten im Hellfeldfall", *ibid.*, pp. 334 *et seq.*

tive view was adopted by the Institute of International Law as early as 1891.<sup>260</sup> Prominent among more recent subscribers are Allen,<sup>261</sup> Watkins,<sup>262</sup> Shepard<sup>263</sup> Brinton,<sup>264</sup> Garner,<sup>265</sup> Hervey,<sup>266</sup> Phillimore,<sup>267</sup> Fensterwald,<sup>268</sup> Fairman,<sup>269</sup> Fox,<sup>270</sup> Wolfman,<sup>271</sup> Carabiber,<sup>272</sup> Hennebicq,<sup>273</sup> Trachtenberg,<sup>274</sup> de Visscher,<sup>275</sup> Bishop,<sup>276</sup> Niboyet,<sup>277</sup> Hyde,<sup>278</sup> Friedmann,<sup>279</sup> Fawcett,<sup>280</sup> Loewenfeld,<sup>281</sup> Lémonon,<sup>282</sup>

(Footnote 259 continued.)

1858, *ibid.*, vol. VII (1859), pp. 182–186; Gabba, *loc. cit.* (1888) (see footnote 236 above); F. Despagnet, *Cours de droit international public*, 4th ed. rev. by C. de Boeck (Paris, Sirey, 1910), No. 257; A. Mérignhac, *Traité de droit public international* (Paris, Librairie générale de droit et de jurisprudence, 1905), vol. I, pp. 262 *et seq.*

<sup>260</sup> *Annuaire de l'Institut de droit international*, 1891–1892 (Brussels), vol. 11, pp. 436 *et seq.*

<sup>261</sup> E. W. Allen, *The Position of Foreign States before National Courts* (New York, Macmillan, 1933).

<sup>262</sup> R. D. Watkins, *The State as a Party Litigant* (Baltimore, Md., The Johns Hopkins University, 1927), pp. 189–191.

<sup>263</sup> P. Shepard, *Sovereignty and State-owned Commercial Entities* (New York, Aberdeen Press, 1951).

<sup>264</sup> J. Y. Brinton, "Suits against foreign States", *The American Journal of International Law* (Washington, D.C.), vol. 25 (1931), p. 50.

<sup>265</sup> J. W. Garner, "Immunities of State-owned ships employed in commerce", *The British Year Book of International Law*, 1925 (London), vol. 6, p. 128.

<sup>266</sup> J. G. Hervey, "The immunity of foreign States when engaged in commercial enterprises: A proposed solution", *Michigan Law Review* (Ann Arbor, Mich.), vol. 27 (1927), p. 751.

<sup>267</sup> G. G. Phillimore, "Immunité des Etats au point de vue de la juridiction ou de l'exécution forcée", *Recueil des cours* . . . , 1925–III (Paris, Hachette), vol. 8, p. 461.

<sup>268</sup> B. Fensterwald, "Sovereign immunity and Soviet State trading", *Harvard Law Review* (Cambridge, Mass.), vol. 63 (1949–1950), p. 614.

<sup>269</sup> C. Fairman, "Some disputed applications of the principle of State immunity", *The American Journal of International Law* (Washington, D.C.), vol. 22 (1928), p. 560; cf. A. Hayes, "Private claims against foreign sovereigns", *Harvard Law Review* (Cambridge, Mass.), vol. 38 (1924–1925), p. 599.

<sup>270</sup> W. T. R. Fox, "Competence of courts in regard to 'non sovereign' acts of foreign States", *The American Journal of International Law* (Washington, D.C.), vol. 35 (1941), pp. 632–636 and 640.

<sup>271</sup> N. Wolfman, "Sovereigns as defendants", *ibid.*, vol. 4 (1910), p. 373.

<sup>272</sup> C. Carabiber, "Le concept des immunités de juridiction doit-il être révisé et dans quel sens?", *Journal du droit international* (Clunet) (Paris), vol. 79 (1952), p. 440.

<sup>273</sup> M. R. Hennebicq, note concerning *Socobelge et Etat belge v. Etat hellénique* . . . (1951), *ibid.*, pp. 244–266 (see also footnote 81 above).

<sup>274</sup> B. Trachtenberg, "L'immunité judiciaire de l'Etat et les représentations commerciales de l'URSS à l'étranger", *Revue de droit international privé* (Darras) (Paris), vol. XXVI (1931), p. 757.

<sup>275</sup> C. de Visscher, "Les gouvernements étrangers en justice", *Revue de droit international et de législation comparée* (Brussels), 3rd series, vol. III (1922), pp. 300 *et seq.*

<sup>276</sup> W. W. Bishop, Jr., "New United States policy limiting sovereign immunity", *loc. cit.* (see footnote 205 above).

<sup>277</sup> J. P. Niboyet, *Traité de droit international privé français*, vol. VI, part 1 (*op. cit.*, see footnote 103 above), pp. 342–367, Nos. 1759–1771; "Les immunités de juridiction en France des Etats étrangers engagés dans des transactions privées", *Revue générale de droit international public* (Paris), vol. 43 (1936), p. 525; "Immunité de juridiction et incompétence d'attribution", *loc. cit.* (footnote 94 above).

<sup>278</sup> C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd ed. (Boston, Little Brown, 1945), vol. 2, p. 849; see also Fensterwald, *loc. cit.* (footnote 268 above); Brinton, *loc. cit.* (footnote 264 above); and Hayes, *loc. cit.* (footnote 269 above).

<sup>279</sup> W. Friedmann, "The growth of State control over the individual and its effects upon the rules of international State responsibility",

Lalive,<sup>283</sup> Carter,<sup>284</sup> Lauterpacht,<sup>285</sup> Denning,<sup>286</sup> and Suy.<sup>287</sup>

119. The restrictive trend is so overwhelming in the opinions of contemporary writers<sup>288</sup> that it is no longer possible to find any trace of an "absolute" doctrine among living authorities on international law. Indeed, the authors who had earlier expressed opinions favouring an unlimited doctrine of immunity appear to have changed their minds in the face of drastic reversals of principles in modern case-law and international conventions, each and every one of which seems to turn away from "absolutism" towards a more realistic and relative theory of State immunity. The problem to be faced squarely is the precise extent or limits to be prescribed for the application of State immunity. As far as trading or commercial activity of a foreign State is concerned, current legal opinions appear to be singularly uniform in favour of restriction. The next question to be resolved is one of formulation and more precise statement of the exception of trading or commercial activity.

## C. Formulation of draft article 12

### 1. ESSENTIAL ELEMENTS

120. The foregoing analysis of relevant material sources of State practice, legislation, conventions and legal opinions apparently points to a convergence of several common features or elements to be noted before venturing a formulation of draft article 12.

(a) It has been clearly established that, unless otherwise agreed, the existing rules of international law do not require a State to allow jurisdictional immunity in

*The British Year Book of International Law*, 1938 (London), vol. 19, pp. 118 and 123–130.

<sup>280</sup> J. E. S. Fawcett, "Legal aspects of State trading", *ibid.*, 1948, vol. 25, pp. 34–38.

<sup>281</sup> E. Loewenfeld, "Some legal aspects of the immunity of State property", *The Grotius Society Transactions*, 1948 (London, Longmans Green), vol. 34, p. 111; "The doctrine of sovereign immunity", International Law Association, *Report of the Forty-fourth Conference* (Copenhagen, 27 August–2 September 1950) (London, 1952), p. 204; Statement concerning the draft resolution on the jurisdictional immunity of States, *idem*, *Report of the Forty-fifth Conference* (Lucerne, 31 August–6 September 1952) (London, 1953), pp. 215–218.

<sup>282</sup> E. Lémonon, "L'immunité de juridiction et d'exécution forcée des Etats étrangers: rapport et projet de résolutions définitifs", *Annuaire de l'Institut de droit international*, 1952 (Basel), vol. 44, part I, pp. 1–136; *ibid.*, part II, pp. 424–438; see also the observations of writers in connection with the proposed resolution (part I, pp. 44 *et seq.*).

<sup>283</sup> J. F. Lalive, "L'immunité de juridiction des Etats et des organisations internationales", *loc. cit.* (footnote 157 above).

<sup>284</sup> P. B. Carter, "Immunity of foreign sovereigns from jurisdiction", *The International and Comparative Law Quarterly* (London), vol. 1 (1952), p. 543; "Sovereign immunity: Substantiation of claims", *ibid.*, vol. 4, (1955), p. 469.

<sup>285</sup> H. Lauterpacht, "The problem of jurisdictional immunities of foreign States" *loc. cit.* (footnote 157 above).

<sup>286</sup> See *Rahimtoola v. Nizam of Hyderabad* (1957) (see footnote 177 above).

<sup>287</sup> E. Suy, "L'immunité des Etats dans la jurisprudence belge", *loc. cit.* (footnote 81 above); see also A. O. Adede, "The doctrine of sovereign immunity under international commercial law: An observation on recent trends", *The Indian Journal of International Law* (New Delhi), vol. 17, Nos. 3 and 4 (1977), p. 259.

<sup>288</sup> A quick glance at the codification efforts listed in paragraphs 108–116 will confirm the current unmistakable trend.

respect of a trading or commercial activity of another State even though it may be partly or wholly carried on in the latter's territory.

(b) Increasingly, there appears to be stronger support and justification for disallowing immunity and therefore for the court of one State to exercise its territorial competence or subject-matter jurisdiction as respects the activities of another State in a commercial, industrial or financial field.

(c) The problem of defining the notion of "trading or commercial activity" is one that seems difficult to avoid in this particular connection, although on earlier occasions in relation to diplomatic immunities<sup>289</sup> and regulation of international trade<sup>290</sup> there appears to have been no compelling necessity for such a definition, as a general notion of trade is well understood. On the other hand, other endeavours, notably the Harvard draft<sup>291</sup> and national legislation such as the Pakistan State Immunity Ordinance, 1981,<sup>292</sup> have found it useful to insert a provision on use of terms or a definition provision. The expression necessarily covers a single isolated transaction, such as a contract of sale or purchase of goods or services, as well as a series of acts or a course of conduct, or the operation of a business enterprise or organization.

<sup>289</sup> There was no definition provision in regard to the private trading activities of a diplomatic agent in the 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95), either in article 31 of the convention or in the commentary to draft article 29 proposed by the Commission (*Yearbook* . . . 1958, vol. II, pp. 98–99, document A/3859).

<sup>290</sup> There was found to be no necessity for a definition of "State trading enterprise" in the General Agreement on Tariffs and Trade (GATT, *Basic Instruments and Selected Documents*, vol. IV (Sales No.: GATT/1969-1)). The wider term "public commercial enterprise" as defined by article 54 of the Havana Charter of 1947 refers to agencies of government engaging in trade as well as to trading enterprises referred to in article 46 in connection with restrictive business practices. Article 29, paras. 1–2, of the Charter distinguish between ordinary sales and purchases, and imports of products purchased for governmental purposes not with a view to commercial resale. (For the text of the Charter, see *United Nations Conference on Trade and Employment*, Havana, 21 November 1947–24 March 1948, *Final Act and Related Documents* (E/CONF.2/78), sect. II.)

<sup>291</sup> See article 11 of the Harvard draft, *op. cit.*, p. 597 (see footnote 33 above).

<sup>292</sup> See section 5, subsection (3) of the Ordinance (see paras. 105–106 and footnote 220 above).

(d) Even with a well-defined concept of trading or commercial activity, there may still be a need for the adoption of further criteria to identify or facilitate the designation or classification of an activity as "trading or commercial" by reference either to the *nature of the activity*, or to its *purpose*, or to both the nature and the purpose, primarily the nature and if need be also the underlying public or governmental object of a particular activity or transaction.<sup>293</sup>

(e) Another practical test consists in the assimilation of the position of a State to that of a private person or enterprise carrying on a trade or business in the territory of another State. Implied consent or implied waiver of immunity has also been advanced as an added justification for an assimilative theory.

(f) The idea of profit-making or speculation of lucrative gains is not altogether alien to the notion of trade or commerce, although it is not always a realizable condition of fact. A further question that can be pertinently asked relates to the extent, if any, to which the notion of profit can be considered relevant to the determination of the non-public character or the private and commercial nature of a transaction or activity.<sup>294</sup>

(g) Reciprocity has furnished a further justification for mutual limitation of State immunity in respect of trading.

## 2. TEXT OF DRAFT ARTICLE 12

121. Draft article 12 reads as follows:

### Article 12. Trading or commercial activity

**1. In the absence of agreement to the contrary, a State is not immune from the jurisdiction of another State in respect of proceedings relating to any trading or commercial activity conducted by it, partly or wholly in the territory of that other State, being an activity in which private persons or entities may there engage;**

**2. Paragraph 1 does not apply to transactions concluded between States, nor to contracts concluded on a government-to-government basis.**

<sup>293</sup> See draft article 2, para. 1(f) (footnote 9 above), and draft article 3, para. 2 (footnote 10 above).

<sup>294</sup> See, for example, article 26 of the Harvard draft, *op. cit.*, p. 716.





# STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 7]

DOCUMENT A/CN.4/356 and Add.1-3\*

## Information received from Governments

[Original: English, French, Russian, Spanish]  
[25 March, 8 and 20 April and 5 May 1982]

### CONTENTS

	Page
INTRODUCTION .....	232
Austria .....	232
Botswana .....	235
Czechoslovakia .....	235
Finland .....	236
Federal Republic of Germany .....	236
Ivory Coast .....	237
Japan .....	237
Luxembourg .....	237
Mexico .....	237
Republic of Korea .....	237
Spain .....	239
Union of Soviet Socialist Republics .....	240
Yugoslavia .....	244

---

### NOTE

Multilateral conventions mentioned in the present document:

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) Hereinafter called 1961 Vienna Convention	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963) Hereinafter called 1963 Vienna Convention	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) Hereinafter called 1975 Vienna Convention	<i>Ibid.</i> , 1975 (Sales No. E.77.V.3), p. 87.

---

---

\* Incorporating document A/CN.4/356/Add.1/Corr.1.

## Introduction

1. The International Law Commission, at its thirty-third session in 1981, requested the Secretariat to solicit from States information on national laws, regulations, procedures and practices as well as information on judicial decisions, arbitral awards and diplomatic correspondence regarding the treatment of the diplomatic courier and the diplomatic bag.<sup>1</sup> Pursuant to the Commission's request, the Legal Counsel of the United Nations addressed a circular letter dated 14 October 1981 to the Governments of States, inviting them to submit relevant information by 28 February 1982.

2. The replies received by the end of April 1982 from the Governments of 13 States are reproduced below.

<sup>1</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 248, subpara. (b).

### Austria

[Original: English]  
[19 February 1982]

1. Austria is party to the following multilateral conventions:

Convention on the Privileges and Immunities of the United Nations, 1946;<sup>1</sup>

Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, 1947;<sup>2</sup>  
Vienna Convention on Diplomatic Relations, 1961;  
Vienna Convention on Consular Relations, 1963.

2. Provisions regarding the status of the diplomatic courier and the diplomatic bag are contained in the headquarters agreements with the following international organizations established in Austria:

International Atomic Energy Agency;  
United Nations Industrial Development Organization;

Organization of the Petroleum Exporting Countries;  
OPEC Fund for International Development.

The text of the above-mentioned relevant provisions is reproduced below (sect. A).

3. The Austrian position on certain aspects relating to the diplomatic courier and diplomatic bag is reflected in the circulars reproduced below (sect. B).

4. Provisions of bilateral treaties on consular relations concluded by Austria which might be relevant to the study of the status of the diplomatic courier and bag are also reproduced below (sect. C).

### A. HEADQUARTERS AGREEMENTS

*Agreement between the Republic of Austria and the International Atomic Energy Agency regarding the headquarters of the International Atomic Energy Agency*<sup>3</sup>

<sup>1</sup> United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum).

<sup>2</sup> *Ibid.*, vol. 33, p. 261.

<sup>3</sup> *Ibid.*, vol. 339, p. 152.

### Section 15

(a) All official communications directed to the IAEA, or to any of its officials at the headquarters seat, and all outward official communications of the IAEA, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy. Such immunity shall extend, without limitation by reason of this enumeration, to publications, still and moving pictures, films and sound recordings.

(b) The IAEA shall have the right to use codes and to dispatch and receive correspondence and other official communications by courier or in sealed bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

*Agreement between the United Nations and the Republic of Austria regarding the headquarters of the United Nations Industrial Development Organization*<sup>4</sup>

#### Article VI. Communications, Publications and Transportation

### Section 13

(a) All official communications directed to the UNIDO, or to any of its officials at the headquarters seat, and all outward official communications of the UNIDO, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy. Such immunity shall extend, without limitation by reason of this enumeration, to publications, still and moving pictures, films and sound recordings.

(b) The UNIDO shall have the right to use codes and to dispatch and receive correspondence and other official communications by courier or in sealed bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

*Agreement between the Republic of Austria and the Organization of the Petroleum Exporting Countries regarding the headquarters of the Organization of the Petroleum Exporting Countries*<sup>5</sup>

#### Article 11

(1) All official communications directed to OPEC, or to any of its

<sup>4</sup> *Ibid.*, vol. 600, p. 94.

<sup>5</sup> *Ibid.*, vol. 589, p. 135.

officials at the headquarters seat, and all outward official communications of OPEC, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy.

(2) OPEC shall have the right to use codes and to dispatch and receive correspondence and other official communications by courier or in sealed bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

*Agreement between the Republic of Austria and the OPEC Fund for International Development regarding the headquarters of the Fund<sup>6</sup>*

*Article 14*

(1) All official communications directed to the Fund, or to any of its officials at the headquarters seat, and all outward official communications of the Fund, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy.

(2) The Fund shall have the right to use codes and to dispatch and receive correspondence and other official communications by courier or in sealed bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

**B. CIRCULARS**

*Circular to the diplomatic missions accredited to Austria, the international organizations in Vienna, the permanent missions and observer missions*

The introduction of more stringent security checks at international airports as a tool for fighting international terrorism has persistently given rise to the question whether the use of such measures in the case of diplomats is consistent with the provisions of the Vienna Convention on Diplomatic Relations (the stipulations of the convention applicable in this context are, without doubt, also generally recognized rules of international common law).

In recent years, the Austrian Federal Ministry of Foreign Affairs has always been of the opinion that security checks as an instrument for fighting terrorism in international civil aviation are both in the interest of all passengers, including diplomats, and admissible under the Vienna Convention on Diplomatic Relations, provided that certain limits are not exceeded. The following aspects may generally be considered a criterion for the admissibility of such measures:

The checks must not extend to diplomatic bags, except for electronic screening,

The measures must not be discriminatory, and

They must not consist in the manual search of the personal baggage of the diplomat by organs of the receiving State. Thus, the Federal Ministry of Foreign Affairs considers an inspection of the baggage admissible only if it is carried out by technical devices (X-rays, metal detectors, etc.) or if it is done in such a way that the diplomat concerned is asked to open his personal baggage without the control organs inspecting it manually. If such checks give rise to the well-founded suspicion that prohibited articles are carried along, the exemption from the prohibition of the inspection of the personal baggage provided for under article 36 (2) of the Vienna Convention on Diplomatic Relations will apply.

Basically, the Federal Ministry of Foreign Affairs considers checks of persons also admissible within reasonable limits (electronic devices, manual search).

Apart from the weighing of interests, this attitude is also substantiated by the fact that, as a rule, the check is not carried out by State organs but by employees of the airport authority or the airline involved and also that there is no obligation to agree to being checked. According to international usage, however, the airline may deny transportation if such checks are refused.

Therefore all members of the Foreign Service are again requested, in the interest of their own security, to comply with such checks voluntarily—with the above-mentioned restrictions.

*Circular to the diplomatic missions accredited to Austria, the international organizations in Vienna, the permanent missions and observer missions*

For some time, airlines have been requesting not only the random screening of departing passengers and their hand baggage by metal detectors but also the X-raying of diplomatic bags marked as such.

In recent years, the Federal Ministry of Foreign Affairs has consistently held the opinion that security checks as a means for fighting terrorism in international civil aviation lie in the interest of all passengers and that they are also admissible in the case of diplomats and couriers in the light of the provisions of the Vienna Convention on Diplomatic Relations and the Headquarters Agreement, provided that such checks are carried out within the limits determined by the Vienna Convention. The Federal Ministry considers electronic screening of diplomatic bags marked as such admissible in this sense and being in accordance with the text and the meaning of article 27 (3) of the convention.

Mention may be made of the fact that persons who are not willing to agree to the screening of their person or their baggage, including diplomatic bags, which is demanded by the airlines, take the risk of being denied transportation.

The Federal Ministry of Foreign Affairs requests that all persons concerned are apprised of this circular.

*Circular to the diplomatic missions accredited to Austria, the international organizations in Vienna, the permanent missions and observer missions*

The Austrian Federal Ministry of Foreign Affairs presents its compliments to the diplomatic missions accredited to Austria and has the honour to announce that new technical security devices (the so-called "security lock") have been put into service at the entrance to the gates at Vienna-Schwechat airport on 14 April 1978.

These devices include:

1. A device for X-raying the hand baggage for metal articles, and
2. A magnetometer which identifies all metal articles worn by a person when passing through.

As from now on, all departing passengers will have to pass through this security lock, no exception being made for holders of diplomatic passports, including heads of mission and their dependants.

The Federal Ministry of Foreign Affairs hopes that these measures, which are designed to make international aviation still safer and thus serve all passengers, are appreciated.

**C. CONSULAR CONVENTIONS**

*Consular treaty between Austria and the Union of Soviet Socialist Republics, signed at Moscow on 28 February 1959<sup>7</sup>*

*Article 13*

1. The official correspondence of consulates, regardless of the

<sup>6</sup> *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 248 (8 June 1982).

<sup>7</sup> United Nations, *Treaty Series*, vol. 356, p. 62.

means of communication employed, shall be inviolable and shall not be subjected to examination.

2. In their communications with the authorities of the sending country, consulates shall be entitled to use codes and the services of diplomatic couriers. Consulates shall be charged at the same rates as diplomatic missions for the use of ordinary means of communication.

3. Consular archives shall be inviolable. Papers of an unofficial character shall not be kept in the consular archives.

4. The offices of consulates shall be inviolable. The authorities of the receiving country shall not use force in any form whatsoever, without the consent of the consul, in the offices or in the private living quarters of consuls.

*Consular treaty between Austria and Yugoslavia, signed at Belgrade on 18 March 1960<sup>8</sup>*

*Article 15*

...

(2) Official correspondence and official communications, howsoever exchanged, between the consular post and any authority of the sending State shall be inviolable and shall not be subject to censorship. The term "authority of the sending State" shall be deemed to include the diplomatic missions and consular posts of the sending State.

...

*Consular convention between Austria and Romania, signed at Vienna on 24 September 1970<sup>9</sup>*

*Article 31. Freedom of communication*

1. The receiving State shall permit and facilitate freedom of communication on the part of consular posts of the sending State for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all lawful means of communication, including diplomatic or consular couriers, diplomatic or consular bags and coded or uncoded messages. However, the consular post may install or use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post and the consular bag shall be inviolable, they shall not be opened, examined or detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the correspondence or bag contains something other than the correspondence, documents or articles referred to in paragraph 3, it shall be returned to its place of origin.

3. The consular bag, whether consisting of one package or more than one, shall be sealed and shall bear visible external marks of its character; it may contain only official correspondence and documents or articles intended exclusively for official use.

4. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. He must be a national of the sending State and may not be domiciled in the territory of the receiving State. In the performance of his functions, the consular courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to detention or to any other form of restriction on his personal freedom.

5. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized airport. The captain shall be provided with an official document indicating the number of

packages constituting the consular bag; he shall not, however, be considered to be a consular courier. The consular post may send one of its members to take possession of the bag directly and freely from the captain of the aircraft. The provisions of paragraph 2 concerning the return of consular bags shall apply *mutatis mutandis*.

*Consular convention between Austria and Poland, signed at Vienna on 2 October 1974<sup>10</sup>*

*Article 18*

(1) The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the Government, the diplomatic missions and other consular posts of the sending State, wherever situated, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular mail and messages in code or cipher. However, a wireless transmitter may be installed and used in the consular post only with the consent of the receiving State.

(2) The official correspondence of the consular post shall be inviolable.

(3) Packages constituting consular official mail shall be sealed and shall bear visible external marks of their character. They may contain only official correspondence and documents or articles intended exclusively for official use.

(4) Consular official mail fulfilling the conditions of paragraph (3) shall not be opened, examined or detained.

...

*Consular convention between Austria and the German Democratic Republic, signed at Berlin on 26 March 1975<sup>11</sup>*

*Article 14*

(1) The receiving State shall permit and protect freedom of communication on the part of the consulate for all official purposes with the Government, the diplomatic missions and other consulates of the sending State, wherever situated. For that purpose, the consulate may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. The consulate may install and use a radio station only with the consent of the receiving State. The same rules for the use of means of communication shall apply to the consulate as to the diplomatic mission.

(2) The official correspondence of the consulate shall be inviolable.

(3) Packages constituting the consular bag shall be sealed and shall bear visible external marks of their character. They may contain only official correspondence and documents or articles intended exclusively for official use.

(4) A consular bag which fulfils the conditions of paragraph (3) shall not be opened, examined or detained.

(5) The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. He shall be a national of the sending State and shall not have a place of residence in the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall therefore not be liable to detention, arrest or any other form of restriction on his personal freedom. The foregoing shall also apply to a consular courier *ad hoc*, but his immunities and the obligation of the receiving State to protect him shall cease when he has delivered the consular bag to the consignee.

(6) The consular bag may also be entrusted to the captain of an aircraft operated by an airline for commercial purposes or to the captain of a ship. The captain shall be provided with an official

<sup>8</sup> *Ibid.*, vol. 763, p. 158.

<sup>9</sup> *Ibid.*, vol. 848, p. 106.

<sup>10</sup> *Bundesgesetzblatt für die Republik Österreich* (Vienna), No. 383 (18 July 1975).

<sup>11</sup> *Ibid.*, No. 494 (26 September 1975).

document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. Subject to compliance with the security regulations in force for the airport or port concerned, a member of the consulate may directly and freely deliver the consular bag to the captain or take possession of it from him.

*Consular convention between Austria and Bulgaria, signed at Sofia on 4 May 1975*<sup>12</sup>

*Article 30. Freedom of communication*

(1) The receiving State shall permit and facilitate freedom of communication on the part of the consulate of the sending State for all official purposes. In communicating with the Government, the diplomatic missions and other consulates, wherever situated, of the sending State, the consulate may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and coded or uncoded messages. However, the consulate may install and use a wireless transmitter only with the consent of the receiving State. Where conventional means are used to transmit messages, the same rates shall apply to consulates as apply to diplomatic missions.

(2) The correspondence of the consulate and the consular bag shall be inviolable; they shall not be opened, examined or detained. Nevertheless, if there is serious reason to believe that the consignment contains something other than the official correspondence, documents or articles referred to in paragraph (3), it may be returned to its place of origin.

(3) The consular bag and the packages constituting the consular bag shall be sealed and shall bear visible external marks of their character. They may contain only official correspondence and documents or articles intended exclusively for official use.

(4) The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. He shall be a national of the sending State and shall not be domiciled in the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to detention or any other form of restriction on his personal freedom.

(5) A consular bag may also be entrusted to the captain of a ship or of a commercial aircraft. He shall be provided with an official document indicating the number of packages constituting the bag. He shall not, however, be considered to be a consular courier. The consulate may send one of its members to deliver the bag directly and freely to the captain or to receive it from him. The provisions of paragraph (2) concerning the return of consular bags shall apply *mutatis mutandis*.

*Consular convention between Austria and Hungary, signed at Budapest on 25 February 1975*<sup>13</sup>

*Article 15*

(1) The receiving State shall permit and protect freedom of communication on the part of the consulate for all official purposes. In communicating with the Government, the diplomatic missions and other consulates, wherever situated, of the sending State, the consulate may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular mail and messages in code or cipher. However, the consulate may install and use a wireless transmitter only with the consent of the receiving State.

(2) The official correspondence of the consulate shall be inviolable.

(3) Packages constituting consular official mail shall be sealed and shall bear visible external marks of their character. They may contain only official correspondence and documents or articles intended exclusively for official use.

(4) Consular official mail fulfilling the conditions of paragraph (3) shall not be opened, examined or detained.

<sup>12</sup> *Ibid.*, No. 342 (8 July 1976).

<sup>13</sup> *Ibid.*, No. 146 (7 April 1977).

(5) The consular courier shall be provided with an official document indicating his status and the number of packages constituting consular official mail. He shall be a national of the sending State and shall not be a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall therefore not be liable to arrest or detention or to any other form of restriction on his personal freedom.

(6) Consular official mail may be entrusted to the captain of a ship or of a commercial aircraft. He shall be provided with an official document indicating the number of packages constituting consular official mail; however, he shall not be considered to be a consular courier. A member of the consulate may directly and freely deliver consular official mail to the captain or take possession of it from him.

**Botswana**

[Original: English]  
[4 March 1982]

1. Botswana has no national laws, regulations, judicial decisions and arbitral awards regarding treatment of the diplomatic courier and the diplomatic bag.

2. Botswana treats diplomatic couriers like accredited diplomats. They are accorded VIP status and are not subjected to security checks and/or searches at airports or borders. Diplomatic correspondence is also not subjected to security checks and/or searches.

**Czechoslovakia**

[Original: French]  
[13 April 1982]

*Customs Act of 24 April 1974*<sup>1</sup>

*Article 29*

...

2. The following shall not be subject to customs inspection:

(a) Diplomatic bags of the Federal Ministry of Foreign Affairs and of Czechoslovak diplomatic or consular missions, and diplomatic bags which are exempt from customs inspection under international treaties.

...

*Order of the Federal Ministry of Foreign Trade of 25 November 1974 implementing the Customs Act, No. 44/1974 of the Statute-book*<sup>2</sup>

**CHAPTER II. EXEMPTION FROM CUSTOMS INSPECTION**

...

*Article 5*

Goods shall not be subject to customs inspection if they are transported from one foreign country to another by

...

<sup>1</sup> *Sbírka zákonů Československá socialistická republika, 1974* [Compendium of Laws of the Czechoslovak Socialist Republic, 1974] (Prague), p. 121, No. 44.

<sup>2</sup> *Ibid.*, p. 405, No. 119.

(h) Diplomatic and consular couriers (hereinafter referred to as "couriers") of foreign States.

#### Article 6

1. Exemption from customs inspection shall also apply to baggage of the persons referred to in articles 4 and 5 which is transported in connection with a particular journey of such persons, even if it is imported or exported by a means of transport other than that used by such persons.

2. Exemption from customs inspection shall not apply in cases where there are serious grounds for presuming that the baggage contains articles the import, export or transit of which is prohibited or restricted. Customs inspection shall be conducted only in the presence of the person referred to in article 4 or 5 or of his authorized representative.

#### Article 7

1. Sealed diplomatic bags and consular bags (hereinafter referred to as "diplomatic bags") which the courier transports by the same means of transport as he himself uses shall not be subject to customs inspection. The courier shall be provided with an official document prepared by and bearing the stamp of the post dispatching the diplomatic bag. The said document shall indicate the number of packages constituting the diplomatic bag and the type of external cover.

2. Sealed diplomatic bags transported otherwise than by courier shall not be subject to customs inspection; however, they shall be accompanied by an official document prepared by and bearing the stamp of the post dispatching the diplomatic bag. The said document must indicate the number of packages constituting the diplomatic bag, the type of external cover and the address of the post or authority to which the bag is consigned.

3. Diplomatic bags may contain only diplomatic documents or articles intended for the official use of the mission.

#### Finland

[Original: English]  
[24 February 1982]

1. As a party to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, Finland is bound by the relevant provisions of these instruments. When ratifying the 1963 convention, however, Finland entered the following reservation:

With regard to article 35, paragraph 1, and article 58, paragraph 1, Finland does not accord to consular posts headed by honorary consular officers the right to employ diplomatic or consular couriers and diplomatic or consular bags, or to Governments, diplomatic missions and other consular posts the right to employ these means in communicating with consular posts headed by honorary consular officers, except to the extent that Finland may have consented thereto in particular cases.<sup>1</sup>

2. As regards foreign missions in Finland, there are national requirements according to which officially sealed courier consignments entered in the courier list, destined for such missions, are allowed to pass free of inspection and without a written customs declaration. Consignments not entered in the courier list, if not suspected of containing objects not classifiable as documents, are also allowed to pass free of inspection and without a written customs declaration. In such a case the receiver is, however, obliged to give a receipt or to sign his acknowledgement of receipt in the list of goods of the vehicle of transportation. Courier consignments and consignments of documents referred to above are

handed over to the receiver immediately on arrival of the vehicle. General provisions on reciprocal exemption of diplomatic consignments from customs duties are contained in the 1978 Customs Tax Act.<sup>2</sup>

3. The provisions of article 40 of the 1961 Vienna Convention dealing with the inviolability and protection of the diplomatic courier and the diplomatic bag are also strictly followed in Finland, even if no specific rules or guidelines concerning their practical application have been issued. Exemption from customs duties may also be derived from the general exemption of transit goods from such duties.

4. The administrative regulations concerning the diplomatic bag and applied in foreign representation are contained in a Manual of Diplomatic Service. The Ministry for Foreign Affairs has regular connections by air to all Finnish diplomatic missions and missions headed by appointed consuls-general. Since the captain of the aeroplane cannot, in accordance with article 27, paragraph 7, of the 1961 Vienna Convention, be considered a diplomatic courier, he or the member of the crew acting in his place as "courier" will be given only the reference numbers of the packages constituting the bag and a certificate indicating the total number of the packages, but not a courier passport. In the instructions issued to Finnish missions it is also emphasized that a courier consignment shall be delivered directly to the plane as well as received directly from the plane.

5. The Finnish foreign service no longer has regular couriers. However, *ad hoc* couriers, as provided for in article 27, paragraph 6, of the 1961 convention, are designated for special assignments. Such couriers may be officials in the foreign service or adult members of their families, or even other Finnish citizens of high reputation, and in the first place, persons eligible to carry a diplomatic passport or a passport of official service. The *ad hoc* courier will be provided not only with the certificate mentioned above but also with a courier passport which will indicate his/her diplomatic status and which the courier has to hand over to the receiver. When land or sea transportation is used (for heavy consignments), captains of Finnish ships or Finnish truck drivers may act as couriers.

6. If the right of unhampered courier connections of a Finnish mission is interfered with by the receiving State, the mission shall immediately inform the Ministry for Foreign Affairs thereof. The Ministry shall then instruct the mission as regards possible issuance of a protest or the taking of other measures.

<sup>2</sup> *Suomen Asetuskokoelma, 1978* [Compendium of Laws of Finland, 1978] (Helsinki), p. 1194, No. 575.

#### Federal Republic of Germany

[Original: German\*]  
[23 March 1982]

#### Courier service<sup>1</sup>

1. The Federal Republic of Germany permits and

\* English translation provided by the Federal Republic of Germany.

<sup>1</sup> *Gemeinsames Ministerialblatt* [Interministerial journal] (Bonn), 26th year, No. 13 (18 April 1975), p. 344, sect. VI.

<sup>1</sup> See United Nations, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1981* (Sales No. E.81.V.9), p. 71.

protects the freedom of communication of foreign heads of State, heads or ministers of other Governments during their stay in the Federal Republic of Germany, heads of diplomatic missions and the head of the Permanent Representation of the German Democratic Republic, and heads of consular or other posts that have been granted this right for all official purposes. It follows from this that, in communicating with other missions and posts of the sending State, they may employ all appropriate means, including couriers and messages in code or cipher, as well as radio, but only with the approval of the Federal Government.

2. The official correspondence of missions and of the Permanent Representation of the German Democratic Republic is inviolable. This inviolability extends beyond the fundamental right embodied in article 10 of the Basic Law and also offers protection against confiscation by a judge.

3. Official correspondence may not be opened or detained. It may be carried by:

(a) Diplomatic or official couriers. The courier must be provided with an official document indicating his status. He enjoys personal inviolability and is not liable to any form of arrest or detention;

(b) The captain of a commercial aircraft scheduled to land at an authorized port of entry;

(c) In the case of a consular bag, the captain of a ship heading for an authorized port of entry.

4. Packages constituting the bag must bear visible external marks of their character. The courier or the captain of an aircraft or of a ship carrying the bag must be provided with an official document indicating the number of packages constituting the bag.

5. Couriers and bags also enjoy inviolability and protection in transit from the sending State.

6. Customs clearance of diplomatic and consular bags is covered by annex I, section II, of the *Dienstweisung zum Zollgesetz und zur Allgemeinen Zollordnung* (Official Instructions relating to the Customs Act and the General Customs Regulations).

#### Ivory Coast

[Original: French]  
[11 March 1982]

In the Ivory Coast, the current practice on this question is that provided for in the 1961 Vienna Convention governing diplomatic practices and diplomatic relations.

#### Japan

[Original: English]  
[18 December 1981]

1. There is no domestic law in Japan relating to the diplomatic courier and the diplomatic bag. The provisions of the 1961 Vienna Convention on Diplomatic Relations apply directly.

2. No judicial decision is found to have been made regarding the treatment of the diplomatic courier and the diplomatic bag.

#### Luxembourg

[Original: French]  
[12 February 1982]

The Luxembourg authorities strictly apply the provisions of the 1961 Vienna Convention on Diplomatic Relations governing the treatment of both the official correspondence of diplomatic missions and the diplomatic bag.

There are no national laws, regulations or other practices supplementing or replacing the Vienna Convention.

#### Mexico

[Original: Spanish]  
[23 February 1982]

The Government of Mexico bases its treatment of the diplomatic bag and the diplomatic courier on the 1961 Vienna Convention on Diplomatic Relations, to which Mexico has been a party since 1965. It may also be mentioned that draft regulations on the subject are at present under consideration, as the decrees and circulars which gave effect to the convention until 1981 have been abrogated.

#### Republic of Korea

[Original: English]  
[20 April 1982]

1. The Republic of Korea is a party to both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. With regard to article 27 of the Vienna Convention on Diplomatic Relations on the status of the diplomatic bag, the Government of the Republic of Korea enacted a regulation in 1962 concerning the treatment of official documents, part 4 (arts. 25–36) of which contains the provisions concerning the diplomatic bag.

2. With regard to the diplomatic courier, the Government of the Republic of Korea has neither laws nor regulations, but as a courtesy, the following practice has been established.

If a resident embassy in the Republic of Korea requests the Ministry of Foreign Affairs to provide possible assistance to escort its diplomatic courier, the Ministry will make necessary arrangements, in co-operation with the appropriate authorities (the Customs Office), in order to ensure that the procedures are facilitated and that the diplomatic courier is assisted by the authorities concerned.

3. As regards the system for the diplomatic bag, the text of the regulation mentioned above is reproduced below.

#### *Regulation on the Treatment of Official Documents<sup>1</sup>*

##### PART 4: DIPLOMATIC BAG

##### *Article 25. Limitation of the contents of the bag*

1. The diplomatic bag (hereinafter referred to as "bag") shall contain documents and articles intended only for official use.

<sup>1</sup>Minister's Directive of 25 January 1980.



2. The "official use" means when it is used for the following cases:

- (a) Official documents and materials necessary for the management of the missions abroad and for their diplomatic negotiations;
- (b) Letters and other materials required for the maintenance of security;
- (c) Semi-official correspondence and communications; and
- (d) Other matters recognized as important by the Minister of Foreign Affairs and the heads of the missions.

#### *Article 26. Receiving and sending of the bag*

The bag shall be handled only by an official appointed to that capacity among civil servants higher than grade 7. However, the Head Office of the Ministry of Foreign Affairs (hereinafter referred to as "Head Office") may designate agents which assist the Ministry in transportation and customs clearance of the bags under the supervision of the official in charge. The agent shall be designated by the Ministry among the transportation companies affiliated with the International Air Transport Association (IATA).

#### *Article 27. Official in charge of the bag*

1. The bags shall be handled only by the officials in charge, and the officials shall be responsible for possible accidents caused by their own negligence.

2. Each mission abroad shall provide the Head Office with the name of its official in charge at the beginning of each year and, in case the official is replaced, it shall report the successor's name, title, date of replacement and the reason for replacement to the Head Office without delay.

#### *Article 28. Request for dispatch*

1. The documents and materials to be sent by the bag shall be forwarded to the Documents and Archives Division by 15.00 hours (by 12.00 hours on Saturdays) on the previous day to the sending date, the schedule of which is arranged by the Documents and Archives Division. However, urgent documents or materials may be dispatched separately by a special bag and, in this case, the request shall be made officially in writing by Assistant Ministers, Directors-General, the Inspector-General, the Director of the Administration Division or the Dean of the Institute of Foreign Affairs and National Security.

2. The Government authorities (hereinafter referred to as "other authorities") or private citizens other than the Head Office or overseas missions may not use the bag, except when Assistant Ministers, Directors-General, the Inspector-General, the Director of the Administration Division, the Dean of the Institute of Foreign Affairs and National Security or heads of missions abroad, recognizing the importance of the documents and materials as related to the diplomatic mission and its function, have made a written request.

3. The expenses concerned, in paragraph 2, shall be charged to the requesting authorities.

#### *Article 29. Special bag and cargo*

1. When the official in charge sends a special bag, he shall inform the consignee in advance of the flight number, air way-bill number, destination, date of arrival, etc.

2. If the weight of the documents does not exceed 3 kilograms and the contents of such are less important, the head of the mission abroad may send them in sealed yellow envelopes by air freight, registered mail or parcel.

3. If the cargo is heavy and large and less urgent, it may be sent by ship as diplomatic cargo.

4. Newspapers, books or other materials may be sent by air or sea mail depending on their urgency. In such a case, they shall bear the visible external mark "diplomatic freight".

#### *Article 30. Control of the bag and inspection of the contents*

1. The staff of the Documents and Archives Division of the Head Office and the official in charge in the missions abroad shall control the contents of the bag in accordance with article 25 and, if necessary, may open and inspect the contents of the bag. However, at the special request of the authorities concerned, referred to in article 28, paragraph 2, the presentation of the "list of items" and the inspection of the contents may be omitted.

2. When difficulties are expected in repacking the material or freight in its original form after the bag has been opened for inspection, the inspection may be substituted by the presentation of the Confirmation of the Contents issued by the official in charge in the sending office according to the form shown in attachment 1.

#### *Article 31. Security measures*

For the maintenance of security, all the documents to be sent by the bag shall be put in envelopes and sealed up. The bag containing such documents shall be packed and locked according to the procedures and be sealed up by lead ball with the seal of the Ministry of Foreign Affairs.

#### *Article 32. Inquiry concerning a bag not arrived*

If the bag does not arrive in due time or the locking of the bag, including the lead ball, is not in a proper form, the head of the mission abroad shall immediately inquire of the air freight company concerned about it and report the fact to the Head Office without delay.

#### *Article 33. Communicating a change in the dispatching schedule*

If the sending office is to change the dispatching schedule, it shall inform the receiving office of the fact beforehand in the same manner as when a special diplomatic bag is being sent.

#### *Article 34. List of contents*

The official in charge prepares three copies of the list of documents and material according to the form shown in attachment 2; one of these shall be kept in the sending office and the remaining two shall be forwarded after being signed by the sending official. The receiving official shall return one of the two copies to the sending office after signing it and retain the other. The receiving official shall compare the list with the contents of the bag.

#### *Article 35. Comparing the list with the contents of the bag*

If the contents do not conform to the list, the receiving official shall immediately report the fact to the sending official. In the case of a bag delivered to another mission, that mission shall send it back to the sending office without delay. However, if the mission which has received a wrong bag finds it more convenient, in terms of distance, to send it directly to the original receiving office, it shall forward it and report the fact to the Head Office without delay.

#### *Article 36. Exception to the contents limitation*

Medical supplies and necessities, being recognized *mutatis mutandis* as items prescribed in article 25, may be sent in the bag only for the use of the staff of missions abroad in special areas where living conditions are notably uncomfortable. The above-mentioned dispatch is subject to the approval of the Minister of Foreign Affairs.

## Spain

[Original: Spanish]  
[2 February 1982]

# *Regulations concerning the diplomatic bag of 1 July 1968*

## SECTION I. DEFINITION AND CATEGORIES OF BAG

### Article 1

The Spanish diplomatic bag is the means of communication which ensures the inviolability of official correspondence between the central Government of the State and its missions abroad.

### Article 2

Diplomatic bags may, according to their characteristics and the means of transport used, belong to the following categories:

- (a) Accompanied (normally by air);
- (b) Forwarded
  - 1. By air;
  - 2. By sea;
  - 3. By land;
- (c) Postal (consigned by ordinary mail under international agreements). According to whether or not a particular periodicity is prescribed, bags may be either regular or special.

### Article 3

Accompanied bags shall contain confidential, classified or urgent documents only and shall be made up whenever the nature of their contents warrants. Such bags shall be entrusted, against receipt, to the flight personnel of national airlines, who shall deliver them at the place of destination, against receipt, to authorized members of diplomatic and consular missions or to official couriers of this Ministry [of Foreign Affairs]. In exceptional cases, they may be delivered to the Chief of Operations of the Spanish airline Iberia.

### Article 4

Bags forwarded as air freight shall be used for diplomatic communication with posts served by foreign airlines. Unclassified official correspondence shall also continue to be forwarded by national airlines.

### Article 5

The use by Spanish missions of bags forwarded by sea or by land shall be limited to those special consignments whose weight, dimensions and lack of urgency render it desirable. Prior authorization from this Ministry is needed for the consignment of bags by these means. Since the delivery of bags to the Ministry is subject to certain customs formalities, the instructions of the Department of Archives and Diplomatic Mail regarding their make-up and consignment must be complied with.

### Article 6

Postal diplomatic bags are consigned by ordinary mail, with franking privileges, under international agreements between Spain and the countries of the Americas, Germany, Italy, Portugal and the United Kingdom. In accordance with those agreements, such bags shall consist of packages weighing less than 20 kilograms, the three dimensions of which do not exceed 140 centimetres in all or 60 centimetres individually.

## SECTION II. PERSONS RESPONSIBLE FOR BAGS

### Article 7

- 1. Heads of diplomatic mission or consular post are responsible for the bag service at the mission or post in question.

- 2. Each mission or post shall maintain a list of officers who may perform the duty of delivering and accepting bags. The list must be proposed by the head of the diplomatic mission or consular post and approved by the General Foreign Service Directorate.

### Article 8

- 1. The Chief of the Diplomatic Bag Unit is directly responsible for his unit at the Ministry of Foreign Affairs, under the authority of the Department of Archives and Diplomatic Mail.

- 2. Official couriers are the officers responsible for accompanying and accepting bags. They shall normally perform this duty in the central Government. Their status shall be certified by means of appropriate credentials.

### Article 9

Bags may be accompanied to their final destination by a specially designated person, who shall be provided with a certificate giving his personal particulars and the number, weight and other characteristics of the packages constituting the bags, so that they can be distinguished from his personal baggage. Abroad, the certificate shall be signed by the appropriate head of diplomatic mission or consular post. At this Ministry, the certificate shall be signed by the Director of Archives and Diplomatic Mail.

### Article 10

Designated officers or carriers of a bag must deliver it without fail to the head of mission to whom it is addressed or to the Chief of the Diplomatic Bag Unit at the Ministry of Foreign Affairs, who alone are authorized to receive bags and arrange for the distribution of their contents. Any person improperly opening a diplomatic bag will incur liability.

## SECTION III. CONTENT AND MAKE-UP OF BAGS

### Article 12

- 1. The costs of air freight for consignments from other departments or from chancelleries and attachés' offices of missions abroad shall be charged to the budget of the Ministry of Foreign Affairs when they are included in a regular bag. If their size or characteristics necessitate the use of a separate bag, or if their urgency requires the making up of a special bag, such costs shall be borne by the department or office in which they originate.

- 2. In choosing the most convenient and economical means of transport, the Department of Archives and Diplomatic Mail or heads of mission, as the case may be, shall consider the circumstances and urgency of each consignment. The foregoing shall also be taken into account by our missions with a view to not requesting consignments by diplomatic bag from other ministerial departments without prior notification to the Department of Archives and Diplomatic Mail.

### Articles 11 and 13-22

[Classified internal provisions].

## SECTION IV. FORM OF BAGS

### Article 23

The bag shall consist of one or more sealed bags or one or more sealed canvas packages. Each bag shall have attached to it a tag or a stick-on label in a visible position bearing the stamp of the Ministry of Foreign Affairs or the mission of origin and the words "diplomatic bag". Diplomatic bags may be addressed only to the Minister of Foreign Affairs, heads of diplomatic mission or officers in charge of a consular post. Consignments dispatched by other departments or addressed to other offices, even within the Ministry of Foreign Affairs itself, have no such status and are not, therefore, regarded as diplomatic bags by the Spanish or foreign customs.

### Article 24

[Classified internal provisions.]

## Article 25

Heads of mission or heads of post shall ensure that surplus empty bags do not remain at their missions or posts; they must be returned regularly to the Ministry by sea or land, or even by air if other communication services are infrequent.

## Union of Soviet Socialist Republics

[Original: Russian]  
[31 March 1982]

*Information on enforceable enactments in the USSR concerning the status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier*

## I

1. Soviet legislation defines the legal status of the diplomatic courier and diplomatic bag not accompanied by diplomatic courier in complete accordance with the 1961 Vienna Convention on Diplomatic Relations, to which the Soviet Union is a party.
2. The basic document of Soviet legislation in force with regard to this question is the Regulations concerning Diplomatic and Consular Missions of Foreign States in the Territory of the Union of Soviet Socialist Republics, approved by a decree of the Presidium of the Supreme Soviet of the USSR dated 23 May 1966.<sup>1</sup> The rules concerning the diplomatic courier and the diplomatic bag which are contained in the Regulations set out in detail and further develop the relevant provisions of the 1961 Vienna Convention.
3. Provisions concerning the legal status of the diplomatic courier and the diplomatic bag are also contained in the Customs Code of the USSR, approved by a decree of the Presidium of the Supreme Soviet of the USSR dated 5 May 1964.<sup>2</sup> The Code provides that "the procedure of admission across the State frontier of the USSR . . . of the diplomatic bag of the USSR and the personal belongings of Soviet diplomatic couriers shall be determined by legislation of the USSR and also by rules approved by the Ministry of Foreign Trade in accordance with an agreement with the Ministry of Foreign Affairs of the USSR" (article 58). The procedure of admission across the State frontier of the USSR of the diplomatic bag and personal belongings of foreign diplomatic couriers is determined "by legislation of the USSR and also by rules approved by the Ministry of Foreign Trade in accordance with an agreement with the Ministry of Foreign Affairs of the USSR and the Ministry of Finance of the USSR" (article 59).
4. The Regulations concerning the protection of the State frontier of the Union of Soviet Socialist Republics, approved by a decree of the Presidium of the Supreme Soviet of the USSR dated 5 August 1960,<sup>3</sup> state that "the admission of persons across the State

frontier of the USSR shall be permitted only if such persons have the required and properly executed documents entitling them to enter or leave the USSR and shall take place at the control stations of the frontier forces" (article 11). Article 12 of the Regulations states that "admission of the diplomatic bag across the State frontier of the USSR shall be handled by the customs offices in accordance with the Customs Code of the USSR and special instructions".

5. The provisions cited above are set out in detail in the Regulations concerning Entry into and Exit from the USSR, approved by a resolution of the Council of Ministers of the USSR dated 22 September 1970, and also in the Rules concerning Admission Across the State Frontier of the USSR of the Diplomatic Bag of the USSR and of Foreign States and the Personal Belongings of Diplomatic Couriers, approved by the Ministry of Foreign Trade on 4 April 1967.

6. A number of other legislative documents, whose provisions relate to diplomatic couriers of foreign States as well, are in effect in the Soviet Union. Among these documents, mention should first be made of the Act concerning the Legal Status of Foreign Citizens in the USSR, of 24 June 1981.<sup>4</sup> A number of special rules are contained in Soviet criminal law. Under the USSR Act on Criminal Responsibility for Crimes against the State, of 25 December 1958,<sup>5</sup> terrorist acts—the murder of a representative of a foreign State in order to provoke war or international complications, or grievous bodily harm inflicted upon such a representative with the same intentions—are considered particularly dangerous crimes against the State. Persons who have committed such crimes are criminally responsible under article 4 of the Act. This rule is reproduced in the Criminal Code of the Russian Soviet Federated Socialist Republic<sup>6</sup> (article 67) and in the criminal codes of other Union Republics. According to the commentaries to the Criminal Code of the RSFSR, this rule applies to terrorist acts against "persons who are in our country on the instructions of their Governments" and therefore should also be applied in cases in which a terrorist act has been committed in the territory of the USSR against a diplomatic courier of a foreign State. Conditional remission of the remainder of the punishment and commutation of the punishment under article 44 of the Basic Principles of Criminal Legislation of the USSR and the Union Republics, of 25 December 1958,<sup>7</sup> may not be applied to a person who has been sentenced for this type of crime.

7. According to article 4 of the above-mentioned Basic Principles of Criminal Legislation, where a crime has been committed within the territory of the USSR by diplomatic representatives of foreign States or by other citizens who, according to the laws or international agreements, do not come within the jurisdiction of Soviet courts in criminal cases, the question of their criminal responsibility is settled through the diplomatic

<sup>1</sup> *Sbornik zakonov SSSR i ukazov Prezidiuma Verkhovnogo Soveta SSSR 1938–1975* [Compendium of laws of the USSR and of decrees of the Presidium of the Supreme Soviet of the USSR, 1938–1975] (Moscow), vol. 2 (1975), p. 280.

<sup>2</sup> *Ibid.*, vol. 1, p. 417.

<sup>3</sup> *Ibid.*, vol. 2, p. 392.

<sup>4</sup> *Vedomosti Verkhovnogo Soveta Soyuz Sovetskikh Sotsialisticheskikh Respublik* [Bulletin of the Supreme Soviet of the Union of Soviet Socialist Republics] (Moscow), vol. 44, No. 26 (1 June 1981), sect. 836.

<sup>5</sup> *Sbornik . . . (op. cit.)*, vol. 3, p. 251.

<sup>6</sup> *Zakony RSFSR i Postanovleniya Verkhovnogo Soveta RSFSR* [Laws of the RSFSR and decrees of the Supreme Soviet of the RSFSR], third session of the fifth legislature (Moscow, 1960), p. 58.

<sup>7</sup> *Sbornik . . . (op. cit.)*, vol. 4 (1976), p. 60.

channel. The same rule applies to persons who have committed administrative offences under the Basic Principles of Legislation of the USSR and the Union Republics concerning Administrative Offences, of 23 October 1980 (article 8).<sup>8</sup>

## II

### LEGISLATIVE TEXTS

#### A. Regulations concerning diplomatic and consular missions of foreign States in the territory of the Union of Soviet Socialist Republics<sup>9</sup>

##### [Extracts]

##### GENERAL PROVISIONS

###### Article 1

Diplomatic missions (embassies or non-ambassadorial missions) and consular missions (consulates-general, consulates, vice-consulates or consular agencies) in the territory of the USSR shall, as organs of a foreign State, be accorded the privileges and immunities set forth in these Regulations for the exercise of their functions as determined in accordance with the norms of international law.

Privileges and immunities shall also be accorded to the personnel of the said missions to the extent specified in the following articles.

###### Article 2

It is the duty of all persons enjoying the privileges and immunities set forth in these Regulations to respect the laws, resolutions and rules in force in the USSR and the Union Republics.

###### Article 3

In those cases in which an international treaty to which the USSR is a party establishes rules other than those contained in these Regulations, the rules of the international treaty shall apply.

###### Article 4

These Regulations shall extend (*mutatis mutandis*) to diplomatic and consular missions of foreign States which may be opened in the territory of a Union Republic by agreement between that Republic and the foreign State.

##### DIPLOMATIC MISSIONS

###### Article 9

A diplomatic mission may communicate freely with its Government, with its country's consular missions in the territory of the USSR, and also with its country's diplomatic and consular missions in third States, by means of . . . the diplomatic bag.

. . .

The diplomatic bag shall not be opened or detained. All parcels constituting the diplomatic bag must bear visible external indications of their character and may contain only diplomatic documents and articles intended for official use.

The procedure for admission of the diplomatic bag across the State frontier of the USSR shall be determined by rules issued by the Ministry of Foreign Trade in accordance with an agreement with the Ministry of Foreign Affairs of the USSR and the Ministry of Finance of the USSR.

The diplomatic courier shall enjoy personal inviolability in the performance of his duties; he shall not be liable to arrest or detention.

The appropriate organs of the USSR and the Union Republics shall afford every assistance to diplomatic couriers in order to ensure their unimpeded passage to the destination and place of safe-keeping of the diplomatic bag conveyed by them.

The provisions of this article shall also apply to temporary diplomatic couriers appointed for the conveyance solely of a specific diplomatic bag (*ad hoc* diplomatic couriers). The immunities accorded to temporary diplomatic couriers shall cease to apply when they have delivered the diplomatic bag to its destination.

By special agreement with a foreign State, the diplomatic bag may be transmitted through the usual channels of communication without an accompanying courier or may be entrusted to the captain of a civil aircraft, who shall not be considered a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly from the captain of the aircraft.

##### CONSULAR MISSIONS

###### Article 24

A consular mission may communicate freely with its Government, with its country's diplomatic mission and consular missions in the territory of the USSR and with its country's diplomatic and consular missions in third States by means of . . . the diplomatic bag.

#### B. Regulations concerning entry into and exit from the Union of Soviet Socialist Republics<sup>10</sup>

##### [Extracts]

##### ENTRY INTO THE UNION OF SOVIET SOCIALIST REPUBLICS

1. The entry of Soviet citizens into the Union of Soviet Socialist Republics shall be permitted on the basis of valid Soviet diplomatic or service . . . passports . . . and certificates of return.

2. The entry of foreign citizens and stateless persons into the Union of Soviet Socialist Republics shall be permitted on the basis of valid foreign passports, or equivalent documents, when furnished with Soviet entry visas, unless another procedure for entry has been established by agreement between the Union of Soviet Socialist Republics and the country concerned.

3. Visas for entry into the Union of Soviet Socialist Republics shall be issued abroad to foreign citizens and stateless persons by Soviet embassies, missions and consulates or, in individual cases, by Soviet representatives specially empowered for that purpose.

4. In appropriate circumstances, visas for entry into the USSR may also be issued in the territory of the Union of Soviet Socialist Republics (exit-entry visas) when a citizen travels abroad for a limited period. Such visas shall be issued in the prescribed manner by the Ministry of Foreign Affairs of the USSR, by the ministries of foreign affairs of the Union Republics, by the diplomatic agencies of the Ministry of Foreign Affairs of the USSR, by the Ministry of Internal Affairs of the USSR, by the ministries of internal affairs of the Union Republics and Autonomous Republics and by the departments of internal affairs of the executive committees of territorial, regional and town Councils of Workers' Deputies.

##### EXIT FROM THE UNION OF SOVIET SOCIALIST REPUBLICS

5. The exit of Soviet citizens from the Union of Soviet Socialist

<sup>8</sup>*Vedomosti* . . . , vol. 43, No. 44 (29 October 1980), sect. 909.

<sup>9</sup>Decree of the Presidium of the Supreme Soviet of the USSR of 23 May 1966; see footnote 1 above.

<sup>10</sup>Resolution of the Council of Ministers of the USSR of 22 September 1970.

Republics shall be permitted on the basis of the valid documents listed in paragraph 8, subparagraphs (a) to (d), of these Regulations.

6. The exit of foreign citizens and stateless persons from the Union of Soviet Socialist Republics shall be permitted on the basis of valid foreign passports or equivalent documents, when furnished with an exit visa, unless a different procedure for exit has been established by agreement between the Union of Soviet Socialist Republics and the country concerned.

7. Visas for exit from the Union of Soviet Socialist Republics shall be issued in the prescribed manner by the Ministry of Foreign Affairs of the USSR, by the ministries of foreign affairs of the Union Republics, by the diplomatic agencies of the Ministry of Foreign Affairs of the USSR, by the Ministry of Internal Affairs of the USSR, by the ministries of internal affairs of the Union Republics and Autonomous Republics and by the departments of internal affairs of the executive committees of territorial, regional and town Councils of Workers' Deputies.

Visas for the exit of foreign citizens and stateless persons from the Union of Soviet Socialist Republics may also be issued abroad (entry-exit visas) when a person enters the USSR for a limited period. Such visas shall be issued by Soviet embassies, missions and consulates or, in individual cases, by Soviet representatives specially empowered for that purpose.

#### DOCUMENTS ENTITLING PERSONS TO CROSS THE STATE FRONTIER OF THE USSR

8. The following documents may be issued to a citizen of the Union of Soviet Socialist Republics for exit from the USSR, sojourn abroad and return to the USSR:

- (a) A diplomatic passport;
- (b) A service passport . . .

. . .

In the absence of such documents, a certificate of return may be issued for return to the USSR.

9. Diplomatic and service . . . passports shall be issued to citizens of the Union of Soviet Socialist Republics who are to travel abroad by the Ministry of Foreign Affairs of the USSR and the ministries of foreign affairs of the Union Republics in accordance with paragraphs 13 and 14 . . . of these Regulations.

Diplomatic and service . . . passports and certificates of return to the USSR shall be issued to citizens of the Union of Soviet Socialist Republics who are abroad by Soviet embassies, missions and consulates or, in individual cases, by Soviet representatives specially empowered for that purpose.

. . .

13. Diplomatic passports shall be issued:

. . .

- (d) . . . to diplomatic couriers . . .

14. Service passports shall be issued:

- (a) to ministry officials . . .

. . .

17. Diplomatic or service . . . passports shall be issued respectively to wives, children aged less than 18 years and unmarried daughters aged more than 18 years travelling with the persons mentioned in paragraphs 13, 14 . . . or travelling to meet such persons. Children aged less than 16 years may also be included in the passports of one of their parents or of the person with whom they are travelling.

. . .

19. Foreign visas for persons travelling on official business shall be received through the Ministry of Foreign Affairs of the USSR, the missions of the Soviet Union in other countries, the ministries of foreign affairs of the Union Republics and the embassies and missions of the USSR in other countries.

#### C. Rules concerning admission across the state frontier of the USSR of the diplomatic bag of the USSR and of foreign States and the personal belongings of diplomatic couriers<sup>11</sup>

##### Based on articles 58 and 59 of the Customs Code of the Soviet Union

1. The following shall have the right of unhindered communication by means of the diplomatic bag: . . . the Ministries (Departments) of Foreign Affairs of States with which the USSR maintains diplomatic or consular relations; the diplomatic and consular missions of those States in the territory of the USSR and in third countries; and international organizations in the territory of the USSR and the missions of foreign States accredited to such organizations if their accreditation is pursuant to an international agreement to which the Soviet Union is a party.

On a basis of reciprocity, this right may be extended to cover transit through the territory of the Soviet Union of the diplomatic bag of foreign States with which the USSR has no diplomatic or consular relations.

2. The diplomatic bag shall not be opened or detained when crossing the State frontier of the USSR.

All parcels constituting the diplomatic bag must bear visible external indications of their character and may contain only official correspondence and documents or articles intended for official use.

Each parcel of the diplomatic bag must be sealed with wax or lead seals by the sender and must bear a gummed label with the words *expédition officielle*. The weight of the diplomatic bag sent to the USSR may be limited on the basis of reciprocity. There shall be no limit on the weight of the diplomatic bag sent in transit through the territory of the USSR.

3. The diplomatic courier must be provided with an official document (courier's certificate) indicating his status and the number of parcels constituting the diplomatic bag. The said document must be signed by the official empowered for that purpose and must bear the stamp of the office sending the diplomatic bag.

4. The diplomatic bag may be entrusted to the captain of a civil aircraft. In such a case the captain of the aircraft shall be provided with an official document (courier's certificate) indicating the number of parcels constituting the diplomatic bag, but he shall not be considered a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag from the captain of the aircraft direct and without hindrance.

5. The diplomatic bag may also be entrusted to a temporary (*ad hoc*) diplomatic courier, who shall be provided with an official document (courier's certificate). In such a case, the provisions of these Rules shall apply, except that his entitlement to the privileges and immunities enjoyed by diplomatic couriers in the execution of their duties shall cease as soon as the diplomatic bag entrusted to him has been delivered to its destination.

6. The procedure and conditions for the dispatch of the properly constituted diplomatic bag transmitted through the usual channels of communication without an accompanying diplomatic courier shall be governed by agreements concluded between the Ministry of Foreign Affairs of the USSR and the competent organs of foreign States.

7. When bringing the diplomatic bag into the territory of the USSR, the diplomatic courier or the captain of the aircraft shall submit to the customs office an official document (courier's certificate) for each parcel of the bag.

The courier's certificate covering the foreign diplomatic bag must bear the visa of the Ministry of Foreign Affairs of the USSR when the diplomatic bag leaves the Soviet Union and that of the diplomatic or consular mission of the USSR when the diplomatic bag enters the USSR.

The visa requirement for courier's certificates may be waived on the basis of reciprocity. The Central Customs Administration shall supply customs offices with a list of the countries for which the visa requirement for courier's certificates has been abolished.

<sup>11</sup> Approved by the Ministry of Foreign Trade on 4 April 1967.

8. Customs offices shall inspect the diplomatic bag only externally, and in the course of such inspection they shall determine whether it is constituted in conformity with these Rules. Parcels not meeting the requirements of these Rules shall not be regarded as forming part of the diplomatic bag.

9. The personal belongings of diplomatic couriers which are imported for their personal use shall be admitted without customs inspection.

**D. Act of the Union of Soviet Socialist Republics concerning the Legal Status of Foreign Citizens in the USSR<sup>12</sup>**

**[Extracts]**

**I. GENERAL PROVISIONS**

**Article 1. Foreign citizens in the USSR**

Persons who are not citizens of the USSR and who possess evidence of citizenship of a foreign State shall be recognized as foreign citizens in the USSR.

In accordance with the Constitution of the USSR, the rights and freedoms provided for by law shall be guaranteed to foreign citizens in the USSR.

**Article 3. Principles concerning the legal status of foreign citizens in the USSR**

Foreign citizens in the USSR shall enjoy the same rights and freedoms and bear the same responsibilities as do citizens of the USSR, unless otherwise provided in the Constitution of the USSR, this Act or other Soviet legislative acts.

Foreign citizens in the USSR shall be equal before the law, irrespective of their origin, social or property status, race, nationality, sex, education, language, attitude towards religion, type and nature of occupation or other characteristics.

With regard to citizens of those States in which the rights and freedoms of citizens of the USSR are subject to special limitations, the Council of Ministers of the USSR may establish corresponding limitations.

The enjoyment by foreign citizens of rights and freedoms in the USSR must not prejudice the interests of Soviet society and the State or the rights and legitimate interests of citizens of the USSR or other persons.

**Article 4. Obligation to respect the Constitution of the USSR and to observe Soviet laws**

The exercise of the rights and freedoms provided in the USSR for foreign citizens shall be contingent upon the fulfilment by them of the obligations established by Soviet legislation.

Foreign citizens in the USSR shall be obliged to respect the Constitution of the USSR, to observe Soviet laws and to respect the rules of socialist society and the traditions and customs of the Soviet people.

**Article 5. Foreign citizens permanently resident and temporarily staying in the USSR**

...

Foreign citizens who are present in the USSR for any lawful purpose shall be considered to be temporarily staying in the USSR. They shall be obliged duly to register their foreign passport or equivalent document and to leave the USSR upon expiration of the period of stay prescribed for them.

**Article 18. Inviolability of the person and of living quarters**

In accordance with Soviet legislation, foreign citizens in the USSR shall be guaranteed inviolability of the person and of living quarters and other personal rights.

**Article 19. Travel in Soviet territory and choice of place and of residence**

Foreign citizens may travel in Soviet territory . . . in accordance with the procedure established by the legislation of the USSR. Limitations on travel . . . shall be permitted when necessary for the maintenance of State security or the preservation of public order, health and morals, or for the defence of the rights and legitimate interests of citizens of the USSR or other persons.

**III. ENTRY INTO THE USSR AND EXIT FROM THE USSR OF FOREIGN CITIZENS**

**Article 24. Entry into the USSR**

Foreign citizens may enter the USSR on a valid foreign passport or equivalent document provided they hold a permit issued by the competent Soviet bodies.

A foreign citizen may be denied entry into the USSR:

- (1) In the interests of maintaining State security or preserving public order;
- (2) If necessary for defence of the rights and legitimate interests of citizens of the USSR or other persons;
- (3) If, during a previous stay in the USSR, facts were established concerning the violation by him of the legislation governing the legal status of foreign citizens in the USSR, or customs, currency or other Soviet legislation;
- (4) If, upon submission of his application for entry, he furnished false information about himself or did not present the necessary documents;
- (5) On any other grounds established by the legislation of the USSR.

**Article 25. Exit from the USSR**

Foreign citizens may leave the USSR on a valid foreign passport or equivalent document provided they hold a permit issued by the competent Soviet bodies.

A foreign citizen shall not be permitted to leave the USSR:

- (1) If there are grounds for bringing a criminal charge against him (prior to completion of proceedings against him);
- (2) If he was convicted of a crime (prior to completion of sentence or prior to release from sentence);
- (3) If his departure is contrary to the interests of maintaining State security (prior to the removal of the circumstances hindering his departure);
- (4) If there are any other grounds established by the legislation of the USSR hindering his departure.

The departure of a foreign citizen from the USSR may be postponed until he has fulfilled property obligations involving the vital interests of citizens of the USSR or other persons or of State, co-operative or other public organizations.

**Article 26. Transit**

Foreign citizens in transit through the territory of the USSR shall proceed, in observance of the rules governing transit, to a frontier point of exit from the USSR by the established itinerary and may stop in Soviet territory provided they hold a permit issued by the competent Soviet bodies.

<sup>12</sup>Promulgated on 24 June 1981; see footnote 4 above.

IV. LIABILITY OF FOREIGN CITIZENS  
CURTAILMENT OF PERIOD OF STAY. EXPULSION

*Article 28. Grounds for liability  
for violation of the law*

Foreign citizens who have committed a crime or administrative or other infringements of the law in the territory of the USSR shall be liable under the same conditions as citizens of the USSR.

*Article 29. Liability for violation of the rules  
governing stay in the USSR and transit  
through the territory of the USSR*

Where foreign citizens violate the rules governing stay in the USSR, i.e., residence without documents authorizing residence in the USSR or residence with invalid documents, non-observance of the established procedure for registration, travel and choice of place of residence, failure to leave upon the expiration of the period of stay prescribed for them or non-observance of the rules governing transit through the territory of the USSR, they may be subject, as an administrative punishment measure, to a warning or a fine not exceeding 50 roubles.

Penalties are imposed by the bodies responsible for internal affairs.

The malicious violation by foreign citizens of the rules governing stay in the USSR and transit through the territory of the USSR entails criminal liability.

*Article 31. Expulsion from the USSR*

A foreign citizen may be expelled from the USSR:

- (1) If his actions are contrary to the interests of maintaining State security or preserving public order;
- (2) If necessary for the protection of public health and morals or the defence of the rights and legitimate interests of citizens of the USSR or other persons;
- (3) If he grossly violated the legislation governing the legal status of foreign citizens in the USSR, or customs, currency or other Soviet legislation.

A decision on expulsion shall be taken by the competent Soviet bodies. A foreign citizen shall be obliged to leave the USSR within the period indicated in that decision. Individuals failing to leave in such cases shall be subject, with the approval of the public procurator, to compulsory detention and expulsion. Detention shall be permitted for the period required for expulsion.

V. FINAL PROVISIONS

*Article 33. Privileges and immunities  
of heads and officials of the missions  
of foreign States and other persons*

The provisions of this Act shall not affect the privileges and immunities established by the legislation of the USSR and by the international agreements of the USSR for heads and officials of foreign diplomatic and consular missions and other persons.

**Yugoslavia**

[Original: English]  
[27 April 1982]

**I**

1. Yugoslavia employs diplomatic couriers *ad hoc*, as well as accompanied and unaccompanied diplomatic bags, in communicating with all categories of its missions abroad and vice versa. Yugoslavia's experience in practice is that it has encountered most difficulties with

diplomatic bags not accompanied by diplomatic courier. There have been instances when transit States and some receiving States failed to give priority to the diplomatic bag, or failed to inform the diplomatic mission of the arrival of the diplomatic bag.

Under Yugoslav law, by Yugoslavia's ratifying—that is, accepting—an international treaty, that treaty becomes an integral part of Yugoslav law. This being the case, Yugoslavia has not enacted separate regulations on the implementation of article 27 of the 1961 Vienna Convention on Diplomatic Relations and the pertinent articles of other conventions dealing with this subject, in view of the fact that it has been confirmed by practice that Yugoslav authorities have not encountered any difficulty in the application of those articles. For the purpose of ensuring consistent application in Yugoslavia of the regulations of international law on diplomatic couriers and diplomatic bags, internal instructions were issued with a view to facilitating a more effective functioning of the system of dispatching and receiving diplomatic mail and diplomatic couriers. For example, the Federal Secretariat for Foreign Affairs sent a Circular Note on 12 May 1980 to all diplomatic missions in Belgrade on the procedure applicable when receiving and dispatching diplomatic mail (see sect. II below).

In the period since the Second World War, no judicial or arbitration decisions have been adopted relating to this question; this means that Yugoslavia has consistently fulfilled its obligations in respect of these matters.

2. In view of the fact that it has not to date submitted any written comments or observations, the Yugoslav Government avails itself of this opportunity to express the view that it considers desirable the adoption of additional regulations on the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The provisions of the existing international conventions regulating this matter<sup>1</sup> do not, it seems, fully solve all questions; consequently, specific problems in the application of the existing regulations emerge in practice. Yugoslavia has also encountered similar difficulties with respect to its diplomatic couriers and its diplomatic bag, although it believes these difficulties were caused not so much because of the non-existence or lack of precise meaning of the regulations of international law, as because of disrespect for such regulations on the part of individual States.

The Yugoslav Government believes that the work of the International Law Commission and future international instruments will contribute to promoting and ensuring a more effective functioning of diplomatic communication between States, which is of great importance for peaceful co-operation among them. Yugoslavia has always attached and continues to attach importance to this question, as is confirmed by the fact that it has ratified the above-mentioned conventions and that it has abolished visas with about 50 States;

<sup>1</sup> Art. III, sect. 10, of the 1946 Convention on the Privileges and Immunities of the United Nations (United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum)); art. IV, sect. 12, of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (*ibid.*, vol. 33, p. 261); art. 27 of the 1961 Vienna Convention on Diplomatic Relations; art. 35 of the 1963 Vienna Convention on Consular Relations; art. 28 of the 1969 Convention on Special Missions; and arts. 27 and 57 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.



and, in those cases where visas have not been abolished, the formalities for granting the Yugoslav entry visa have been reduced to the minimum.

3. As for the problems to which greater attention should be paid in the future, the Yugoslav Government wishes to communicate the following observations:

(a) *Definition of a diplomatic bag.* A more precise definition of the diplomatic bag should be given, since the definition in the existing conventions, in the opinion of the Yugoslav Government, is not adequate. Perhaps it should be clearly stated in the definition that a "diplomatic bag" constitutes, for all intents and purposes, a *bag* (perhaps even prescribing the maximum weight of the bag).

(b) *Contents of a diplomatic bag.* This question is closely linked with the previous one. As to the contents, the existing conventions laconically stipulate that a diplomatic bag "may contain only diplomatic documents or articles intended for official use".<sup>2</sup> Prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations there prevailed the notion that the diplomatic bag could contain only "diplomatic documents" and not "articles intended for official use". Obviously there are reasons why almost all States have accepted the solution outlined in article 27, paragraph 4, of the 1961 Vienna Convention. The Yugoslav Government, nevertheless, is of the opinion that there exist underlying causes for the reassessment of this provision in terms of having only some articles serving official purposes dispatched by diplomatic bag. It is well known that some States parties to the 1961 Vienna Convention have adopted internal regulations listing each article separately and limiting the number to three or four articles; obviously they are not satisfied with the solution contained in the existing conventions.

(c) *Dispatching of a diplomatic bag with the captain of a commercial ship.* The 1961 Vienna Convention permits the dispatching of a diplomatic bag with the captain of a commercial aircraft. The possibility should be provided whereby a diplomatic bag could also be entrusted to the captain of a commercial ship.

(d) *Control of the diplomatic bag.* It should be clearly specified what kind of control may be exercised by the receiving State or a transit State, and in what manner, in view of the modern technological possibilities for such an inspection without violating the secrecy or damaging the contents of the diplomatic bag. The existing conventions make no reference to this question at all. On the other hand, it is important to bear in mind that the security of air transport demands specific precautionary measures which should not be neglected.

4. The foregoing comments are of a preliminary nature. The Government of the Socialist Federal Republic of Yugoslavia will continue to follow the work of the Commission relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and retains the right subsequently to submit its observations on each point which it deems relevant and important.

## II

*Circular Note 949/80 of 12 May 1980 sent by the Federal Secretariat for Foreign Affairs to all diplomatic missions in Belgrade on the procedures applicable to receiving and dispatching diplomatic mail*

The Federal Secretariat for Foreign Affairs of the Socialist Federal Republic of Yugoslavia (Protocol) presents its compliments to the diplomatic missions in Belgrade and has the honour to inform them of the procedure with respect to the receipt and dispatch of the diplomatic bag at Belgrade International Airport.

The receipt and dispatch of the diplomatic bag at Belgrade International Airport will be carried out as before, in conformity with article 27 of the Vienna Convention on Diplomatic Relations, and in keeping with the necessary security measures in air traffic and the needs of the diplomatic missions. Therefore, the accompanied and unaccompanied diplomatic bag should bear visible external marks (a seal or *plomb*, address of the sender and address of the recipient), while the diplomatic courier should be furnished with an official document (courier's letter) indicating his status and the number of packages constituting the diplomatic bag.

In line with the above, the receipt and dispatch of the diplomatic bag will be carried out in the following manner:

1. On their arrival, diplomatic couriers carrying the diplomatic bag should be met by the authorized representatives of the diplomatic missions in the hall for baggage pick-up in the customs area in the basement. On departure, diplomatic couriers will be escorted by the representatives of the diplomatic missions to the customs control on the first floor.

2. The exchange of diplomatic bags will be carried out in a separate room located next to the passport control in the arrivals hall. The room bears the inscription "Diplomatic Mail".

3. If the diplomatic mail is received or dispatched by way of cases in the aircraft, or if it is received from a diplomatic courier or a captain of an aircraft who are unable to leave the aircraft, the authorized representatives of the diplomatic missions will be allowed access to the aircraft in the presence of an employee of the Enterprise for Airport Services.

4. When the accompanied or unaccompanied diplomatic bag is large in volume or heavy, the diplomatic missions should contact the duty officer of the Enterprise for Airport Services (tel: 601-166), indicating the kind of assistance required, the number of workers necessary to handle the bag and the time of arrival at the airport of representatives authorized by the diplomatic missions. The meeting place will invariably be in front of the main entrance 1 of Terminal 2. On arrival, diplomatic couriers carrying the bag to the baggage compartment of an aircraft may ask the ground hostess or the ramp manager for assistance.

5. Airport services will be charged, and customers are requested to sign the appropriate invoices.

6. Airport services are at the disposal of customers every day, except that on Saturdays and Sundays diplomatic bags received during the previous days will not be delivered.

<sup>2</sup> Art. 27, para. 4 of the 1961 Vienna Convention. The definition is not different in the other conventions mentioned in footnote 1.

For the purpose of meeting diplomatic couriers in the customs section, exchange of diplomatic bags in the designated room, pick-up or dispatch by way of cases in the aircraft, and pick-up from or delivery to couriers unable to leave the plane, officers of the diplomatic missions should be furnished with a special authorization from the head of their mission. On arrival at the airport, they should address the police officer at the desk at the official entrance on the first floor, except in the case of meeting diplomatic couriers (para. 1 above), when permission to enter the customs area is granted

by the customs officer at the official entrance in the basement.

In the hope that the described procedure for the pick-up and dispatch of the diplomatic bag is also in accordance with the requirements of the diplomatic missions and that it will facilitate an effective handling of the diplomatic bag, the Federal Secretariat for Foreign Affairs (Protocol) avails itself of this opportunity to renew to the diplomatic missions accredited to the Socialist Federal Republic of Yugoslavia the assurances of its high consideration.

**DOCUMENT A/CN.4/359\* and Add.1**

**Third report on the status of the diplomatic courier and the diplomatic bag  
not accompanied by diplomatic courier,  
by Mr. Alexander Yankov, Special Rapporteur**

[Original: English]  
[22 and 28 June 1982]

**CONTENTS**

<i>Note</i> .....		Page 248
<b>INTRODUCTION</b> .....	<i>Paragraphs</i> 1-11	248
<i>Sections</i>		
<b>I. RECONSIDERATION OF THE DRAFT ARTICLES ON GENERAL PROVISIONS</b> .....	12-59	249
A. Introductory note .....	12	249
B. Scope of the draft articles .....	13-20	250
Article 1. Scope of the present articles .....	19	251
Article 2. Couriers and bags not within the scope of the present articles .....	20	251
C. Use of terms .....	21-42	251
Article 3. Use of terms .....	42	255
D. General principles .....	43-59	255
Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags .....	56	257
Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State .....	56	257
Article 6. Non-discrimination and reciprocity .....	56	257
<b>II. DRAFT ARTICLES ON THE STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER AD HOC AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG</b> .....	60-128	258
A. Introductory note .....	60-61	258
B. Status of the diplomatic courier .....	62-103	258
1. Proof of status .....	62-79	258
Article 7. Proof of status .....	79	263
2. Appointment of a diplomatic courier .....	80-96	263
Article 8. Appointment of a diplomatic courier .....	96	266
Article 9. Appointment of the same person by two or more States as a diplomatic courier .....	96	266
3. Nationality of the diplomatic courier .....	97-103	266
Article 10. Nationality of the diplomatic courier .....	103	267
C. Functions of the diplomatic courier .....	104-128	267
1. Scope and content of the functions .....	104-110	267
Article 11. Functions of the diplomatic courier .....	110	269
2. Duration of the functions .....	111-128	269
(a) Commencement of the functions .....	111-114	269
Article 12. Commencement of the functions of the diplomatic courier .....	114	269
(b) End of the functions .....	115-128	269
Article 13. End of the function of the diplomatic courier .....	128	271
Article 14. Persons declared non grata or not acceptable .....	128	271

---

\* Incorporating A/CN.4/359/Corr.1-4.

## NOTE

Multilateral conventions mentioned in the present report:

Vienna Convention on Diplomatic Relations  
(Vienna, 18 April 1961)  
Hereinafter called 1961 Vienna Convention

Vienna Convention on Consular Relations  
(Vienna, 24 April 1963)  
Hereinafter called 1963 Vienna Convention

Convention on Special Missions  
(New York, 8 December 1969)

Vienna Convention on the Representation of States  
in their Relations with International  
Organizations of a Universal Character  
(Vienna, 14 March 1975)  
Hereinafter called 1975 Vienna Convention

*Source*

United Nations, *Treaty Series*, vol. 500, p. 95.

*Ibid.*, vol. 596, p. 261.

United Nations, *Juridical Yearbook 1969*  
(Sales No. E.71.V.4), p. 125.

*Ibid.*, 1975 (Sales No. E.77.V.3), p. 87.

## Introduction

1. This is the third report on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, submitted by the Special Rapporteur to the International Law Commission at its thirty-fourth session, pursuant to General Assembly resolution 36/114 of 10 December 1981. By paragraph 3 (b) of that resolution, the General Assembly recommended that the Commission should continue its work aimed at the preparation of draft articles on the topic under consideration.<sup>1</sup>

2. The Special Rapporteur has deemed it appropriate, before proceeding to the submission of the next set of draft articles, to include at the outset of the present report a brief substantive summary of the Commission's consideration of the main issues raised in the previous two reports,<sup>2</sup> so as to provide a certain continuity in the work of the Commission at the commencement of its present term and in its enlarged and renewed composition. He also wishes to propose revised texts for draft articles 1-6 in part I (General provisions), which were submitted in the second report, in the light of their consideration by the Commission at its thirty-third session and the Sixth Committee of the General Assembly at its thirty-sixth session. Those draft articles were referred to the Drafting Committee, but were not considered by it.

3. The preliminary report which was submitted by the Special Rapporteur to the Commission at its thirty-second session, in 1980, contained a detailed consolidated account of the history of the consideration of the topic<sup>3</sup> in view of the increasing dynamics of international relations, where the freedom of communication

for all official purposes, including the use of diplomatic couriers and bags, has acquired particular significance. The Commission noted that there were many issues relating to the status of the diplomatic courier and the diplomatic bag on which no specific provisions were contained in the four existing conventions on diplomatic law adopted under the auspices of the United Nations,<sup>4</sup> while on several issues the relevant provisions were of a very general nature. It was therefore suggested that further elaboration was desirable through codification and progressive development of international law.<sup>5</sup> It was pointed out that for many countries, and in particular for developing countries, the elaboration of rules on the status of the diplomatic courier *ad hoc* and the unaccompanied diplomatic bag were of paramount practical significance.<sup>6</sup>

4. The preliminary report reviewed the sources of international law relevant to the topic.<sup>7</sup> It was stated that those sources were mainly conventional in character and that there was a great scarcity of international judicial decisions. The main sources are the four codification conventions concluded under the auspices of the United Nations.<sup>8</sup> References were also made to important multilateral and bilateral treaties, national legislation, diplomatic correspondence and official communications or statements which provide evidence of State practice. The importance of *travaux préparatoires* for the four codification conventions, as well as writings of publicists and learned societies, was noted in the report.

5. The form of the eventual instrument was also considered in the light of the relevant resolutions of the

<sup>1</sup>For a detailed historical background of the Commission's work on the topic up to 1981, see *Yearbook . . . 1979*, vol. II (Part Two), p. 170, paras. 149-155; *Yearbook . . . 1980*, vol. II (Part Two), pp. 162 *et seq.*, paras. 145-176; and *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249.

<sup>2</sup>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.

<sup>3</sup>*Yearbook . . . 1980*, vol. II (Part One), pp. 232-235, document A/CN.4/335, paras. 7-15.

<sup>4</sup>The four multilateral conventions are: the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention (see above for a note concerning these instruments).

<sup>5</sup>*Yearbook . . . 1979*, vol. II (Part Two), pp. 171 *et seq.*, paras. 156-163.

<sup>6</sup>*Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 163.

<sup>7</sup>See *Yearbook . . . 1980*, vol. II (Part One), pp. 235 *et seq.*, document A/CN.4/335, paras. 17-34.

<sup>8</sup>See footnote 4 above.

General Assembly, which referred to "a protocol" or "an appropriate legal instrument". It was pointed out in the report and was supported by the Commission that, at this stage, draft articles should be construed, incorporating and combining elements of both *lex lata* and *lex ferenda*, and the final decision on the form of the instrument be left to the Members of the United Nations at an appropriate stage of the codification process.

6. The examination of empirical references as the best method for studying the topic was noted in the preliminary report, and was endorsed by the Commission.<sup>9</sup> Such an examination would take into account the nature, scope and precise functions of the couriers and the bag. The report emphasized that the facilities, privileges and immunities accorded to the diplomatic courier are *only* to facilitate the performance of his functions, which are instrumental in the exercise of the right of communication. In this connection, the Commission agreed with the approach advanced by the Special Rapporteur that in the codification and progressive development of international law in this field the main objective should be to strike a balance between the interests of the sending State for safe, unimpeded and expeditious delivery of the bag and the protection of the confidentiality of its content as a tool of official communications, on the one hand, and the legitimate security interests of the receiving and the transit States, on the other.

7. The preliminary report suggested a comprehensive and uniform approach with regard to the scope and the content of the draft articles, so as to include all types of diplomatic couriers and bags.<sup>10</sup> Thus, a comprehensive definition of diplomatic courier and bags was suggested, due to the lack of any definition in the existing conventions. In proposing such definitions, the report emphasized the importance of maintaining a balance between the interests and the obligations of the sending State with those of the receiving State, as well as of third States in cases of *force majeure*.

8. The report suggested that the draft articles should be formulated on the basis of fundamental principles of international law which underlie the four codification conventions, such as freedom of communication for all official purposes, respect for the laws and regulations of the receiving and transit State, and the principle of non-discrimination. While agreeing with this approach, the Commission also pointed out the need to elaborate

new rules applicable to a modern international communication system for all official purposes.<sup>11</sup>

9. With respect to the field of application of the rules governing the régime of all types of couriers and bags, it was noted by the Commission that the codification effort should be basically confined to couriers and bags used by States, though there were some suggestions also to include couriers and bags used for all official purposes of international organizations.<sup>12</sup>

10. In his preliminary report, the Special Rapporteur proposed as a working method that the draft articles consist of four parts. This structure of the draft articles, which the Commission, after consideration at its thirty-second session<sup>13</sup> and in the Sixth Committee of the General Assembly at its thirty-fifth session,<sup>14</sup> decided to retain, is as follows:<sup>15</sup>

*Part I.* General provisions;

*Part II.* The status of the diplomatic courier, including the courier *ad hoc* and the status of the captain of a commercial aircraft or ship carrying a diplomatic bag;

*Part III.* The status of the diplomatic bag, including the diplomatic bag not accompanied by diplomatic courier;

*Part IV.* Other provisions (miscellaneous provisions), including obligations of the transit State and the third State, relationship of the draft articles to the existing multilateral conventions in the field of diplomatic law concluded under the auspices of the United Nations, and other provisions.

11. Those were the main issues raised by the Special Rapporteur in his preliminary report, and subsequently considered by the Commission and the Sixth Committee. Following the main trends emerging from their discussions, the Special Rapporteur proceeded to the elaboration of the draft articles in part I (General provisions), which were submitted to the Commission in his second report.

<sup>11</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 164.

<sup>12</sup> *Ibid.*, para. 167.

<sup>13</sup> Some members of the Commission made comments or suggestions (*Yearbook . . . 1980*, vol. I, p. 264, 1634th meeting, para. 38 (Mr. Reuter); p. 276, 1636th meeting, para. 19 (Mr. Evensen); p. 282, 1637th meeting, para. 7 (Mr. Francis); p. 283, para. 16 (Mr. Thiam); p. 284, paras. 24–26 (Mr. Riphagen); and para. 29 (Sir Francis Vallat)), but the proposed structure as a working method received the general approval of the Commission (*Yearbook . . . 1980*, vol. II (Part Two), p. 165, para. 170).

<sup>14</sup> See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-fifth session of the General Assembly" (A/CN.4/L.326), para. 371.

<sup>15</sup> See second report, para. 7 (*Yearbook . . . 1981*, vol. II (Part One), pp. 155–156, document A/CN.4/347 and Add.1 and 2).

<sup>9</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 165.

<sup>10</sup> Such a broad approach might include all types of diplomatic couriers and diplomatic bags sent to diplomatic and consular missions, to special missions or to the representatives of international organizations. (*Yearbook . . . 1980*, vol. II (Part One), pp. 240 and 244–245, document A/CN.4/335, paras. 39–40, 57 and 62.

## I. Reconsideration of the draft articles on general provisions

### A. Introductory note

12. The second report submitted by the Special Rapporteur contained the text of six proposed draft articles which constituted part I of the entire set of draft articles

on the topic, entitled "General Provisions". The first three were: "Scope of the present articles" (art. 1),<sup>16</sup>

<sup>16</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 164, document A/CN.4/347 and Add.1 and 2, para. 49.

"Couriers and bags not within the scope of the present articles (art. 2),<sup>17</sup> "Use of terms" (art. 3),<sup>18</sup> and the other three, on the general principles of international law underlying the four codification conventions: "Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags" (art. 4),<sup>19</sup> "Duty to respect international law and the laws and regulations of the receiving and the transit State (art. 5),<sup>20</sup> and "Non-discrimination and reciprocity" (art. 6).<sup>21</sup> These six draft articles comprised three main issues, namely: the scope of the draft articles on the topic under consideration, the use of terms, and the general principles of international law relevant to the status of the diplomatic courier and the diplomatic bag. Therefore the Special Rapporteur proposes to examine these three issues in the light of the comments made by the Commission at its thirty-third session<sup>22</sup> and by the Sixth Committee of the General Assembly at its thirty-sixth session.<sup>23</sup>

### B. Scope of the draft articles

13. The scope of the draft articles on the topic was the subject of examination in the preliminary report and, in greater detail, in the second report submitted by the Special Rapporteur.<sup>24</sup> The Special Rapporteur has always maintained that a comprehensive and uniform approach should be applied to all kinds of couriers and bags used by States in their official communications with their missions abroad, as was stated in the preliminary report<sup>25</sup> and further elaborated in the second report.<sup>26</sup> Such an approach would correspond adequately to State practice that has been evolving since the 1961 Vienna Convention and the other multilateral conventions in the field of diplomatic law adopted under the auspices of the United Nations, which provided the basis for other multilateral and bilateral treaties in this field.

14. For the purposes of convenience, the Special Rapporteur has employed the global notions "official courier" and "official bag" as terms referring to all kinds of couriers and bags used by States as official means of communications with their missions abroad.<sup>27</sup> However, as was pointed out in the second report, the comprehensive and uniform approach "should be applied with greater caution, taking into account a pos-

sible reaction of anxiety and reservations of States when new concepts were introduced".<sup>28</sup> Accordingly, the Special Rapporteur suggested that, while retaining the well-established and familiar notions of "diplomatic courier" and "diplomatic bag", a new concept may be formulated to comprise, through an assimilation formula, all types of couriers and bags used by States for official communications.<sup>29</sup> This understanding was further confirmed as a prevailing trend emerging from the debate in the Commission and in the Sixth Committee in 1980.<sup>30</sup>

15. Following such a comprehensive and uniform approach with respect to the scope of the draft articles, the Special Rapporteur proceeded to the elaboration of the draft articles, taking into consideration the multi-purpose services of the diplomatic courier with respect to all types of missions of the sending State by carrying and delivering various kinds of official bags.<sup>31</sup> At the same time, the other main objective of a comprehensive and uniform approach was to provide a proper formula for applying the regime governing the status of the diplomatic courier and diplomatic bags used by States for all official purposes with their consular posts and other missions or delegations abroad.

16. It was suggested that, at this stage of the work of the Commission, the scope of the draft articles should be confined to the couriers and bags used by States, leaving aside, at least for the time being, the courier and the bag used for all official purposes by international organizations. This seemed to be the prevailing trend in the consideration of the scope of application of the draft articles which took place during the thirty-second and thirty-third sessions of the Commission and in the Sixth Committee of the General Assembly at its thirty-fifth and thirty-sixth sessions in 1980<sup>32</sup> and 1981.<sup>33</sup> However, some views expressed in the Commission and in the Sixth Committee found the exclusion of international organizations and some other subjects of international law from the scope of the present draft articles unjustifiable, considering the important role of international organizations in present international relations.<sup>34</sup> The Special Rapporteur pointed out that such a limitation was suggested for practical purposes so as to concentrate at this stage on the examination of the most common and widely known kinds of couriers and bags without losing sight of couriers and bags of international organizations.<sup>35</sup> Moreover, paragraph 2 of draft article 2 contains a safeguard provision protect-

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, pp. 188-189, para. 211.

<sup>19</sup> *Ibid.*, p. 190, para. 217.

<sup>20</sup> *Ibid.*, pp. 191-192, para. 225.

<sup>21</sup> *Ibid.*, pp. 192-193, para. 231.

<sup>22</sup> *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, paras. 228-249.

<sup>23</sup> *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 36th meeting, and 40th to 56th meetings; and "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly" (A/CN.4/L.339), paras. 180-200.

<sup>24</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 157 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 13-49.

<sup>25</sup> See footnote 10 above.

<sup>26</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 157-158, document A/CN.4/347 and Add.1 and 2, paras. 13-14 and 18-19.

<sup>27</sup> Missions abroad may be diplomatic missions, permanent missions to international organizations, special missions, consular posts, etc.

<sup>28</sup> *Ibid.*, p. 157, para. 14.

<sup>29</sup> *Ibid.*, paras. 14-15.

<sup>30</sup> *Yearbook . . . 1980*, vol. II (Part Two), p. 164, para. 167; and "Topical summary . . . thirty-fifth session . . ." (A/CN.4/L.326), paras. 366-382.

<sup>31</sup> Official bags may be diplomatic, consular, bags of special missions, permanent missions to international organizations or delegations to international conferences.

<sup>32</sup> See footnote 30 above.

<sup>33</sup> See *Yearbook . . . 1981*, vol. II (Part Two), p. 160, para. 235; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 40th meeting, para. 12 (United Kingdom), 49th meeting, para. 11 (Czechoslovakia) and para. 28 (Brazil), 51st meeting, para. 9 (Bulgaria); and "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), paras. 190-192.

<sup>34</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 160, para. 236; and "Topical summary . . ." (A/CN.4/L.339), para. 191.

<sup>35</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 163-164, document A/CN.4/347 and Add.1 and 2, paras. 46-48.

ing the legal status of the couriers and bags used by international organizations for official purposes with regard to the facilities, privileges and immunities which could be accorded to them within the framework of the present draft articles and under international law, including international treaties governing the diplomatic intercourse of international organizations.

17. During the debate on the scope of the present draft articles which took place in the Commission and in the Sixth Committee of the General Assembly in 1981, some pertinent critical observations were made which, in the view of the Special Rapporteur, warranted the reconsideration of draft article 1. Many members of the Commission generally agreed with the proposed scope advanced in the article. Some expressed doubt as to the desirability of referring to communications not only of the sending State with its missions abroad and between those missions, but also to communications directly "with other States or international organizations".<sup>36</sup> Similar observations were also made during the discussions in the Sixth Committee.<sup>37</sup> The Special Rapporteur's proposal on this matter was considered to be "an undue extension of the concept of diplomatic courier and diplomatic bag" and a deviation from the traditional field of communications between a State and its missions abroad.<sup>38</sup> It was maintained that the Commission should consider this point with greater caution in order to keep the scope of the draft articles within well-established limits based on common State practice.<sup>39</sup>

18. Taking into consideration the above-mentioned comments and suggestions, the Special Rapporteur would propose to amend draft article 1 by deleting the reference to direct communications between the sending State and the receiving State or international organization for the purpose of determining the scope of the present draft articles. Furthermore, upon reconsideration of the text of draft article 1, the Special Rapporteur is of the view that the substantive part of paragraph 2 could be incorporated at the end of paragraph 1 through an assimilation formula, modelled after the diplomatic courier and bag, referring to the use of consular couriers and bags, couriers and bags of special missions, or other missions or delegations.

19. Thus the revised draft article 1 which the Special Rapporteur would like to submit to the Commission for examination and approval reads as follows:

## PART I

### GENERAL PROVISIONS

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

**The present articles shall apply to communications of States for all official purposes with their diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, and also to**

**official communications of these missions and delegations with the sending State or with each other, by employing diplomatic couriers and diplomatic bags, as well as consular couriers and bags, couriers and bags of the special missions, permanent missions or delegations.**

20. Taking into consideration the observations made on draft article 2, "Couriers and bags not within the scope of the present articles", it is proposed to retain the text of that draft article as it appears in the second report, as follows:

#### *Article 2. Couriers and bags not within the scope of the present articles*

**1. The present articles shall not apply to couriers and bags used for all official purposes by international organizations.**

**2. The fact that the present articles do not apply to couriers and bags used for all official purposes by 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 with regard to the facilities, privileges and immunities which would be accorded under international law independently of the present articles.**

At the same time, it may be pointed out that, should the Commission reconsider this item in the light of its further examination in connection with the detailed elaboration of the rules relating to the status of the courier and the bag, then the problem of couriers and bags used by international organizations could be considered at a later stage of the work of the Commission.

### C. Use of terms

21. A substantial part of the second report was devoted to the examination of definitional problems inherent in the nature of the topic and relevant to the draft articles to be proposed.<sup>40</sup> Some of the terms to be used were well established by State practice and were embodied in existing treaties in the field of diplomatic law, including the four codification conventions adopted under the auspices of the United Nations. The terms in this category form a long list and enjoy general recognition. For the purpose of the present draft articles, those terms could be used directly or by reference to the respective international conventions of a universal character, such as the four codification conventions.

22. The main problem was the definition of the terms closely and specifically relating to the topic, which were only partially defined in the existing conventions.<sup>41</sup> In the view of the Special Rapporteur, those terms, which form the *sedes materiae* of the topic, deserved thorough examination based on the *travaux préparatoires* of the four codification conventions and the relevant State practice. Therefore it was suggested that they be given

<sup>36</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 160, para. 235.

<sup>37</sup> "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), para. 192.

<sup>38</sup> *Ibid.*; and *Official Records of the General Assembly, Thirty-sixth Session; Sixth Committee*, 49th meeting, para. 28 (Brazil).

<sup>39</sup> *Ibid.*, 48th meeting, paras. 54-55 (Spain).

<sup>40</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 164 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 50-211.

<sup>41</sup> This was the case with the terms "diplomatic courier" and "diplomatic bag", "consular courier" and "consular bag", as well as other kinds of couriers and bags, including the notion of the "courier *ad hoc*", and the status of the captain of a commercial aircraft or ship entrusted with the transportation of a diplomatic bag.



a preponderant place within the definitional provisions of the draft articles.<sup>42</sup>

23. The examination of the notions of the diplomatic courier and the diplomatic bag and the other types of official couriers and bags was concentrated on the identification of their essential legal features. The second report contained an extensive analytical survey of the legislative background of the pertinent provisions of the four codification conventions in order to reveal the main legal elements determining the notions of the professional diplomatic courier, the diplomatic courier *ad hoc* and the status of the captain of a commercial aircraft or ship entrusted with the transportation, custody and delivery of a diplomatic bag.<sup>43</sup> The same method was applied to the study of the notion of the diplomatic bag and the other kinds of bags used by States for all official purposes in the conduct of communications with their missions abroad.<sup>44</sup> Perhaps the Special Rapporteur placed too much emphasis on the need to insert more substantive legal components in the definition of the courier and the bag, which may have led to some excessively detailed and even cumbersome definitions.

24. In the course of the consideration of the second report, both by the Commission and in the Sixth Committee of the General Assembly in 1981, several critical observations were made which, in the view of the Special Rapporteur, deserve careful consideration. Some of these observations were of a general nature, while others referred to specific issues. One of the observations of a general nature referred to article 3 ("Use of terms"). It was pointed out that this draft article contained an unnecessarily long list of terms, some of which were self-explanatory, or their meaning was so well established in international law and State practice that their enumeration might only burden the text.<sup>45</sup> Another observation referred to some definitions in paragraph 1 of that article, particularly of the terms "diplomatic courier" (sub. para. (1)), "diplomatic courier *ad hoc*" (subpara. (2)), "diplomatic bag" (subpara. (3)), "transit State" (subpara. (7)), and others. It was maintained that those definitions contained certain substantive rules which could be eliminated from a provision which is meant to define briefly a legal term to be used in various subsequent articles.<sup>46</sup>

25. Specific comments were made in the Sixth Committee with regard to the definition of the term "diplomatic courier" contained in draft article 3, where "the transmission of an official oral message" was mentioned among the main functions of that courier. Some representatives expressed doubts as to the desirability of including within the scope of the functions of the diplomatic courier the transmission of official oral messages. In their view, such an inclusion might lead to

confusion with the function of a special envoy.<sup>47</sup> They believed that the role of the diplomatic courier should be confined to carrying and delivering the diplomatic bag.

26. In the course of the debate in the Commission and in the Sixth Committee, it was suggested that the drafting of some of the definitions contained in subparagraphs (1), (2), (3), (4) and (7) of article 3, paragraph 1, be reconsidered, as well as the scope and length of that article, with a view to reducing the list of terms.

27. The extensive survey of the legislative background of article 27 of the 1961 Vienna Convention and the relevant articles of the other codification conventions examined in the second report<sup>48</sup> provided enough substantive material for the definition of the legal status of the diplomatic courier and the diplomatic bag, as well as the other kinds of courier and bag. On that basis the three main legal features of the courier were identified.<sup>49</sup> In the view of the Special Rapporteur, the identification of these main legal components of the notion of the courier, though constituting a certain deviation from the usual format of a legal definition under the "use of terms" provision, might provide a comprehensive legal notion of the term "diplomatic courier".

28. However, discussion of the proposed draft article 3, subparagraph (1) of paragraph 1, in 1981, both by the Commission and in the Sixth Committee, proved that such a comprehensive definition was not justified, for it contained substantive elements which could be the subject of specific and more comprehensive provisions. Thus a concise definition would be preferable not only for its brevity, but also as having the advantage of avoiding possible overlapping with the pertinent provisions on specific issues. The Special Rapporteur would therefore suggest that the proposed definitions be revised in line with the above considerations.

29. The definition of the term "diplomatic courier" should thus indicate briefly the official capacity and main function of the courier, i.e., a person duly authorized by the competent authorities of the sending State who is entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic and other missions of the sending State. In this case there are only two substantive elements which should be indispensable for the definition of the notion of the diplomatic courier: first, his official authorization by the competent authorities of the sending State, and secondly,

<sup>42</sup> *Ibid.*, p. 165, para. 55.

<sup>43</sup> *Ibid.*, pp. 172-174, paras. 107-120.

<sup>44</sup> *Ibid.*, pp. 175 *et seq.*, paras. 126-186.

<sup>45</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 239; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 55 (Spain) and 49th meeting, para. 30 (Brazil); and "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), para. 194.

<sup>46</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 161, para. 239; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 50th meeting, para. 46 (Iraq) and 53rd meeting, paras. 30-31 (Mexico); and "Topical summary . . ." (A/CN.4/L.339), para. 195.

<sup>47</sup> *Official Records of the General Assembly, Thirty-sixth session, Sixth Committee*, 48th meeting, para. 55 (Spain) and 53rd meeting, para. 29 (Mexico); and "Topical summary . . ." (A/CN.4/L.339), para. 193.

<sup>48</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 165 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 58-120.

<sup>49</sup> The main legal features of the courier are his main function, the requirements for the proof of his status, such as his credentials, and the scope and content of the facilities, privileges and immunities accorded to him by the receiving State for the exercise of his functions. These three elements: function, proof of status, and facilities, privileges and immunities were assigned as the attributes of the diplomatic courier and identified as the main legal components of the definition which should be used in the draft articles. They have to be further elaborated in the form of specific provisions on the functions, proof of status and credentials of the courier, his appointment and nationality, as well as the facilities, privileges and immunities which he could enjoy in the territory of the receiving State.

his duty to carry and deliver the diplomatic bag to its destination. Consequently, all references in the definition to the formal credentials of the courier (the official document indicating his status and the number of packages constituting the diplomatic bag) and to the "facilities, privileges and immunities [accorded to him by the receiving State] in the performance of his official functions" could be deleted.

30. As was pointed out above (para. 25) "the transmission of an official oral message" was indicated among the functions of the diplomatic courier, contained in paragraph 1 (1) of article 3. This attribute was included in the notion of the diplomatic courier at an early stage of the consideration of the item,<sup>50</sup> based on the practice of certain States and the suggestions made in the written comments of some Governments.<sup>51</sup> However, in order to avoid a possible confusion between a diplomatic courier and a diplomatic envoy, the Special Rapporteur would suggest avoiding reference to the transmission of an official oral message as one of the functions of the diplomatic courier.

31. Following the advice to eliminate substantive rules or elements from the proposed definitions, it is also suggested that the definition of the "diplomatic courier *ad hoc*" be accordingly confined to his capacity as an official of the sending State, with a function to deliver the diplomatic bag on special occasions only as part of his other functions. Consequently, the substantive rule on the duration of the enjoyment of facilities, privileges and immunities accorded to the courier *ad hoc* up to the moment of the delivery to the consignee of the diplomatic bag in his charge should not be embodied in the definition itself. Therefore, the term "diplomatic courier *ad hoc*" may be defined as "an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions". However, it would be indispensable in the relevant provisions on the status of the "diplomatic courier *ad hoc*" to spell out the distinction between the

status of the "diplomatic courier *ad hoc*" and that of the ordinary or professional diplomatic courier, as specifically indicated in article 27, paragraph 6, of the 1961 Vienna Convention and the relevant provisions of the other three codification conventions in the field of diplomatic law.<sup>52</sup>

32. The above considerations on the definition of the diplomatic courier regarding the elimination of some substantive rules or elements should also apply to the definitions of all other kinds of courier.<sup>53</sup> Those substantive rules or elements would be dealt with in the relevant provisions on different aspects of the legal status of those couriers.

33. The next important definitional problem which was the subject of extensive examination in the second report<sup>54</sup> and subsequent discussions by the Commission and the Sixth Committee was the definition of the term "diplomatic bag" and the kinds of official bag.<sup>55</sup> On the basis of the examination of the legislative background of the four codification conventions, the Special Rapporteur identified five substantive legal elements determining the status of the diplomatic bag, namely:

(a) The official *function* of the bag as an instrument of diplomatic communications;

(b) The *content* of the bag, consisting of official correspondence, documents or articles intended for official use only;

(c) The *external features* relevant to the identification of the diplomatic bag, such as special labels, wax-sealed packages and other visible marks;

(d) The *required documents* indicating the character of the bag and the number of packages constituting it;

(e) The *treatment accorded* to the bag by the authorities of the receiving or the transit State in accordance with international law, particularly its inviolability.<sup>56</sup>

34. These legal features are characteristic for all kinds of diplomatic bag, whether accompanied by a professional diplomatic courier, by a diplomatic courier *ad hoc* or entrusted to the captain of a ship or a commercial aircraft, as well as the diplomatic bag dispatched by postal or other means, whether by land, air or sea. Certain specific features inherent in the non-accompanied diplomatic bag, which were indicated in the second report,<sup>57</sup> should be further examined in connection with the elaboration of the relevant draft articles. In the case of a diplomatic bag dispatched by postal or other means, whether by land, air or sea, the postal

<sup>50</sup> Already in one of the early reports of the Working Group on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, in 1978, it was explicitly pointed out, when indicating the scope of the functions of the courier, that "he might also carry messages orally" (A/CN.4/L.285) (see *Yearbook* . . . 1978, vol. II (Part Two), p. 140, para. 144, sect. (2) "Function of the diplomatic courier"). This idea of the oral message was retained in the subsequent reports on this topic (A/CN.4/WP.4 and A/CN.4/L.310) which were considered by the Commission (see *Yearbook* . . . 1979, vol. II (Part Two), pp. 172-173, chap. VI, sect. C.1 (2) (e) and C.2 (1)).

<sup>51</sup> See *Yearbook* . . . 1979, vol. II (Part One), p. 213, document A/CN.4/321 and Add.1-7. According to the comment of the Government of Chile, the diplomatic courier "is responsible for the custody and physical transport of the diplomatic bag, or for transmitting an oral message, from the sending State to the premises of the appropriate mission or office in the receiving State" (*ibid.*, p. 218).

Indeed, there have been instances when an officer of the sending State was entrusted with the mission to deliver an official correspondence of that State and to convey an official oral message. Sometimes the official oral message is contained also in a written statement or other documents addressed to the competent authorities of the receiving State. In this case, however, the messenger is not a diplomatic courier as such but a special diplomatic envoy who, owing to his special function, is accorded legal protection, privileges and immunities similar to, but very often exceeding, those of a diplomatic courier. While the main task of the diplomatic courier is to deliver the diplomatic bag to the missions of the sending State, the role of the special messenger or envoy is to transmit an official oral or written message by the head of State or Government, or other higher officer of the sending State, to the corresponding competent authorities of the receiving State.

<sup>52</sup> Cf. article 35, para. 6 of the 1963 Vienna Convention; article 28, para. 7 of the 1969 Convention on Special Missions; article 27, para. 6 of the 1975 Vienna Convention.

<sup>53</sup> Consular couriers, couriers of the special missions or permanent missions to international organizations, etc.

<sup>54</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 175 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 123-186.

<sup>55</sup> It was emphasized that the status of the diplomatic bag deserved thorough investigation, for it was one of the principal tools for the exercise of the freedom of communication for all official purposes. Following the method applied by the Special Rapporteur in the examination of the legal features of the diplomatic courier, it was suggested that the legislative background of the provisions of the four codification conventions and the relevant State practice relating to the status of the official bag be studied. The main object of this study was to identify the legal components of the definition of the diplomatic bag.

<sup>56</sup> *Ibid.*, pp. 180-181, paras. 159-166.

<sup>57</sup> *Ibid.*, pp. 182-185, paras. 174-183.

documents, the documents for the consignment on ship or the document for the air freight may indicate the official character of the parcel containing the diplomatic bag. There might also be some specific regulations for the legal protection and preferential treatment of this kind of diplomatic bag in order to ensure safe and speedy delivery.

35. Taking into consideration the main legal features of the diplomatic bag as elucidated by the provisions of the 1961 Vienna Convention and the other codification conventions and evidenced by State practice, a functional definition of the diplomatic bag was suggested for consideration.<sup>58</sup> However, in the light of the comments made during the consideration of the second report in the Commission and in the Sixth Committee, the proposed definition of the diplomatic bag contained in draft article 3, paragraph 1 (3) should be reconsidered. First, the definition should be harmonized with the revised provision on the scope of the present articles (draft article 1). Consequently, the function of the diplomatic bag should be confined to communications between the sending State and its missions abroad and the reference to direct communications "with other states or international organizations" should be deleted. Secondly, the substantive rule for granting facilities, privileges and immunities to the official bag by the receiving State or the transit State should also be left out, though it is central to the legal status of the bag. Of course, the treatment to be accorded to the diplomatic bag will be the subject of special provisions. In this case the definition of the diplomatic bag will contain only the indication: (a) of its function, to carry official correspondence, documents or articles exclusively for official use as an instrument for communications between the sending State and its missions abroad; (b) its external features or visible external marks certifying the official character of the bag; and (c) the method of its delivery—by a diplomatic courier or not accompanied by such a courier. These three objective features are, in the view of the Special Rapporteur, indispensable for the definition of the status of the diplomatic bag and will distinguish it *prima facie* from the personal luggage of a diplomatic agent or an ordinary postal parcel or consignment dispatched by land, air or sea. The same approach shall be applied to the legal definition of a diplomatic bag not accompanied by diplomatic courier, i.e., a diplomatic bag entrusted to the captain of a ship or a commercial aircraft or sent by postal or other means, whether by land, air or sea.

36. The legal definition under the "use of terms" provisions in article 3 may provide only the most essential objective elements of the legal status of the

diplomatic bag. Other equally important attributes<sup>59</sup> or questions of a more technical nature ought to be considered in substance in part III of the present draft articles.

37. The other terms listed in draft article 3, paragraph 1, could also be reconsidered in the light of the comments made in the course of the debate on this item in the Commission and in the Sixth Committee. The revision of the proposed terms could be carried out in either of two ways, by amending some of the terms, or by reducing the list of legal definitions by removing those terms which are self-explanatory or well established in international law or generally recognized State practice. This approach was already suggested by the Special Rapporteur in his second report<sup>60</sup> and during the consideration of that report by the Commission,<sup>61</sup> and was further recommended by some members of the Commission and some representatives in the Sixth Committee.<sup>62</sup> It is therefore suggested to modify the definition of "sending State" in article 3, para. 1 (4), by deleting, in accordance with the revised text of draft article 1 ("Scope of the present articles"), the words "or to other States or international organizations".

38. Regarding the definition of "transit State" contained in para. 1 (7), there were some observations with regard to the consent of that State as a requirement for the passage of the courier or the non-accompanied diplomatic bag *en route* to the receiving State. A view was expressed that such a provision might impose undue restrictions upon the sending State.<sup>63</sup> However, in the view of the Special Rapporteur the consent of the transit State is already implied in the case of a visa-free regime when, in accordance with bilateral or other agreements between the sending and the transit State, an entry or transit visa is not required for persons visiting or passing through the territory of the latter State.<sup>64</sup> Perhaps it should be clarified in the text that the reference to the consent of the transit State should be made more conditional, in accordance with the regime established between the sending and the transit State. It is obvious that in normal circumstances, prior consent of the transit State should not be required for the dispatch of a diplomatic bag not accompanied by diplomatic courier. Another solution of this problem would be to leave out the requirement of "consent" from the definition of the transit State and to consider it specifically with respect to the provisions on the rights and obligations of the transit State and the third State.

<sup>59</sup> These attributes include the notion of "official correspondence, documents or articles exclusively for official use", which is of particular significance for the prevention of possible abuses, or the problems relating to the treatment to be accorded to the bag and the protection of its inviolability.

<sup>60</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 164–165, and 186–188, document A/CN.4/347 and Add.1 and 2, paras. 54 and 187–210.

<sup>61</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 161, para. 241.

<sup>62</sup> *Ibid.*, paras. 239–240; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 48th meeting, para. 55 (Spain), 49th meeting, para. 30 (Brazil), 50th meeting, para. 46 (Iraq), 51st meeting, para. 9 (Bulgaria), 53rd meeting, paras. 30–31 (Mexico); and "Topical summary . . . thirty-sixth session . . ." (A/CN.4/L.339), paras. 194–196.

<sup>63</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 161, para. 239.

<sup>64</sup> It is evident that a transit visa when requested is a restriction, but it is applied to all nationals including officials of the sending State, unless an exemption from such consent is given on the basis of a special arrangement with regard to diplomatic agents or other State officials of the sending State.

<sup>58</sup> For the examination of the official bag entrusted to the captain of a ship or a commercial aircraft, *ibid.*, pp. 183–184, paras. 176–180, and for some specific aspects of the legal status of the diplomatic bag sent by postal channels or through overland shipment by sea and air freight, *ibid.*, pp. 184–185, paras. 181–183.

This definition was conceived as a model definition of all kinds of official bag, such as consular bags and bags of the missions or delegations to international meetings (*ibid.*, p. 185, para. 184). The proposed definition, though not exhaustive with regard to all distinctive elements of the legal status of the official bag, in the view of the Special Rapporteur, should "contain only an indication of the legal components of the notion, which as a whole define the essential characteristics of the bag" (*ibid.*, para. 185). It was also understood that each one of these elements would deserve special consideration and should be further elaborated in specific draft articles (*ibid.*).

39. As was pointed out earlier (para. 24 above), some critical observations were made with respect to the length of the list of legal definitions contained in draft article 3.<sup>65</sup> Following the comments made, definition of some of the terms in article 3 could be omitted, at least at this stage of the work on the topic. There is another category of legal terms which are defined in the codification conventions and are widely used in international law and State practice<sup>66</sup> which may be retained in the draft at this stage, for they pertain very closely to the very nature of the status of the diplomatic courier and the diplomatic bag.

40. It is further suggested that the list of the terms to be used should be considered in connection with the development of the work on the topic; thus definitions could be submitted as soon as needed in the relevant draft provisions proposed for examination. The examination of the draft article on the use of terms as a whole could therefore be considered after the completion of the entire set of draft articles.

41. Since there were no comments or amendments regarding the provisions of paragraphs 2-3 of draft article 3, the Special Rapporteur proposes to retain them without any change.

42. Taking into consideration the comments and suggestions made on legal definitions to be used for the purpose of presenting draft articles, the Special Rapporteur would like to submit to the Commission for examination and provisional approval the following revised draft article on the use of terms:

### *Article 3. Use of terms*

#### **1. For the purpose of the present articles:**

(1) "diplomatic courier" means a person duly authorized by the competent authorities of the sending State entrusted with the custody, transportation and delivery of the diplomatic bag to the diplomatic missions, consular posts, special missions, permanent missions or delegations of the sending State, wherever situated;

(2) "diplomatic courier *ad hoc*" means an official of the sending State entrusted with the function of diplomatic courier for a special occasion or occasions;

(3) "diplomatic bag" means all packages containing official correspondence, documents or articles exclusively for official use which bear visible external marks of their character, used for communications between the sending State and its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated, dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea;

(4) "sending State" means a State dispatching a diplomatic bag, with or without a courier, to its diplo-

matic missions, consular posts, special missions, permanent missions or delegations, wherever situated:

(5) "receiving State" means a State on whose territory:

(a) diplomatic missions, consular posts, special missions or permanent missions are situated; or

(b) a meeting of an organ of an international organization or an international conference is held;

(6) "transit State" means a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State;

(7) "diplomatic mission" means a permanent mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(8) "consular post" means any consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(9) "special mission" means a temporary mission, representing the State, which is sent by one State to another with the consent of the latter, for the purpose of dealing with it on specific questions or performing a special task in relation to it;

(10) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to that organization;

(11) "delegation" means the delegation sent by a State to participate on its behalf in the proceedings of either an organ of an international organization or an international conference;

(12) "international organization" means an inter-governmental organization.

2. The provisions of paragraph 1, subparagraphs (1), (2) and (3), on the terms "diplomatic courier", "diplomatic courier *ad hoc*" and "diplomatic bag" may also apply to consular courier and consular courier *ad hoc*, to couriers and couriers *ad hoc* of special missions, permanent missions or delegations, as well as to the consular bag and the bags of special missions, permanent missions or delegations of the sending State.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in other international instruments or the internal law of any State.

### **D. General principles**

43. The attempt at formulating some general principles of international law underlying the existing basic rules of modern diplomatic law with special reference to the legal status of the diplomatic courier and the diplomatic bag found a favourable response, both by the Commission and the Sixth Committee.<sup>67</sup> At the same time, there were some comments on specific

<sup>65</sup> Indeed, while some of the terms, such as "delegation", "delegation to an organ", "delegation to a conference", are self-explanatory, others, such as "host State", "permanent observer mission", "observer delegation", "observer delegation to an organ" and "observer delegation to a conference", might seldom be used in the relevant articles.

<sup>66</sup> "Diplomatic mission", "consular post", "special mission", "permanent mission", "sending State", "receiving State", "transit State" and "international organizations".

<sup>67</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 243; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 42nd meeting, para. 29 (USSR), 44th meeting, para. 18 (Ukrainian SSR), 49th meeting, para. 31 (Brazil), 50th meeting, para. 37 (German Democratic Republic) and para. 46 (Iraq); and "Topical summary . . ." (A/CN.4/L.339), para. 197.

provisions contained in draft articles 4-6 submitted by the Special Rapporteur in his second report.<sup>68</sup>

44. Since these draft articles, like those preceding them, were referred to the Drafting Committee but were not considered by it, it might be prudent, in the light of the comments and observations made in the course of the debate in the Commission and in the Sixth Committee, to suggest certain amendments thereto. It should be pointed out, however, that in the case of draft articles 4-6, the suggestions for changes were relatively limited in number and scope.

45. It was emphasized that the three general principles should be taken together as a framework of rights and obligations of all States concerned, namely the sending State, receiving State and transit State. The interplay of those principles provides a sound basis for effective reciprocity and a viable balance between the rights and obligations of the sending and the receiving State. Diplomatic law as a system of international legal rules is based on the sovereign equality of States and operates predominantly through reciprocity. Therefore, very often in State practice the most effective sanction in the field of diplomatic law takes the form of reciprocal action. The fact is that every State is both a sending and a receiving State, so that there could always be an equilibrium between rights and obligations in the process of the diplomatic intercourse governed by the general accepted rules of international law.

46. Nevertheless, the principle of freedom of diplomatic communication contains certain basic norms which cannot be derogated from or nullified by way of reciprocity. In the submission of the Special Rapporteur, the rule of reciprocity could provide a compromise or a balance between mutual rights and obligations only in respect to certain modalities in the application of the principle itself. These modalities may refer, for instance, to the size of the staff of the mission, the establishment of laws and regulations concerning zones of entry in which the operation of radio transmitters is restricted or prohibited, or the scope of facilities accorded to the missions for the acquisition of accommodation and other facilities.

47. The restrictive application of the principle of freedom of diplomatic communication could operate through reciprocity only on the condition that it does not affect the fundamental rights inherent in that principle, such as the right of free and confidential communication between the sending State and its missions abroad by all appropriate means, including diplomatic couriers and bags, the dispatch of written or radio messages in code or cipher, the inviolability of the diplomatic courier and the diplomatic bag, as well as other related facilities, privileges and immunities.

48. The main objective of the principle of freedom of communication for all official purposes is to provide legal protection of, and ensure favourable conditions for, the performance of the functions of the diplomatic mission. The safe, unimpeded and expeditious delivery of the diplomatic message and the inviolability of its confidential character constitute the most important practical aspect of that principle. Therefore it was placed as the first in order of the set of three general

principles constituting the basis of the legal framework of specific provisions relating to the status of the diplomatic courier and the diplomatic bag. It was therefore explicitly stated in draft article 6, paragraph 2 (b), that States could modify among themselves, by custom or agreement, the extent of the facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such reciprocal modification was not incompatible with the object and purpose of the provisions on the status of the courier and the bag.

49. The effective application of the rule of free diplomatic communication not only requires the receiving State to permit and protect free communications on its territory, effected through diplomatic couriers and bags or other appropriate means, but places upon the transit State or States an identical obligation. For it is obvious that in some instances the safe, unimpeded and expeditious delivery of the diplomatic bag to its final destination depends upon its passage, on its itinerary, through the territories of other States. This practical requirement is embodied as a general rule in paragraph 2 of draft article 4. It is contemplated further that on that basis there should be some more specific provisions regarding the right of the diplomatic courier to travel through the territory of the transit State *en route* to the receiving State, his obligation to respect the laws and regulations of the transit State and the facilities, privileges and immunities accorded by the transit State to the diplomatic courier and the diplomatic bag.

50. Taking into consideration the above observations, it is suggested that the text of draft article 4 be maintained as submitted in the second report,<sup>69</sup> with some minor editorial changes. The duties of the receiving and the transit States to permit and protect on their territory free communications on the part of the sending State with its diplomatic and other missions, as well as between those missions, as stipulated in draft article 4, are well harmonized with the duties of the sending State and its officials, including its diplomatic couriers, to respect the rules of international law and the laws and regulations of the receiving and the transit State. In this case, the required proper balance is struck between the rights and obligations of all States concerned, i.e., the sending State, the receiving State and the transit State.

51. It was suggested during the consideration of the second report by the Commission and later in the Sixth Committee<sup>70</sup> that draft article 5, paragraph 1, should prescribe not only the duty of the courier to respect international law and the laws and regulations of the receiving and the transit State, but also such a duty of the sending State itself, in order to establish the necessary equilibrium between the rights and duties of the sending, the receiving and transit States stipulated in draft articles 4-5. This approach seems reasonable and, accordingly, draft article 5, paragraph 1, is amended.

52. Draft article 5 contains further references to some more specific duties of the diplomatic courier in the

<sup>69</sup> *Ibid.*, p. 190, para. 217.

<sup>68</sup> *Yearbook . . . 1981*, vol. II (Part One), pp. 189 *et seq.*, document A/CN.4/347 and Add.1 and 2, paras. 212-231.

<sup>70</sup> *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 243; *Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 49th meeting, para. 31 (Brazil); and "Topical summary . . ." (A/CN.4/L.339), para. 198.

discharge of his functions not to interfere in the internal affairs of the receiving and the transit State (para. 2). According to this article, the temporary accommodation of the diplomatic courier should not be used in any manner incompatible with his functions as set out by the present articles, by the relevant provisions of the 1961 Vienna Convention or by other rules of general international law or by special agreements in force between the sending and the receiving or the transit State.

53. The duty to respect international law and the laws and regulations of the receiving or the transit State may relate to a wide range of specific obligations regarding the maintenance of law and order and respect for administrative and other regulations enforced in the public interest. They should be spelled out in more specific terms in part II of the draft articles, devoted to the status of the diplomatic courier.

54. The provisions of draft article 5 as a whole constitute an essential correlative rule of the freedom of communication which could enhance the protection of the legitimate interests of the receiving and the transit States. They also provide a framework of general rules which could have a preventive function with respect to possible abuses with the facilities, privileges and immunities accorded to the diplomatic courier. For the purposes of formulating general principles, the present drafting of articles 4-5 could be sufficient, since it lays down the ground rules for the equilibrium between the rights and obligations of the sending and the receiving States or the transit State. These rules may, of course, be further substantiated in specific provisions on various aspects of the legal status of the diplomatic courier.

55. The general principle of non-discrimination and equal treatment through reciprocity applied in the field of diplomatic intercourse in general, and to the status of the diplomatic courier and the diplomatic bag in particular, is based on the sovereign equality of States. Considered together with the two other principles formulated in draft articles 4-5, it adds an important element to the legal framework underlying the rules governing the status of the diplomatic courier and the diplomatic bag. This principle was reflected in the draft article 6 submitted in the second report.<sup>71</sup> Since there were no specific observations or amendments, the Special Rapporteur suggests that that text be retained.

56. In the light of the above observations, the Special Rapporteur would like to submit to the Commission for consideration and provisional adoption the draft articles on general principles, with the amendments already indicated:

**Article 4. Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags**

**1. The receiving State shall permit and protect on its territory free communications on the part of the sending State for all official purposes with its diplomatic missions, consular posts, special missions, permanent missions or delegations as well as between those missions, consular posts and delegations, wherever situated, as provided for in article 1.**

<sup>71</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 192-193, document A/CN.4/347 and Add.1 and 2, para. 231.

**2. The transit State shall facilitate free communication through its territory effected through diplomatic couriers and diplomatic bags referred to in paragraph 1 of the present article.**

**Article 5. Duty to respect international law and the laws and regulations of the receiving and the transit State**

**1. Without prejudice to the facilities, privileges and immunities accorded to a diplomatic courier, it is the duty of the sending State and its diplomatic courier to respect the rules of international law and the laws and regulations of the receiving State and the transit State.**

**2. The diplomatic courier also has a duty, in the discharge of his functions, not to interfere in the internal affairs of the receiving State and the transit State.**

**3. The temporary accommodation of the diplomatic courier must not be used in any manner incompatible with his functions as laid down in the present articles, by the relevant provisions of the Vienna Convention on Diplomatic Relations of 1961 or by other rules of international law or by any special agreements in force between the sending State and the receiving State or the transit State.**

**Article 6. Non-discrimination and reciprocity**

**1. In the application of the provisions of the present articles, no discrimination shall be made as between States with regard to the treatment of diplomatic couriers and diplomatic bags.**

**2. However, discrimination shall not be regarded as taking place:**

(a) where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic couriers and diplomatic bags in 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 it 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.

57. In the course of the debate on the general principles (draft articles 4, 5 and 6), both in the Commission and in the Sixth Committee, reference was made to some other issues of a general nature such as, on the one hand, the rule of unconditional and complete inviolability of the diplomatic bag as provided for in article 27 of the 1961 Vienna Convention, article 28 of the 1969 Convention on Special Missions and article 57 of the 1975 Vienna Convention, and, on the other hand, the option to open or return the consular bag if the request for opening is refused by the authorities of the sending State, as provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. This is an important issue which deserves full consideration. At this stage of the work on the topic, the issue of the inviolability of the bag was dealt with in the two previous reports, in greater detail in the second report.<sup>72</sup>

<sup>72</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 243, document A/CN.4/335, para. 52; and *Yearbook* . . . 1981, vol. II (Part One), pp. 154, 162 *et passim*, document A/CN.4/347 and Add.1 and 2, paras. 3, 35 and footnotes 42 and 43, paras. 143-146 and 165-173.



58. The Special Rapporteur expressed the view that it would be advisable to opt toward the uniform rule contained in article 27 of the 1961 Vienna Convention<sup>73</sup> and accordingly suggested to proceed on that basis to the elaboration of draft articles on the legal status of the diplomatic bag.<sup>74</sup> This suggestion was also based on the examination of some 110 bilateral treaties in the field of diplomatic law, 92 of which contained provisions on unconditional and complete inviolability similar to article 27 of the 1961 Vienna Convention, while only 18 had provisions deviating from it in one way or another along the lines of article 35, paragraph 3, of the 1963 Vienna Convention.<sup>75</sup>

<sup>73</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 181–182, document A/CN.4/347 and Add.1 and 2, para. 168.

<sup>74</sup> *Ibid.*, p. 182, para. 173.

<sup>75</sup> *Yearbook* . . . 1981, vol. II (Part Two), p. 162, para. 244. Some bilateral conventions contain the rule of unconditional and complete

59. If this matter is to be examined further, it may be more appropriate to do so when the draft articles on the status of the diplomatic bag are considered by the Commission. Such a pragmatic approach might offer more substantive grounds for the study and evaluation of the practical consequences of the appropriate solution of that problem. The Special Rapporteur is conscious of the significance of this issue and would keep in mind the comments that were made thereon.

inviolability of the consular bag. A number of those conventions were concluded prior to the 1963 Vienna Convention but many of them were concluded after it, and yet they contain the rule of unconditional and complete inviolability (for further reference to this issue, see *Yearbook* . . . 1981, vol. II (Part One), pp. 161–162, document A/CN.4/347 and Add.1 and 2, paras. 34–35 and footnotes 42 and 43). A further examination of some additional bilateral treaties and other instruments up to 1980, most of them on consular relations, has provided even stronger evidence of the trend towards unconditional and complete inviolability of the diplomatic and consular bag.

## II. Draft articles on the status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag

### A. Introductory note

60. Following the structure of the draft articles proposed in the second report,<sup>76</sup> the next part of the study of the topic and elaboration of draft articles therein will be devoted to the status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship entrusted with the delivery of a diplomatic bag. The work on this second part of the draft articles would be greatly assisted by the analytical survey of the *travaux préparatoires* of the four codification conventions pertaining to those issues, which was done in the second report.<sup>77</sup> Therefore, while applying the same functional and pragmatic approach in the examination of the problems under consideration, greater emphasis will be placed on inquiry into the present State practice, as evidenced by international treaties, national laws and regulations and established practices. Consequently, the reference to the legislative history of the relevant provisions of the four codification conventions would be confined only to a brief background, which should serve for the elucidation of the main legal elements determining the status of the diplomatic courier.

61. The notion of the status of the diplomatic courier could be conceived in a restricted sense as a set of rules which lay down the formal requirements for the determination of the position of the diplomatic courier, his credentials, and the recognition or acceptance of his official functions. This notion of the status of the diplomatic courier will be used for the purpose of the present draft articles related to the proof of his status, the procedure for his appointment by the sending State, and his acceptance by the receiving State, including the question of his nationality. The notion of the status of the diplomatic courier could also have a broader meaning. It may comprise not only the status of the diplomatic courier in the restricted sense but in addition it may

include the indication of his official functions, their scope and duration, as well as his rights and obligations, including the facilities, privileges and immunities accorded to him for the performance of his functions. Under such a general notion would fall three categories of provisions which reflect the main facets of the legal status of the diplomatic courier: firstly, the proof of the status of the diplomatic courier, his appointment, nationality and acceptance or non-acceptance by the receiving State; *secondly*, the content, scope and duration of his functions; and *thirdly*, his rights and obligations, including the facilities, privileges and immunities accorded to him by the receiving State. These three categories of provisions in their entirety form part II of the present draft articles. They would be considered, as appropriate, when determining the status of the regular professional diplomatic courier, and in more limited ways, the status of the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship. It is suggested that the examination of these issues proceed in the order indicated above.

### B. Status of the diplomatic courier

#### 1. PROOF OF STATUS

62. The formal requirements of the documents or credentials testifying to the status of the diplomatic courier are essentially within the domestic jurisdiction of the sending State. They are set out by national laws, regulations or established practices, and may be embodied in various legal instruments such as laws and other legislative acts, decrees, customs, immigration and other administrative regulations, foreign office circulars, orders.<sup>78</sup> However, there are certain general rules

<sup>76</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 155–156, document A/CN.4/347 and Add.1 and 2, para. 7; see also para. 10 above.

<sup>77</sup> *Ibid.*, pp. 165 *et seq.*, paras. 58–122.

<sup>78</sup> The legal nature and denominations of the relevant acts are known for their diversity, even within one State. In some instances there are specific provisions on the status of foreigners, and diplomatic couriers in particular, embodied in civil and criminal laws and laws on customs, immigration and foreign trade. For example, for such laws of the USSR which contain information on administrative regulations on the matter, see United Nations, Legislative Series,



of international law established through international customary law or bilateral and multilateral treaties in the field of diplomatic intercourse which are related to the documents required for indicating the status of the diplomatic courier.<sup>79</sup> Such rules also have been developed in State practice, in diplomatic correspondence and in official communications or statements.<sup>80</sup>

vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (Sales No. 58.V.3), pp. 338 and 345-347; and information communicated in 1982 by the USSR (see pp. 240-244 above), document A/CN.4/356 and Add.1-3). The Austrian Federal Act of 15 June 1955 concerning customs and customs procedures provides, in article 172, para. 9, that "the official luggage of diplomatic couriers" shall not be submitted to customs inspection (United Nations, Legislative Series, vol. VII . . . , p. 20). Similar régimes of exemption are provided by Customs Act No. 271 of Finland of 8 September 1939 (*ibid.*, pp. 118-119) and the Customs Act of Czechoslovakia of 24 April 1974 (see the information communicated by Czechoslovakia, pp. 235-236 above, document A/CN.4/356 and Add.1-3).

Certain States have enacted special decrees on the diplomatic courier and the diplomatic bag. This is the case with Argentina: Decree No. 3437 of 22 November 1955 (United Nations, Legislative Series, vol. VII . . . , p. 7); Colombia: Decree No. 615 of 6 April 1935 (*ibid.*, p. 67) and Decree No. 3135 of 20 December 1956 (Pan American Union, *Documents and notes on privileges and immunities with special reference to the Organization of American States* (Washington, D.C., 1968), pp. 264 and 270-271); Ecuador: Supreme Decree No. 1422 of 31 December 1953 (*ibid.*, p. 292); and Paraguay: Decree-law No. 160 of 26 February 1958 (*ibid.*, p. 338).

The prevailing State practice attests that usually States prefer to deal with the status of the diplomatic courier and the diplomatic bag through regulations and other administrative acts, orders, circulars, memoranda or instructions issued by the Ministry of Foreign Affairs, the Ministry of Foreign Trade or other governmental agencies. Such regulations and circulars on diplomatic privileges and immunities have been adopted, for instance, by the Philippines: chapter III of the Foreign Service Regulations of the Philippines (United Nations, Legislative Series, vol. VII . . . , p. 237); Sweden: Ordonnance royale sur les étrangers of 4 June 1954 (*ibid.*, p. 303); Switzerland: Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires (*ibid.*, p. 307) and Règlement sur le traitement en douane des envois destinés aux missions diplomatiques à Berne et à leur personnel, of 24 August 1955 (*ibid.*, pp. 323-324); Belgium: Mémoire sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique (*ibid.*, pp. 29-30) and Instruction du Ministère des finances concernant les immunités diplomatiques, 1955 (*ibid.*, pp. 45-46); Republic of Korea: Regulation on the Treatment of Official Documents (see above, pp. 237-238, document A/CN.4/356 and Add.1-3); Czechoslovakia: Customs Act of 24 April 1974 (*ibid.*, p. 235); Yugoslavia: Circular note 949/80 of 12 May 1980 sent by the Federal Secretariat for Foreign Affairs to all the diplomatic missions in Belgrade on the procedures applicable to receiving and dispatching mail (*ibid.*, p. 245); and others. The *Code of Federal Regulations* of the United States of America contains, in Title 19, specific provisions on the immunities of the official bag and the accompanied personal baggage of the diplomatic courier (*Code of Federal Regulations, Title 19—Customs Duties*, revised as of April 1, 1981 (Washington, D.C.), pp. 594-596, sect. 148.82 and 148.83).

<sup>79</sup>For more detailed reference to international treaties dealing with the status of the diplomatic and other kinds of official courier, see the preliminary report, paras. 17-30 (*Yearbook . . . 1980*, vol. II (Part One), pp. 235-237, document A/CN.4/335).

<sup>80</sup>Sources of this kind reveal interesting international disputes and attitudes of States with regard to some important issues relating to the required documents testifying to the official status of the diplomatic courier, his functions, privileges and immunities in general, and his personal inviolability, exemption from customs control, granting of visas and other specific issues, in particular. Reference to such cases could be found in some well-known collections of international treaties and diplomatic documents, writings of publicists and periodicals in the field of international law, such as: J. B. Moore, *A Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1906), pp. 695-701 and 711-716; G. H. Hackworth, *Digest of International Law*, vol. IV (Washington, D.C., U.S. Government Printing Office, 1942), pp. 621-629; M. M. Whiteman, *Digest of International Law*, vol. 7 (Washington, D.C., U.S. Government Printing Office, 1970), pp. 214-220; G. Perrenoud,

63. The rule of customary international law regarding the proof of status of the diplomatic courier was first reflected in article 27, paragraph 5, of the 1961 Vienna Convention. According to established practice, it stipulates that the diplomatic courier "shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag". This provision was later used as a model for the other codification conventions in the field of diplomatic law adopted under the auspices of the United Nations.<sup>81</sup>

64. An analytical survey of the legislative history of the above provision indicates that the discussions were confined to the consideration of the kind of documents required to testify to the status of the courier, their character and denomination. The diversity of State practice on this matter was referred to very often in the *travaux préparatoires* of the Convention. The following lines give a brief account of the initial consideration of the issue by the Commission and the subsequent codification work of the 1961 Vienna Convention.

65. The reference to the proof of status of the diplomatic courier was made in draft article 16, paragraph 1, on diplomatic intercourse and immunities proposed by the Special Rapporteur for the topic at the ninth session of the Commission, in 1957. It stated that:

1. The receiving State shall accord all necessary facilities for the performance of the work of the mission. In particular, it shall permit and protect communications by whatever means, including messengers provided with passports ad hoc\* . . .<sup>82</sup>

In reference to article 16 above, the Secretary to the Commission stated that "as regards the reference to passports *ad hoc*, . . . diplomatic couriers often had regular passports designating them as such".<sup>83</sup> Regarding the use of the term "passport", one member of the Commission stated that, in the French language, the term "passport" for the travel document carried by diplomatic couriers was inappropriate. He stated that in Europe the practice was for such persons to receive from the head of the mission or the minister of foreign

*Régimes des privilèges et immunités des missions diplomatiques étrangères et des organisations internationales en Suisse* (Lausanne, Librairie de l'Université F. Rouge, 1949), pp. 66-68; C. Hurst, "Les immunités diplomatiques", *Recueil des cours de l'Académie de droit international de la Haye, 1926-II* (Paris, Hachette, 1927), vol. 12, pp. 115 et seq.; E. Satow, *A Guide to Diplomatic Practice*, 4th ed., rev. by N. Bland (London, Longmans, 1957); R. Genet, *Traité de diplomatie et de droit diplomatique* (Paris, Pedone, 1931), vols. I-III; C. Parry, *A British Digest of International Law* (London), part VII, "Organs of States" (London, Stevens, 1965); J. A. Beesley, ed., "Canadian practice in international law during 1972 as reflected mainly in public correspondence and statements of the Department of External Affairs", *The Canadian Yearbook of International Law* 1973 (Vancouver, B.C.), vol. XIII, pp. 308-309; P. Cahier, *Le droit diplomatique contemporain* (Geneva, Droz, 1962); C. Rousseau, "Chronique des faits internationaux", *Revue générale de droit international public* (Paris), vol. 75 (1971), p. 159; A. W. Rovine, "Contemporary practice of the United States relating to international law", *American Journal of International Law* (Washington, D.C.), vol. 67 (1973), pp. 536-538.

<sup>81</sup>Cf. article 35, para. 5, of the 1963 Vienna Convention; article 28, para. 6, of the 1969 Convention on Special Missions; article 27, para. 5, article 57, paras. 6 and 8, and article 72 of the 1975 Vienna Convention.

<sup>82</sup>*Yearbook . . . 1957*, vol. I, p. 74, 398th meeting, para. 27. The term "passports *ad hoc*" was used in article 14, para. 1, of the Harvard Law School draft on Diplomatic Privileges and Immunities (see Harvard Law School, *Research in International Law*, part I, "Diplomatic Privileges and Immunities" (Cambridge, Mass., 1932), published as *Supplement to The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 79-85).

<sup>83</sup>*Yearbook . . . 1957*, vol. I, p. 74, 398th meeting, para. 34.

affairs special papers which showed the number and serial numbers of the letters or parcels entrusted to the couriers; in certain countries, those papers had to be stamped. He admitted, however, that some States employed regular diplomatic couriers who carried regular diplomatic passports, but they too had to carry couriers' papers.<sup>84</sup>

66. In the draft articles submitted to the Commission at its tenth session, in 1958, by the Special Rapporteur on the same subject, article 21, paragraph 3, alluded to the status of a diplomatic courier. It read in part:

The expression "diplomatic courier" means a person who carries a diplomatic bag and who is for this purpose furnished with a document (courier's passport) testifying to his status. . . .<sup>85</sup>

In regard to the above paragraph, one Commission member drew attention to the difficulty which often arose in connection with the courier's passport. He pointed out that while some States insisted that the passport should be visaed by the embassy, the general practice was not to demand a visa, though States were within their rights in requiring a visa, as either a permanent or a temporary measure. He added that it was important, however, for States to notify other States of any change in their practice.<sup>86</sup> Another member, on the other hand, doubted the necessity of including a definition in the text, adding that it might perhaps be sufficient to state that "A diplomatic courier shall be furnished with a document testifying to his status."<sup>87</sup> Referring to the practice of some countries, one member of the Commission wondered whether it was necessary to mention the courier's passport, as distinct from a document testifying to the status of the courier, taking into consideration the fact that only couriers who were permanent members of the courier service were given courier's passports.<sup>88</sup> There was a compromise suggestion to the effect that, in addition to the phrase in the 1957 text, it should be stated that the diplomatic courier should be furnished with a document testifying to his status, though not necessarily a courier's passport.<sup>89</sup>

67. As was pointed out in the second report,<sup>90</sup> the 1961 United Nations Conference on Diplomatic Intercourse and Immunities devoted relatively limited discussion to the question of diplomatic couriers, which was overshadowed by the question of wireless transmitters and the diplomatic bag. Perhaps the most essential proposition was an amendment to paragraph 5 of draft article 25 (containing a provision on the status of the diplomatic courier),<sup>91</sup> submitted by the French delegation. According to this amendment, in paragraph 5 of article 25, after the words: "The diplomatic courier" the following text was to be inserted: ". . . , who shall be provided with an official document attesting his rank

and the number of packages constituting the bag",<sup>92</sup> The amendment was adopted with some drafting changes.<sup>93</sup>

68. In the draft articles on consular intercourse and immunities which were considered by the Commission at its twelfth session, in 1960, no specific mention was made of diplomatic or consular couriers. The general assumption at that time was that the institution of consular couriers was unknown to international law and was not common in State practice. In line with such a perception, a member of the Commission maintained the view that even though an agreement had been reached that consuls were entitled to use diplomatic couriers, it was however undeniable that they could in no case issue diplomatic passports to such couriers.<sup>94</sup>

69. In the final report submitted to the United Nations Conference on Consular Relations in 1963, article 35 on the freedom of communication contained some references to diplomatic or consular couriers. The pertinent part of paragraph 1 of that article read:

. . . In communicating with the Government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers . . . .<sup>95</sup>

The commentary relative to the status of a consular courier read in part:

. . . The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. . . .<sup>96</sup>

70. At the Conference on Consular Relations, the discussion on the status of the courier was concentrated on three amendments. Two of them referred to the consular courier *ad hoc*<sup>97</sup> and the captain of an aircraft or ship entrusted with a consular bag.<sup>98</sup> They were adopted after an animated discussion. The third amendment, submitted by Japan, was to the effect of deleting the term "Consular courier", since it "was entirely new and would only lead to complications".<sup>99</sup>

<sup>92</sup> *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), p. 20, document A/CONF.20/C.1/L.125. Draft article 25, para. 5, proposed in 1958 by the Commission, read:

"5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention." (*Yearbook . . . 1958*, vol. II, p. 97, document A/3859.)

<sup>93</sup> The French amendment was further amended by substituting the word "attendant" for the word "constatant" and, in the English text, by substituting the word "status" for the word "rank".

<sup>94</sup> *Yearbook . . . 1960*, vol. I, pp. 32-33, 532nd meeting, para. 40. See also remarks to the same effect by Sir Gerald Fitzmaurice (*ibid.*, p. 34, para. 44).

<sup>95</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No. 64.X.1), p. 22.

<sup>96</sup> *Ibid.*, p. 23, para. (4) of the commentary to article 35.

<sup>97</sup> Amendment proposed by the Netherlands (A/CONF.25/C.2/L.15) (*ibid.*, p. 74) and amendment proposed by the Byelorussian SSR (A/CONF.25/C.2/L.70) (*ibid.*, p. 80), which were later merged into a joint proposal.

<sup>98</sup> Amendment proposed by Italy (A/CONF.25/C.2/L.102) (*ibid.*, p. 84). For more details on the consideration of this amendment, see the statement by the representative of Italy (*ibid.*, vol. I, *Summary records of plenary meetings and of the meetings of the First and Second Committees* (United Nations publication, Sales No. 63.X.2), p. 328, *Second Committee*, Fourteenth meeting, para. 43).

<sup>99</sup> A/CONF.25/C.2/L.55 (*ibid.*, vol. II, p. 79); see the statement of the representative of Japan in regard to this amendment (*ibid.*, vol. I, p. 319, *Second Committee*, Thirteenth meeting, para. 8).

<sup>84</sup> *Ibid.*, p. 75, para. 41.

<sup>85</sup> *Yearbook . . . 1958*, vol. II, p. 17, document A/CN.4/116/Add.1 and 2.

<sup>86</sup> *Yearbook . . . 1958*, vol. I, p. 139, 457th meeting, para. 65.

<sup>87</sup> *Ibid.*, para. 66.

<sup>88</sup> *Ibid.*, p. 140, 458th meeting, para. 1.

<sup>89</sup> *Ibid.*, paras. 7-8.

<sup>90</sup> *Yearbook . . . 1981*, vol. II (Part One), p. 167, document A/CN.4/347 and Add.1 and 2, para. 71 and footnote 69.

<sup>91</sup> This article later became article 27 of the 1961 Vienna Convention.

This amendment, though supported by some representatives at the Conference<sup>100</sup> was strongly opposed by several other representatives.<sup>101</sup> Consequently, the Japanese amendment was rejected. The concept of the consular courier, including the consular courier *ad hoc*, adopted by the Conference and reflected in article 35 of the 1963 Vienna Convention was further reiterated in a considerable number of bilateral treaties and it is now firmly established in State practice.<sup>102</sup>

71. In the draft articles submitted by the Special Rapporteur on Special Missions at the sixteenth session of the Commission, in 1964, only an indirect reference to the status of diplomatic couriers can be inferred. Article 21, para. 4 stated that:

4. Special missions may send *ad hoc* couriers to communicate in both directions with the organs of their State. *Only members of the missions or of its staff may act as couriers.*<sup>103</sup>

The draft articles which were submitted the following year were more specific on the status of the diplomatic courier of the special mission. Thus article 22, paragraph 5, read:

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag,\* shall be protected by the receiving State in the performance of his functions. . . .<sup>104</sup>

No change was made to the above wording in the text adopted by the Commission at its nineteenth session, in 1967, but article 22 was renumbered as article 28 of the draft articles.<sup>105</sup>

72. When the final draft articles on Special Missions were proposed by the Commission to the Sixth Committee of the General Assembly for adoption, at its twenty-third session in 1968, no changes were made with regard to article 28, paragraph 6, referring to the proof of status of the courier of the special mission. The only substantial addition to the proposed text came from the proposal for amendment by Ghana,<sup>106</sup> which was eventually adopted with minor drafting changes as new paragraph 3 of article 28 of the convention, stipulating that:

3. Where practicable, the special mission shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission of the sending State.

73. The work of the Commission with respect to the status of the courier of a permanent mission to international organizations or the courier of the delegation of a

State at an international conference was greatly helped by the previous codification of international diplomatic law. Article 27, paragraph 5, of the draft articles on relations between States and international organizations<sup>107</sup> prepared by the Commission at its twentieth session, in 1968, was modelled verbatim after article 27, paragraph 5, of the 1961 Vienna Convention and article 28, paragraph 6, of the 1969 Convention on Special Missions. The same approach was applied to the elaboration of article 57, paragraph 6, on the proof of status of the courier of a delegation to an international conference.

74. At the United Nations Conference on the Representation of States in their Relations with International Organizations in 1975, no substantial change was made in the draft articles referring to the status of the courier, including the proof of his status. Article 28, paragraph 6, and article 57, paragraph 6, would also be applied to couriers used by observer delegations to meetings of international organs and to international conferences. This was explicitly stipulated in article 72 of the convention adopted by the conference.<sup>108</sup>

75. The prevailing State practice, particularly during the last two decades, has followed closely the pattern established by the 1961 Vienna Convention with regard to the required documents as a proof of the official status of the diplomatic and other couriers. The survey of some 30 bilateral consular conventions signed after the 1963 Vienna Convention also confirmed the standard provision, according to which "the consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag" (art. 35, para. 5). The same provision referring to an official document indicating the number of packages constituting the bag is applied to the captain of a commercial aircraft or master of a vessel.<sup>109</sup>

<sup>107</sup> *Yearbook* . . . 1968, vol. II, pp. 149–150, document A/CN.4/203 and Add.1–5. See also *Yearbook* . . . 1969, vol. I, p. 136, 1017th meeting, para. 53; *Yearbook* . . . 1970, vol. II, document A/8010/Rev.1, pp. 293–294 (art. 97), and pp. 297–298 (art. 110).

<sup>108</sup> See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. I (United Nations publication, Sales No. E.75.V.11), p. 21, 6th plenary meeting, paras. 66–74; p. 27, 7th plenary meeting, paras. 68–70; pp. 37–41, 9th plenary meeting, paras. 48–68, and 10th plenary meeting, paras. 1–36; p. 178, *Committee of the Whole*, 18th meeting, paras. 31–34; pp. 236–242, *ibid.*, 27th meeting, paras. 41–59, and 28th meeting, paras. 1–47; pp. 280–283, *ibid.*, 36th meeting, paras. 22–52; p. 313, *ibid.*, 42nd meeting, paras. 42–44; p. 343, *ibid.*, 47th meeting, para. 54; p. 345, *ibid.*, 48th meeting, para. 20; and p. 347, *ibid.*, para. 42. See also the report of the Committee of the Whole, *Official Records of the United Nations Conference on the Representation of States* . . . vol. II (United Nations publication, Sales No. E.75.V.12), pp. 101–102, 123–125, 147–149 and 159–160. See also the second report, para. 104 (*Yearbook* . . . 1981, vol. II (Part One), p. 172, document A/CN.4/347 and Add.1 and 2).

<sup>109</sup> See, for example, the Consular Convention between France and Romania of 18 May 1968 (art. 25, para. 5); the Consular Convention between Mongolia and the German Democratic Republic of 12 October 1973 (art. 14, para. 4); the Consular Convention between Belgium and Turkey of 28 April 1972 (art. 22, para. 4); the Consular Convention between Poland and Cuba of 12 May 1972 (art. 16, paras. 5–6); the Consular Convention between the USSR and Norway of 7 December 1971 (art. 14, paras. 4–6); the Consular Convention between Hungary and Mongolia of 27 June 1974 (art. 14); the Consular Convention between the United Kingdom and Czechoslovakia of 3 April 1975 (art. 16); the Consular Conventions between Greece and Hungary of 18 March 1977 and between Greece and Poland of 30 August 1977; the Consular Convention between

(Continued on next page.)

<sup>100</sup> Among these representatives were those of Yugoslavia (*ibid.*, vol. I, p. 320, para. 17), Australia (*ibid.*, para. 18) and Belgium (*ibid.*, para. 25).

<sup>101</sup> *Inter alia*, the representatives of the United Kingdom (*ibid.*, pp. 319–320, para. 15); Bulgaria (*ibid.*, p. 320, para. 20); Italy (*ibid.*, para. 21); India (*ibid.*, para. 23); and Finland (*ibid.*, para. 26).

<sup>102</sup> See the second report, paras. 82–89 (*Yearbook* . . . 1981, vol. II (Part One), pp. 168–169, document A/CN.4/347 and Add.1 and 2).

<sup>103</sup> *Yearbook* . . . 1964, vol. II, p. 109, document A/CN.4/166.

<sup>104</sup> *Yearbook* . . . 1965, vol. II, p. 130, document A/CN.4/179.

<sup>105</sup> *Yearbook* . . . 1967, vol. II, pp. 360–361, document A/6709/Rev.1. See also the second report, paras. 90–96 (*Yearbook* . . . 1981, vol. II (Part One), pp. 169–170, document A/CN.4/347 and Add.1–2).

<sup>106</sup> A/C.6/L.696/Rev.1. The United Kingdom had a similar proposal (A/C.6/L.699), which was withdrawn. See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, "Report of the Sixth Committee", para. 214, under (b); see also the statement of the representative of Ghana (*ibid.*, Sixth Committee, 1068th meeting, para. 16) and the decision of the Sixth Committee (*ibid.*, 1089th meeting, para. 8).

76. The formula related to the official document indicating the official status of the courier contained in article 27, paragraph 5, of the 1961 Vienna Convention and other multilateral and bilateral treaties in the field of diplomatic law, has also been adopted in some national laws, regulations and established practices, with various denominations of the document itself or emphasis on the specific nature of such a document. In the Spanish regulations concerning the diplomatic bag of 1 July 1968, there is only a general reference to the effect that the status of the official couriers "shall be certified by means of appropriate credentials" (sect. II, art. 8, para. 2).<sup>110</sup> The relevant regulations on this matter embodied in the Manual of the Diplomatic Service of Finland are more specific. They indicate that the *ad hoc* courier will be provided not only with a diplomatic passport or a passport of official service "but also with a courier passport which will indicate his/her diplomatic status and which the courier has to hand over to the receiver".<sup>111</sup> Under the term "courier passport" usually is conceived a special document indicating the status of the courier and very often also the number of parcels constituting the diplomatic bag. The regulations and practice of some States provide the couriers with such documents called "courier passport" testifying to their status.<sup>112</sup> This kind of "passport" should be distinguished from the regular and widespread use of the term "passport" meaning an official document issued by the competent authorities to their nationals, permitting the bearer of the passport to travel abroad.<sup>113</sup> Of course, such a passport could also be employed as a proof of the official status of the courier if among the personal particulars contained in the passport it is indicated that its bearer is a diplomatic courier. As a matter of fact there are many countries which furnish with diplomatic passports their professional or regular couriers, i.e., the diplomatic couriers regularly employed in the courier's service of the

foreign office. In addition to the passport (diplomatic passport or passport of official service) the couriers are provided with an official document or certificate indicating the status of the courier, the destination of the diplomatic bag entrusted to him and some data about the diplomatic bag itself.<sup>114</sup> The rules, regulations and established practices in many States refer specifically to the official document as a proof of the status of the diplomatic courier on the presumption that a diplomatic or service passport is in any case indispensable as a valid document for travel abroad. There are various denominations of the documents testifying to the status of the courier, but the terminological differences have no legal significance. Whether the document is called simply a document indicating the status of the courier<sup>115</sup> or "official document",<sup>116</sup> "courier letter",<sup>117</sup> "certificate", "courier's certificate", or "special certificate",<sup>118</sup> etc. its legal nature and purpose remain essentially the same, namely an official document proving the status of the diplomatic courier.<sup>119</sup>

77. The survey of the *travaux préparatoires* and the recent State practice with all its diversity reveal the main legal requirements for the proof of the status of the diplomatic courier. It attests the existence of a general practice that, in addition to his passport (diplomatic or service passport), the diplomatic courier is provided with an official document testifying explicitly to his status and most essential personal particulars, and indicating some pertinent data of the diplomatic bag. Such data, if required, include the total number of packages constituting the diplomatic pouch, the serial numbers of each parcel, the destination, its size and the weight of the diplomatic bag. This document is issued by the competent authorities of the sending State or its

(Footnote 109 continued.)

Czechoslovakia and Cyprus of 12 May 1976; the Consular Convention between the United States of America and the People's Republic of China of 17 September 1980; the Consular Conventions concluded by Austria with Romania, of 24 September 1974 (art. 31, para. 4) (see p. 234 above, document A/CN.4/356 and Add.1-3), with Hungary, of 25 February 1975 (art. 15, para. 5) (*ibid.*, p. 235), with the German Democratic Republic, of 26 March 1975 (art. 14, para. 5) (*ibid.*, p. 234), and with Bulgaria of 4 May 1975 (art. 30, para. 4) (*ibid.*, p. 235).

<sup>110</sup> See p. 239 above, document A/CN.4/356 and Add.1-3.

<sup>111</sup> *Ibid.*, p. 236.

<sup>112</sup> On the use of the term "passport" as a travel document and its distinction from the official document issued to the diplomatic courier as a proof of his status, see also the comments made by some members of the Commission in 1957 and 1958, as mentioned in paragraphs 65-66 above.

<sup>113</sup> See, for example, article 17 of Decree No. 3437 of Argentina (United Nations, Legislative Series, vol. VII . . . , p. 7), which refers to the courier's passport as a document testifying to his status. According to the relevant regulations of Belgium: "Mémoire sur le régime fiscal, douanier, etc., applicable aux membres du corps diplomatique accrédités en Belgique" and "Instruction du Ministère des finances concernant les immunités diplomatiques, 1955" (*ibid.*, pp. 29-30 and 45-46), the parcels, packages, etc., should be mentioned in the passport or the way-bill ("*la feuille de route*") of the courier. According to the *Foreign Affairs Manual* of the Department of State of the United States of America, "each professional diplomatic courier will be issued in addition to his diplomatic passport, a courier passport, signed by the Secretary of State for his official travel as a courier . . ." (United States of America, Department of State, *Foreign Affairs Manual* (Washington, D.C., U.S. Government Printing Office, 1970), pp. 213-214, paras. 352.1, 352.2, 352.3-1 and 352.4-1).

<sup>114</sup> See paragraph 13 (d) of the "Regulations concerning entry into and exit from the Union of Soviet Socialist Republics", which stipulates that diplomatic passports shall be issued to diplomatic couriers, and paragraph 3 of the "Rules concerning the admission across the State frontier of the USSR of the diplomatic bag of Foreign States and the personal belongings of diplomatic couriers", which states that "The diplomatic courier must be provided with an official document (courier's certificate) indicating his status and the number of parcels constituting the diplomatic bag" (see pp. 241 and 242 above, document A/CN.4/356 and Add.1-3). According to the *Foreign Affairs Manual* of the Department of State of the United States (see footnote 113 above), "each professional diplomatic courier will be issued in addition to his diplomatic passport, a courier passport . . .", and, when indicating the requirements for a professional courier service, the same *Manual* states that "the person to be designated is a male employee who has been issued a diplomatic passport". In the practice of the United States, the terms "courier letters" or "regional courier letters" are also employed.

<sup>115</sup> See the instructions concerning the courier service of the Federal Republic of Germany (p. 236 above, document A/CN.4/356 and Add.1-3).

<sup>116</sup> See article 7 of the Order of the Federal Ministry of Foreign Trade of Czechoslovakia (*ibid.*, p. 235).

<sup>117</sup> See footnote 114 above. The same term "courier letter" ("*lettre de courier*") is employed by Switzerland in its "Règles appliquées par le Département politique fédéral en matière d'immunités et privilèges diplomatiques et consulaires" (United Nations, Legislative Series, vol. VII . . . , p. 307).

<sup>118</sup> See the relevant regulations of Spain (p. 239 above, document A/CN.4/356 and Add.1-3) and the practice of the USSR mentioned in footnote 114 above. In the practice of the United States the term "special certificate" was used in the past (see Hackworth, *op. cit.*, p. 621).

<sup>119</sup> The following are among the other terms used for indicating documents which serve as a proof of the status of the diplomatic courier: "attestation" and "sauf-conduit", used in the Swiss Regulations (see footnote 117 above) and "*feuille de route*", used by Belgium (see footnote 113 above).

diplomatic or other official missions abroad. The form of the document, its formal particulars and denomination, are entirely within the jurisdiction and discretion of the sending State in accordance with its laws, regulations and established practices.

78. However, it would be advisable to attain a certain minimum degree of coherence and uniformity which may facilitate the safe, unimpeded and expeditious dispatch and delivery of the diplomatic bag through the establishment of generally agreed rules and regulations. It might be advisable to furnish the professional diplomatic courier or the courier regularly employed in the courier service with a diplomatic or service passport. Such a passport should indicate the official position of a diplomatic courier in addition to the other data, such as the name of its bearer, the date and place of birth (if required), the date of the issuance of the passport and its validity, etc. Therefore, in the ordinary travel document used by all persons travelling abroad, the status of the diplomatic courier will be certified. Such a practice could be very useful when the courier is required to undergo ordinary checking of travel documents at intermediate transit points on his journey. This kind of a passport could by itself provide certain legal protection or preferential treatment, even before producing the special courier's document as a proof of status. With regard to diplomatic couriers *ad hoc*, their passports and the rank indicated therein serves the same purpose. Of course, there is no doubt whatsoever that the most important specific proof of the position of the courier should be the official document indicating his status and the particulars of the accompanied diplomatic bag.

79. In the light of the above considerations regarding the proof of status of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

## PART II

### STATUS OF THE DIPLOMATIC COURIER, THE DIPLOMATIC COURIER *AD HOC* AND THE CAPTAIN OF A COMMERCIAL AIRCRAFT OR THE MASTER OF A SHIP CARRYING A DIPLOMATIC BAG

#### Article 7. Proof of status

**The diplomatic courier shall be provided, in addition to his passport, with an official document indicating his status and the number of packages constituting the diplomatic bag as accompanied by him.**

#### 2. APPOINTMENT OF A DIPLOMATIC COURIER

80. The requirements and procedures for the appointment of a diplomatic courier constitute an essential aspect of his legal status. The appointment of a diplomatic courier is an act of the competent authorities of the sending State or its mission abroad to designate a person for the performance of an official function, namely the custody, transportation and delivery of the diplomatic bag. This act defines the category of the courier and consequently his legal position in the territory of the receiving or the transit State. The legal characteristics and implementations of an "appoint-

ment" of the professional or regular diplomatic courier differ significantly from that of a diplomatic courier *ad hoc*. The "assignment" of the captain of a commercial aircraft or the master of a ship to carry a diplomatic bag should not be considered as an "appointment".

81. The appointment of a professional diplomatic courier who is employed in the regular courier service, as a general rule, is effected by an act of a competent organ of the Ministry of Foreign Affairs.<sup>120</sup> Thus the diplomatic courier becomes a member of the permanent staff of the Foreign Office, with rights and duties deriving from his position as a civil servant. The act of appointment therefore creates a permanent legal relationship, stipulating also a pay in return for the service rendered by the courier. In his capacity of an official performing a function in the field of diplomatic communications, the diplomatic courier is accorded certain facilities, privileges and immunities by the receiving or the transit State. The diplomatic courier enjoys those facilities, privileges and immunities throughout the duration of his official journey abroad until his return back to the sending State, since they are granted to him not as a person but as an official of the foreign service.

82. The act of appointment so defined should be distinguished from an assignment for a particular round of official travel in connection with the delivery of a diplomatic bag. Such an assignment is attested by the official document (courier's letter or way-bill) with which he is provided for that occasion. Of course, this official document indicating the status of the courier and the number of packages constituting the diplomatic bag testifies to the status of the courier, who presumably had already been duly appointed as a member of the foreign office staff.

83. The designation of a diplomatic courier *ad hoc* is essentially a different act from the act of appointment of a professional diplomatic courier. Though in most instances a diplomatic courier *ad hoc* may be a diplomat, a member of the staff of the diplomatic mission or a member of the staff of the foreign office of the sending State, this official status is not a mandatory requirement. The function of a diplomatic courier *ad hoc* could be performed by any official of the sending State or any person freely chosen by its competent authorities.<sup>121</sup> The designation of a diplomatic courier *ad hoc* is for a special occasion. Therefore the legal relationship between the relevant office of the sending State and the diplomatic courier *ad hoc* is of a temporary

<sup>120</sup>This is the usual practice of States with regular courier service employing professional couriers. The appointment of such couriers is governed by the rules applicable to the designation of members of the staff of the foreign office. The courier service may be a distinct and autonomous unit within the institutional structure of the Ministry of Foreign Affairs or associated with some other departments or divisions, such as, for example, a communication department, dispatching service or other departments. In all instances, however, the appointment of a professional (regular, or permanent) diplomatic courier is considered to be an act of designation of a civil servant whose function is to carry the diplomatic pouch. As a matter of fact, most of the examples mentioned above (see footnotes 78, 109 and 113-119 above) referring to professional diplomatic or consular couriers have in mind couriers duly appointed as members of the staff of the foreign service.

<sup>121</sup>The foreign service of Finland, for example, employs *ad hoc* couriers designated for special assignments. Such couriers are chosen among the officials of the Foreign Office or adult members of their families, or even other Finnish citizens, but are, in the first place, persons eligible to carry a diplomatic passport or a passport of official service (see p. 236 above, document A/CN.4/356 and Add.1-3).

nature. The obligation of such a courier is to deliver the diplomatic bag safely to its destination, and for that reason he is entitled to certain rights, including some facilities, privileges and immunities necessary for the exercise of his function. Obviously, if the courier *ad hoc* happens to be a member of the staff of the foreign office or a member of the diplomatic staff he may have a permanent legal relationship with that office, but his rights and obligations would derive from the act of his appointment as an official of the foreign service or the diplomatic mission, and not because of his special assignment as a courier *ad hoc*. This distinction may acquire practical significance in certain circumstances.

84. The diplomatic courier *ad hoc* could be designated either by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations. In accordance with the regulations and practice of some States, their missions abroad maintain a list of members of the staff who are eligible to perform the functions of a courier *ad hoc*.<sup>122</sup> The diplomatic courier *ad hoc*, like the professional courier, is furnished with a special document indicating his status and the number of packages constituting the diplomatic bag.

85. Unlike the professional diplomatic courier, however, who is granted facilities, privileges and immunities throughout his official journey until he returns back to the sending State, the courier *ad hoc* enjoys such facilities, privileges and immunities up to the moment when he has delivered to the consignee the diplomatic bag in his charge. This restriction is explicitly contemplated in article 27, paragraph 6, of the 1961 Vienna Convention and has invariably been followed by the other codification conventions and in State practice. It is an indication of the functional approach to the legal status of the diplomatic courier. Obviously if the diplomatic courier *ad hoc* is at the same time a diplomatic agent entitled to privileges and immunities he would certainly enjoy them even after the delivery of the diplomatic bag, by virtue of his diplomatic status and not because of his already accomplished task as a diplomatic courier *ad hoc*. Accordingly, if the diplomatic courier *ad hoc* is a person not eligible for a diplomatic status, the facilities, privileges and immunities accorded to him as a courier shall cease to apply when he has delivered the diplomatic bag to its destination, because his designation was with limited legal effect.

86. The assignment of a captain of a commercial aircraft or a master of a ship<sup>123</sup> to carry a diplomatic bag is of much more limited character as far as their rights and duties are concerned. In accordance with article 27, paragraph 7, of the 1961 Vienna Convention and the relevant provisions of the other codification conventions, the captain or the master shall not be considered to be diplomatic couriers. This provision has been

generally reiterated in other treaties, and especially in recent State practice, as a standard rule on that matter.<sup>124</sup> The captain of a commercial aircraft or the master of a ship may be employed for the custody, transportation and delivery of the diplomatic bag to an authorized port of entry on their scheduled itinerary. The designation of the captain or master is made on an *ad hoc* basis and is not effected by any formal act. However, their special assignment is indirectly evidenced by that fact that they are provided with an official document indicating the number of packages constituting the bag entrusted to them. Some bilateral treaties and national regulations and established practices envisage facilities for free and direct delivery of the bag to members of the diplomatic mission of the sending State, who are allowed to have access to the aircraft or the ship in order to take direct possession of the diplomatic consignment.

87. The legal protection and favourable treatment to which the diplomatic bag is entitled constitutes the legal ground for the appropriate arrangements provided for the delivery of the bag at the aircraft or the ship. These are facilities which are not granted to the captain of the aircraft or the master of the ship but to the members of the diplomatic mission which is the consignee of the bag.<sup>125</sup> The captain or the master do not need any special treatment on the territory of the receiving State and are not granted any diplomatic privileges and immunities, because they are not supposed to carry the bag through the territory of the receiving State. Their task is to hand over the bag to the members of the diplomatic mission of the sending State, on board the aircraft or the ship under their authority. Therefore the assignment of a captain of a commercial aircraft or a master of a ship with courier's function does not entail a courier's status of any kind.

88. The appointment of a diplomatic courier is an act which is within the domestic jurisdiction of the sending States. This means that the requirements for appointment or special assignment, the procedure to be followed in the issuance of the act, the designation of the relevant competent authorities and the form of the act are governed by the national laws, regulations and established practices. The sending State is entitled freely, at its own discretion, to appoint a professional diplomatic courier, to designate on special occasion a diplomatic courier *ad hoc* or to entrust the diplomatic bag to the captain of a commercial aircraft or the master of a ship. This is the general rule, applied also to the appointment of members of the staff of the diplomatic mission.<sup>126</sup> There has not been any doubt as

<sup>122</sup> The regulations concerning the diplomatic bag of 1 July 1968 of Spain provide in sect. II, article 7, para. 2, that "Each mission or post shall maintain a list of officers who may perform the duty of delivering and accepting bags", and in the same section, article 8, para. 2, that "Official couriers are the officers responsible for accompanying and accepting bags. They shall normally perform this duty in the Central Government". Presumably this category of couriers are regular or professional couriers.

<sup>123</sup> When the diplomatic bag is in the form of heavy consignments for land transportation, it could also be entrusted to truck drivers (see the regulations of Finland, *ibid.*, p. 236, para. 5).

<sup>124</sup> See the second report, paras. 116-118 (*Yearbook . . . 1981*, vol. II (Part One), p. 174, document A/CN.4/347 and Add.1 and 2); see also para. 75 and footnote 103 above.

<sup>125</sup> The regulations and established practices of many States require explicitly that the delivery of the bag by the captain or the master to the authorized member of the diplomatic mission of the receiving State should be effected against a receipt, confirming the handing over of the diplomatic bag (see, for example, the regulations of Spain concerning the diplomatic bag, sect. I, art. 3 (p. 239) above, document A/CN.4/356 and Add.1-3)).

<sup>126</sup> The 1961 Vienna Convention stipulates, in article 7, that "the sending State may freely appoint the members of the staff of the mission". Identical provisions exist in the 1963 Vienna Convention (art. 19, para. 1), the 1969 Convention on Special Missions (art. 8) and the 1975 Vienna Convention (arts. 9, 43 and 72). The rule mentioned above has also been reiterated by subsequent bilateral



to the legal nature of this rule, deriving from the sovereignty of the State.

89. However, the right of the sending State to appoint freely a diplomatic courier, based on its internal law and regulations, has some international implications affecting the receiving State. There is a need for certain harmonization between the rights and obligations of the sending State and those of the receiving State, which could be achieved through the adoption of some international rules in this field. The sovereign right of the sending State to freely appoint its diplomatic courier should be balanced with the equally sovereign right of the receiving State to admit an official of the sending State on its territory and to allow him to carry and deliver a diplomatic bag. The diplomatic courier ought to perform his official function on the territory of the receiving or the transit State. It is therefore in the interest of the sending State to appoint a diplomatic courier who would not meet any difficulties during the discharge of his duties and would enjoy certain facilities, privileges and immunities while on the territory of the receiving or the transit State. For the receiving State, on the other hand, it is inconvenient to invoke often the rule of declaring the foreign official *persona non grata* or not acceptable.

90. The appointment of a diplomatic courier in principle does not require prior express consent by the receiving State. Nevertheless, this general rule may be subject to some requirements and could be applied with certain modalities. Without entering into details, it could be pointed out that such requirements may refer to the nationality of the courier.<sup>127</sup> As a rule, the regular diplomatic courier should be a national of the sending State and not a national of the receiving State. In case of an appointment of a courier which is not in accordance with this rule, the receiving State is entitled to raise an objection or may declare such a person non-acceptable. There may be other reasons for recourse to the declaration of *persona non grata* or not acceptable,<sup>128</sup> prior to the appointment, if such an advanced notification is addressed by the sending State to the receiving State, or *a posteriori* when the diplomatic courier has already reached the territory of the receiving State. The modalities of application of the provisions related to the requirements and procedures for the appointment of a diplomatic courier by the sending State and his admission to the territory of the receiving State could be of varying character. As has been pointed out, there is no mandatory condition for prior agreement of the receiving State, unless an entry or transit visa is required as a prior condition for admission to the receiving or the transit State. In that case, the procedure of applying for a visa for the diplomatic courier provides an opportunity for the receiving or the transit State to pronounce itself, directly or indirectly, on the acceptability of the diplomatic courier. Entry or transit visas could be granted to the diplomatic courier on an *ad hoc* basis for a single

journey or for several or an unlimited number of journeys for a certain period of time.

91. Another modality for the application of the general rule on the appointment of the diplomatic courier would be a prior notification to that effect, addressed by the sending State to the receiving State, on its own will and discretion, as a courtesy to the latter or with a view to ensuring better conditions for the treatment of its diplomatic courier while performing his functions. All these requirements and modalities do not affect the legal nature of the act of appointment as a sovereign act of the competent authorities of the sending State. The effective operation of this rule, however, requires the co-operation of the receiving State and the establishment of a proper balance between the rights and obligations of the sending and the receiving States. This would be the objective of the draft articles to be submitted on this issue. The practice of States is unequivocally in favour of international rules that would contribute to the promotion of such a flexible legal framework.

92. The appointment of a diplomatic courier has undergone certain developments in response to practical demands deriving from the dynamics of diplomatic intercourse and more rational use of financial means and manpower. This is the case with the ever-increasing practice of appointing the same person by two or more sending States as their joint diplomatic courier. There is no specific provision of this kind relating to the couriers in the four codification conventions. However, there is a provision in the 1961 Vienna Convention stipulating that "Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State". A similar provision is embodied in the other codification conventions.<sup>129</sup> Responding to such pragmatic considerations and inspired by the multilateral conventions in the field of diplomatic law adopted under the auspices of the United Nations, some States have introduced in their practice this new type of joint diplomatic courier. Of course, such a diplomatic courier should meet all the requirements of an ordinary diplomatic courier.

93. The special legal features of the multiple appointment of a diplomatic courier are to a certain degree modifications of the main elements determining the status of the diplomatic courier. The appointment of a joint courier is made on the basis of an agreement between the sending States concerned. This agreement could be for a special occasion or for a longer period of time and for an unspecified number of journeys. The scope and the form of such an instrument is determined by the competent authorities of the States involved in the multiple appointment of a diplomatic courier. The diplomatic courier should be a national of one of those sending States, furnished with a passport (diplomatic or service passport) issued by that State. His status of diplomatic courier may be indicated in such a passport. The special document or documents testifying to the status of the joint diplomatic courier and the number of packages constituting the bag or the bags entrusted to him by the sending States could be issued either by one or all of the sending States. One common certificate

treaties and enjoys general recognition in State practice. In some States there are special regulations on the requirements and procedures related to the appointment of diplomatic couriers confirming their full discretion on this matter.

<sup>127</sup>The problem of the nationality of the diplomatic courier will be dealt with separately (see paras. 97–103 below).

<sup>128</sup>This problem will be considered below (paras. 104 *et seq.*).

<sup>129</sup>See article 6 of the 1961 Vienna Convention; article 18 of the 1963 Vienna Convention; article 5 of the 1969 Convention on Special Missions; and article 8 of the 1975 Vienna Convention.



might be advisable for practical convenience, unless the long list of packages would create certain difficulties in a checking procedure. The letters, parcels or packages with serial numbers and other particulars determined by the individual sending State may be placed in one or separate bags or containers, but the official document containing the necessary data about the diplomatic bag should indicate the origin and destination of each bag.

94. The same procedure should be applied *mutatis mutandis* to a diplomatic courier *ad hoc* appointed by two or more States. He should be provided with a passport issued by the sending State of which he is a national, and an official document or documents indicating his status and the number of packages constituting the bag or the bags of each sending State. In the case of multiple assignment by several sending States of the captain of an aircraft or the master of a ship to carry their diplomatic bags, the prior agreement between those States is not required. When one commercial aircraft or ship is transporting the diplomatic bag, the separation and distinction between the bags of each individual State may acquire particular practical significance in view of the fact that the bag should be received on board by authorized members of the diplomatic mission of the respective sending State. It is possible by mutual agreement between the sending States concerned that a member of the diplomatic mission of one of them take possession of the joint diplomatic bag.

95. There may be some other practical procedures in the operation of a courier appointed by two or more States which are of such a nature that they should not be the subject of strict legal regulations. The main issue is the possibility of multiple appointment of a diplomatic courier, the legal protection of a joint diplomatic bag carried by such a courier and his legal status. The regular diplomatic courier or diplomatic courier *ad hoc* appointed by several States should have the same rights and obligations and enjoy the same facilities, privileges and immunities as those accorded to a diplomatic courier appointed by one sending State. This applies also to the legal protection of the diplomatic bag entrusted by several States to the captain of a commercial aircraft or the master of a ship. For the reasons mentioned above, it may be more justified to issue separate official documents indicating the number of the packages constituting the diplomatic bag of each State.

96. In the light of the above considerations regarding the appointment of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft articles:

**Article 8. Appointment of a diplomatic courier**

Subject to the provisions of articles 9, 10 and 11, diplomatic couriers and diplomatic couriers *ad hoc* are freely appointed by the competent authorities of the sending State or by its diplomatic missions, consular posts, special missions, permanent missions or delegations, and are admitted to perform their functions on the territory of the receiving State or the transit State.

**Article 9. Appointment of the same person by two or more States as a diplomatic courier**

Two or more States may appoint the same person as a diplomatic courier or diplomatic courier *ad hoc*.

### 3. NATIONALITY OF THE DIPLOMATIC COURIER

97. The question of the nationality of the diplomatic courier may be considered as a part of the more general issue of the nationality of the diplomatic agent. The specific rules on the nationality of the diplomatic courier are often related to or influenced by the law governing the status of the diplomatic agent. On the other hand the nationality is an essential legal feature which has an impact on the appointment or non-acceptance of a diplomatic courier and on the privileges accorded to him. Thus the nationality determines important aspects of the status of the diplomatic courier.

98. The history of diplomatic intercourse and diplomatic law bears witness to the political and legal significance of the problem of nationality of all kinds of diplomatic officials. Due to the political importance and confidential nature of the diplomatic functions, it has always been considered that, as a rule, all diplomatic agents should be nationals of the sending State. In the past, there were some exceptions when members of a foreign diplomatic mission were nationals of the receiving State. However, such cases are now almost vanished from State practice and are considered as "curiosities" of history. It should be pointed out that, already at the end of the last century and the beginning of this century, the employment of a national of the receiving State for a diplomatic function performed by the sending State without the consent of the former was considered a violation of diplomatic norms.<sup>130</sup> In the 1928 Havana Convention regarding Diplomatic Officers, it was stipulated in article 7 that "States are free in the selection of their diplomatic officers; but they may not invest with such functions the nationals of a State in which the mission must function without its consent".<sup>131</sup> This trend has been strengthened and recognized as a general rule of diplomatic law. There are prevailing reasons of political and legal nature which justify the adoption by States of a positive attitude towards the enhancement of this rule. The *travaux préparatoires* of the codification conventions adopted under the auspices of the United Nations and the present State practice give enough evidence to this effect.

99. The 1961 Vienna Convention was an important step forward in this direction with respect to the members of the diplomatic staff of the mission.<sup>132</sup> From the text of article 8 of the convention it is evident that,

<sup>130</sup> See, for example, the note of protest of 8 September 1915 by the United States Embassy to the Foreign Office of Austria-Hungary, pointing out that Ambassador Dumba was no longer acceptable as Austro-Hungarian Ambassador at Washington because he had been guilty of "flagrant violation of diplomatic propriety" in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary. (See Hackworth, *op. cit.*, pp. 621-622.)

<sup>131</sup> Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference, signed at Havana, 20 February 1928 (League of Nations, *Treaty Series*, vol. CLV, p. 267).

<sup>132</sup> Article 8 of the 1961 Vienna Convention reads:

"1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

"2. Members of the diplomatic staff of the mission may not be appointed from persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

though in principle members of the diplomatic staff of the mission should be nationals of the sending State, there could be, as an exception, such members who are nationals of the receiving State. This kind of diplomatic agent, however, "shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions", as stipulated in article 38 of the same convention. No specific reference is made on this matter with regard to the nationality of a diplomatic courier.

100. The Commission, when considering the draft articles on consular relations, also did not deal with this issue. This was done later at the Vienna Conference on Consular Relations of 1963 during the discussion on article 35 on freedom of communication.<sup>133</sup> It was proposed to add to paragraph 5 of that article, after the words "consular courier" the words "who shall be neither a national of the receiving State nor a permanent resident thereof".<sup>134</sup> After some discussions on several other amendments referring one way or the other to the nationality of the consular courier, the present text of paragraph 5 of article 35 was adopted by the conference.<sup>135</sup>

101. The 1963 Vienna Convention made headway for the enhancement of the rule contained in the above-mentioned article. Recent State practice has further reinforced that rule. There are several consular conventions signed during the last decade containing specific provisions which stipulate that the consular courier "must be a national of the sending State and may not be domiciled in the territory of the receiving State".<sup>136</sup>

102. Taking into account the main trend in the present diplomatic law and the prevailing State practice, it should be pointed out that the emerging general rule seems to be that the diplomatic courier as well as the other regular couriers should be, in principle, nationals of the sending State. To this general rule certain exceptions may be contemplated. They would, of course, basically be determined by mutual agreement between the sending and the receiving State. The express consent of the latter for appointing as a diplomatic courier a person who has its nationality may

be withdrawn at any time upon the discretion of that State. This right of the receiving State to withdraw its consent is well justified considering the fact that the diplomatic courier is performing his official functions on its territory, and for that purpose is entitled to enjoy certain facilities, privileges and immunities which are granted to foreign subjects. Following the practice of States as confirmed by some bilateral treaties, the receiving State may also reserve its right to object or withdraw its prior consent to the appointment, as a diplomatic courier, of a person who, though a national of the sending State, is a permanent resident of the receiving State. The receiving State should have the same option also with regard to nationals of a third State who are permanent residents of the receiving State. The reason for such an option is that the facilities, privileges and immunities are provided in the interest of the freedom of diplomatic communications between the sending and the receiving State. In a special case when one person is appointed by two or more States as their joint diplomatic courier, the rule requiring that the courier have the nationality of the sending State would be applied to one of the sending States and the exception would be valid with respect to the other sending States. In the latter, a joint diplomatic courier will perform an official function in the field of the diplomatic communications between those States and the receiving State. The above stated general rule and the exceptions thereto may be applied *mutatis mutandis* to a diplomatic courier *ad hoc*.

103. In the light of the above considerations regarding the nationality of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

#### *Article 10. Nationality of the diplomatic courier*

1. The diplomatic courier should, in principle, have the nationality of the sending State.
2. Diplomatic couriers may not be appointed from among the persons having the nationality of the receiving State except with the express consent of that State, which may be withdrawn at any time.
3. The receiving State may reserve the same right under paragraph 2 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.
4. The application of this article is without prejudice to the appointment of the same person by two or more States as a diplomatic courier, as provided in article 9.

#### **C. Functions of the diplomatic courier**

##### **1. SCOPE AND CONTENT OF THE FUNCTIONS**

104. The determination of the scope and content of the official functions of the diplomatic courier as well as their duration is of paramount significance for the courier's legal status. The functions of the courier are instrumental for the exercise by the State of its right to diplomatic communications. Therefore the functions of

<sup>133</sup> "3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State."

<sup>133</sup> *Official Records of the United Nations Conference on Consular Relations*, vol. II . . . , pp. 22-23.

<sup>134</sup> *Ibid.*, vol. I . . . , p. 325, *Second Committee*, Fourteenth meeting, para. 6.

<sup>135</sup> Paragraph 5 of article 35 reads:

"5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. *Except with the consent of the receiving State he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State.*" In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention."

<sup>136</sup> See, for example, article 31, para. 4 of the Consular Convention between Austria and Romania (p. 234 above, document A/CN.4/356 and Add.1-3). Similar provisions are contained (*ibid.*, pp. 233-235) in consular treaties signed by Austria with the German Democratic Republic (art. 14, para. 5), Bulgaria (art. 30, para. 4) and Hungary (art. 15, para. 5), and a number of other bilateral consular conventions to which one of the following States is a party: Austria, Bulgaria, Cyprus, France, German Democratic Republic, Greece, Hungary, Mongolia, United Kingdom, Union of Soviet Socialist Republics.

the courier are, in the end, those of the State itself.<sup>137</sup> The courier is a person designated by the sending State to deliver the diplomatic bag. The diplomatic bag, as a means of the freedom of official communications, is the main subject of legal protection, or the legal status of the diplomatic bag derives from, or is the corollary of the principle of the inviolability of the official correspondence of the diplomatic mission. The facilities, privileges and immunities accorded to the diplomatic bag are extended to the person who is in charge of the custody, transportation and delivery of that bag.

105. The establishment of rules which would provide the guidelines for defining the scope, content and duration of the functions of the diplomatic courier could be of practical importance for the legal protection of the courier and for the prevention or solution of issues arising from possible abuses. The establishment of rules defining the scope and the content of the official functions of the diplomatic courier would provide the legal framework for the distinction of functions which are inherent in the status of the courier and necessary for the accomplishment of his official task from activities which may go beyond those functions. In the case of abuse of the admissible functions, the receiving State may exercise its right to declare the diplomatic courier in question not acceptable or *persona non grata*. On the other hand, an agreed definition of the scope and content of the functions of the diplomatic courier may be useful against an unwarranted recourse to such a right.

106. The recognition of the official functions of the diplomatic courier through international rules would provide the legal foundation for his rights and obligations including the facilities, privileges and immunities granted to him by the receiving and the transit State. This aspect of the problem has always been emphasized as the starting point in the examination of the legal nature, scope and content of diplomatic privileges and immunities accorded to the diplomatic courier. Though the functions of the diplomatic courier were not specifically discussed as a separate issue in the preparation of the four codification conventions, there are some indications in the *travaux préparatoires* of those conventions which may be of some use to the present draft articles. This assumption is based on the fact that the functions of the diplomatic courier can be inferred from certain provisions of the above conventions, as well as from remarks made by the Commission, while discussing other pertinent questions relating to the freedom of communication.

107. During the preparatory work on the 1961 Vienna Convention, there were some observations relating to the functions of a diplomatic courier and their significance as a basis for the privileges and immunities accorded to him. This functional approach induced the general concept that the facilities, privileges and immunities are granted to the diplomatic courier in the *performance of his functions*. Consequently, the definition and clarification of these *functions* are essential to the core of the privileges and immunities of the courier. As was pointed out by one member of the Commission, the immunity of the couriers flows from their official

function: to carry pouches and other strictly confidential diplomatic packages.<sup>138</sup> Other remarks were made to the effect that when the diplomatic bag was used for illicit traffic, such as smuggling diamonds or perfume or for the trafficking of dangerous drugs and parts of atomic bombs, as well as other objects of danger to the public, the transportation and delivery of such a bag did not constitute a function which was supposed to form part of the duties of a diplomatic courier.<sup>139</sup> Reference to the scope and content of the functions of the courier was also made by the Commission in connection with the consideration of article 35 (Freedom of communication) of the draft articles on consular relations. In the commentary to its final draft, the Commission pointed out that the consular posts may use the "diplomatic courier service" of the sending State. Taking into consideration the existing State practice, the Commission indicated that:

... Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States.<sup>140</sup>

108. State practice following the adoption of the general provisions of the 1961 Vienna Convention and the 1963 Vienna Convention further contributed to the definition of the scope and content of the diplomatic courier's functions. The main task of the diplomatic courier is, of course, the safe delivery of the diplomatic bag to its final destination. The courier is in charge of the custody and transportation of the accompanied bag from the moment of receiving it from the competent organ of the sending State until the delivery of that bag to the consignee indicated in the official document and on the bag itself. With the technological development of the means of transportation, the extent of time when the bag is under the exclusive custody and responsibility of the courier has become relatively short, though some overseas official journeys may take more time, if there are intermediate posts for delivering or collecting diplomatic mail. Nevertheless, the duty of the diplomatic courier to take care for the safety and inviolability of the bag is an important component of his official functions. The performance of this function has sometimes been associated with personal strains and even exposure to risks of the life of the courier. This element of the functions of the courier, namely his duty to ensure the safe and expeditious delivery of the diplomatic bag, should be taken into consideration particularly when we consider the facilities, privileges and immunities accorded to him not only by the receiving State but also by the transit State, and the third State in case of *force majeure*.

109. The diplomatic courier could perform a broad range of functions when he is involved in delivering

<sup>138</sup> *Yearbook* . . . 1957, vol. I, p. 75, 398th meeting, para. 41.

<sup>139</sup> *Ibid.*, p. 78, paras. 92 and 95. It was suggested by some members of the Commission that such a bag could be opened in exceptional circumstances, but this could also imply that to carry such a bag was not supposed to fall within the duties of the diplomatic courier (*ibid.*, p. 77, para. 85). One member of the Commission remarked that booksellers were also regularly supplied through the medium of the diplomatic bag, which in itself was an abuse (*ibid.*, pp. 77-78, para. 89).

<sup>140</sup> *Yearbook* . . . 1961, vol. II, p. 111, document A/4843, para. (3) of the commentary to article 35.

<sup>137</sup> See *Yearbook* . . . 1978, vol. II (Part Two), pp. 139 *et seq.*, para. 144; and *Yearbook* . . . 1979, vol. II (Part Two), pp. 172-173, chap. VI, sects. C.1 and C.2.

and/or collecting different kinds of official bags from diplomatic missions, consular posts, permanent missions or other missions or delegations of the sending State situated in several countries or in several cities of a receiving State. As was pointed out in the second report, there has been a widespread practice to use the services of one diplomatic courier during his assignment to carry packages to be delivered on his way to a number of official missions of the sending State.<sup>141</sup> This multi-purpose service which the courier may render constitutes another dimension of the scope and content of the functions which could be performed by the diplomatic courier. Therefore, the rules relating to the functions of the courier should be broad enough to encompass in a comprehensive manner the duties of the diplomatic courier with respect to the custody, transportation and delivery of different kinds of official bags to various missions of the sending State and from those missions to the relevant organs of the sending State.

110. Taking into consideration the above observations on the scope and content of the functions of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following article:

**Article 11. Functions of the diplomatic courier**

**The functions of the diplomatic courier shall consist in taking care of and delivering to its destination the diplomatic bag of the sending State or its diplomatic missions, consular posts, special missions, permanent missions or delegations, wherever situated.**

**2. DURATION OF THE FUNCTIONS**

**(a) Commencement of the functions**

111. The duration of the functions of the diplomatic courier, i.e., the moment of their commencement and of their termination, constitutes an important aspect of the status of the courier. It determines *ratione temporis* the official function of the diplomatic courier and has a direct effect on the duration of the facilities, privileges and immunities granted by the receiving State. Between the commencement and the end of the functions of the diplomatic courier, an intermediary situation of temporary suspension may, in exceptional circumstances, arise. While the commencement of the functions is determined by a single act or event, the end of the functions could be the result of various acts or events such as, for example, the accomplishment of the assignment, the recall of the courier by the sending State, the death of the courier or his declaration as *persona non grata* or not acceptable by the receiving State. The severance or suspension of diplomatic relations as well as the recall of the diplomatic mission, or armed conflict, may also have legal consequences on the duration of the functions of the diplomatic courier.<sup>142</sup>

112. The official function of the diplomatic courier is

<sup>141</sup> *Yearbook* . . . 1981, vol. II (Part One), pp. 168–169, document A/CN.4/347 and Add.1–2, paras. 83–86.

<sup>142</sup> The question of severance or suspension of diplomatic relations, the recall of the diplomatic mission or the occurrence of armed conflict may be considered later as factors which may affect the status of the diplomatic courier.

assumed at the moment of his appointment or assignment. As was pointed out in this report, there is a difference in the legal characteristics and implications between the appointment of the professional courier and that of a diplomatic courier *ad hoc* (see paras. 80–85 above). However, for the receiving or the transit State the commencement of the functions of the diplomatic courier is considered as the moment he enters their territory. When the courier is travelling by car or train, his official function is recognized by the competent authorities of the receiving or transit State at the border check-point. In case the courier uses air or sea transportation, it is at the airport or seaport of entry where his official functions commence. The facilities, privileges and immunities accorded to the diplomatic courier in the performance of his official functions have particular *practical significance* at the moment when he enters the territory of the receiving State, where immigration, customs and other regulations are applied with respect to foreign nationals.

113. The diplomatic courier *ad hoc* may be appointed by the diplomatic mission in the territory of the receiving State among the officials of the mission. A diplomatic courier *ad hoc* thus appointed who is supposed to carry an *outgoing diplomatic bag* from the territory of the State where the diplomatic mission is accredited should enjoy facilities, privileges and immunities on the territory of that State until he crosses its border on his way to the final destination of the bag. In that case the function of the courier may produce its legal effect at the exit from the territory of the State where his function commenced. At the border exit checkpoint, the courier and the bag should enjoy the privileges and immunities accorded by that State.

114. In the light of the above considerations regarding the commencement of the functions of the diplomatic courier, the Special Rapporteur submits for examination and provisional approval the following draft article:

**Article 12. Commencement of the functions of the diplomatic courier**

**The functions of the diplomatic courier shall commence from the moment he is crossing the territory of the transit or receiving State, depending upon which of these events occurs first.**

**(b) End of the functions**

115. There is no specific provision on the end of the functions of the diplomatic courier in the four codification conventions in the field of diplomatic law adopted under the auspices of the United Nations. The Commission, acknowledging this fact, indicated in its report on its thirtieth session that “the termination of a courier’s functions should be the moment when he returned to his home base”.<sup>143</sup>

116. Such a definition of the end of the function of the diplomatic courier, accurate and useful though it may be, seems not to be sufficient. The termination of the functions of a diplomatic courier at the moment of his entry in the sending State may be relevant to the

<sup>143</sup> *Yearbook* . . . 1978, vol. II (Part Two), p. 141, para. 144, item (8).

termination of the function of the *professional or regular diplomatic courier*. It is obvious that the function of such a courier was completed when he "returned to his home base" as the final destination of his official voyage. However, the above formula on the termination of a courier's functions would not embrace the case of a diplomatic courier *ad hoc*, whose function ends upon the delivery of the diplomatic bag entrusted to him to an official mission of the sending State situated on the territory of the receiving State.

117. That there is a need for comprehensive rules relating to the termination of the mission of the diplomatic courier is without doubt. The determination of the relevant moment of the end of the functions is an important prerequisite for greater certainty with respect to the status of the courier. It is also a decisive factor affecting the enjoyment of the facilities, privileges and immunities granted to the courier by the receiving or the transit State, since the official function of the courier is the legal basis for the legal protection of the courier and his favourable treatment.

118. A possible solution of the problem relating to the termination of the end of the diplomatic courier's functions may be sought in the examination of the relevant provisions of the codification conventions and of the State practice regarding the end of the functions of a diplomatic agent or consular officer. Such a study, brief as it may be, could provide the grounds for some useful analogies with the position of the diplomatic courier. Of course, any conclusions based on similarities of the legal status of various kinds of diplomatic and other officials should be made with great caution and careful scrutiny of their specific features, taking into consideration the legal characteristics of the status of the courier and his function.

119. The 1961 Vienna Convention contains several provisions referring, directly or indirectly, to the termination of the function of a diplomatic agent or a member of the staff of the diplomatic mission. Article 43 of the convention states:

The function of a diplomatic agent comes to an end, *inter alia*:

(a) on notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;

(b) on notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.

120. The provisions of article 43 obviously are confined only to acts of the sending and the receiving State. In the latter case, it refers to non-compliance with the consequences of a declaration of a diplomatic agent as *persona non grata* or any other member of the mission as not acceptable. The listing of the possible reasons for the end of the function is not exhaustive, as is emphasized by the explicit use of the words "*inter alia*". However, there are some other provisions in the same convention which implicitly deal with the question of the end of the functions of the diplomatic agent in the occurrence of events such as the death of the diplomatic agent, the severance of diplomatic relations between the sending and the receiving State, or if the diplomatic mission is permanently or temporarily recalled.<sup>144</sup> The convention also contains some provisions relating to

the effect of armed conflict on the privileges and immunities accorded to the diplomatic agent.<sup>145</sup>

121. Similar provisions are contained in the other codification conventions in the field of diplomatic law adopted under the auspices of the United Nations.<sup>146</sup> Those rules, generally agreed by States in their practice, may be applicable *mutatis mutandis* to the status of the diplomatic courier concerning the end of his functions. The factors for the termination of the courier's functions may be:

(a) acts of the sending and the receiving States or the transit State;

(b) events or facts the occurrence of which may also cause the end of the courier's functions.

122. The acts of the sending State which could bring to an end the mission of the diplomatic courier may vary in their substance and motivations. They may take the form of recall, dismissal or other means of termination of the courier's function effected by an act of the competent authority of the sending State. However, vis-à-vis the receiving State or the transit State, this act of the competent organ of the sending State should be expressed by a notification to the courier service or relevant unit of the foreign office of the receiving or the transit State. The act of the receiving State is a declaration to the effect that the diplomatic courier is either *persona non grata* or not acceptable.<sup>147</sup> Thus the receiving State should notify the sending State of its decision to declare a diplomatic courier *persona non grata* or not acceptable. The purpose of this notification is to ask the sending State to terminate the function of its courier.

123. The events which may cause the end of the courier's functions mentioned above may differ greatly in their legal nature or origin; some of them could be physical phenomena, while others could derive from personal actions. Nevertheless, it is possible to identify the most important of those events or facts, taking into consideration the provisions of the codification conventions referring to them and the well-established State practice on this matter. The most frequent and usual fact with such an effect would be the completion of the function of the courier after he had delivered the bag to its final destination. As was pointed out, in the case of the regular or professional courier, this fact would be the return of the courier to the sending State, while in the case of the diplomatic courier *ad hoc* it would be the delivery of the bag in his charge to the consignee. Other events which may bring the courier's function to an end are the death of the courier during the performance of his duties or his resignation before completing his task, i.e., the delivery of the bag to its final destination.

124. For the purpose of the present draft articles it is also appropriate to examine the legal characteristics and implications of the decision of the receiving State to declare a diplomatic courier *persona non grata* or not

<sup>145</sup> See article 44 of the convention. The effects of the severance of diplomatic or consular relations between the sending and the receiving State, the recall of the diplomatic mission or the occurrence of armed conflict on the status of the diplomatic courier may be considered in a later part of this study (see footnote 142 above).

<sup>146</sup> See articles 23 and 53 of the 1963 Vienna Convention; articles 12, 20 and 43 of the 1969 Convention on Special Missions; and articles 34, 40, 68-69 and 72 of the 1975 Vienna Convention.

<sup>147</sup> The distinction between the decision to declare a diplomatic courier *persona non grata* or not acceptable will be examined in para. 125 below.

<sup>144</sup> See articles 39 and 45 of the convention.

acceptable. Though this is only one form of termination of the courier's functions by an act of the receiving State, it deserves special attention. The recourse to this act represents an effective means at the disposal of the receiving State to prevent the appointment of a foreign official or to terminate his function on its territory in order to protect its interests. This right of the receiving State established by international customary law was reiterated in the special provisions of the 1961 Vienna Convention as a model rule of modern international law.<sup>148</sup> Article 9 of the convention identifies the scope of application of this rule, the procedure to be followed in its operation and the legal consequences deriving therefrom with regard to the sending and the receiving State.

125. According to this article, the declaration of a person *non grata* or not acceptable is applicable to the head of the diplomatic mission or any member of the diplomatic staff, i.e., persons with diplomatic status as well as to any other member of the administrative, technical and service staff of the mission. There is a distinction *ratione personae* between the term "*persona non grata*", which is applicable to members of the staff of the mission having diplomatic rank, and the term "not acceptable", which is applicable to those officials who do not have a diplomatic rank. The exercise of the right of the receiving State to declare a member of the diplomatic mission *non grata* or not acceptable could be exercised *ratione temporis* at any time either before the arrival of the official in question in the receiving State or during his stay there. In the first case, the sending State shall withdraw its appointment and recall the person concerned, while in the second case, the functions of that person shall be terminated. If the sending State refuses or fails to carry out these obligations, deriving from the decision of the receiving State, the latter may refuse to recognize the person declared *non grata* or not acceptable as a member of the mission with all the consequences that follow from this act. The receiving State is obliged to notify the sending State of its decision, but without having to explain or justify such a decision.

126. Most of the above-mentioned rules could be applied *mutatis mutandis* to the regular diplomatic courier and the diplomatic courier *ad hoc*. The professional diplomatic courier and the diplomatic courier *ad hoc* may be declared *persona non grata* when they have a diplomatic rank, and not acceptable if they do not have such a rank. As far as the application *ratione temporis* is concerned, a diplomatic courier may be declared *non grata* or not acceptable before the commencement of his functions. This may happen when the sending State deems it suitable to notify the receiving State of the appointment of the courier, or in the event of application for an entry visa if such a visa is required by the receiving State. The decision of the receiving State to declare a diplomatic courier *non grata* or not acceptable could also take place after his entry in the

territory of that State, during his stay there. In both instances the receiving State should not be obliged to explain or justify its decision, unless it decides otherwise. This discretion is not only an expression of the sovereignty of the receiving State, but in many instances it is justified by political or security interests or other considerations.

127. The establishment and application of rules relating to the conditions for terminating the functions of the courier, including the declaration of a diplomatic courier *persona non grata* or not acceptable, may be of some practical significance for the effectiveness of diplomatic law in all its fields of application, and may contribute to provide a viable legal framework for the promotion of co-operation among States in their diplomatic communications. Such rules also may enhance the harmonization of the rights and obligations of the sending and the receiving States, in order to prevent possible abuses of diplomatic privileges and immunities or unjustified restrictions in the performance of the functions of the diplomatic courier.

128. In the light of the above considerations regarding the rules governing the termination of the functions of the diplomatic courier, including the right of the receiving State to declare a diplomatic courier *persona non grata* or not acceptable, the Special Rapporteur submits for examination and provisional approval the following draft articles:

#### **Article 13. End of the function of the diplomatic courier**

The function of a diplomatic courier comes to an end, *inter alia*, upon:

- (a) the completion of his task to deliver the diplomatic bag to its final destination;
- (b) the notification by the sending State to the receiving State that the function of the diplomatic courier has been terminated;
- (c) notification by the receiving State to the sending State that, in accordance with article 14, it refuses to recognize the official status of the diplomatic courier;
- (d) the event of the death of the diplomatic courier.

#### **Article 14. Persons declared 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 of the latter State is declared *persona non grata* or not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his function.

2. In cases when a diplomatic courier is declared *persona non grata* or not acceptable in accordance with paragraph 1 prior to the commencement of his function, the sending State shall send another diplomatic courier to the receiving State.

<sup>148</sup> Identical provisions are contained in the 1963 Vienna Convention (art. 23) and the 1969 Convention on Special Missions (art. 12).





**DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND  
(PARAGRAPHS 1 AND 2 OF GENERAL ASSEMBLY RESOLUTION 36/106 OF  
10 DECEMBER 1981)**

[Agenda item 8]

**DOCUMENT A/CN.4/358 and Add.1-4**

**Comments and observations received from Governments pursuant to  
General Assembly resolution 36/106**

[Original: English, Russian, Spanish]  
[11, 17 and 24 May and 9 June 1982]

**CONTENTS**

	<i>Page</i>
INTRODUCTION .....	274
Barbados .....	274
Byelorussian Soviet Socialist Republic .....	274
Czechoslovakia .....	275
Finland .....	276
German Democratic Republic .....	276
Ukrainian Soviet Socialist Republic .....	277
Union of Soviet Socialist Republics .....	279
Uruguay .....	280

---

**NOTE**

The text of the draft Code of Offences against the Peace and Security of Mankind, prepared by the Commission in 1954, appears in *Yearbook* . . . 1954, vol. II, pp. 151-152, document A/2693, para. 54.

---

## Introduction

1. On 10 December 1981, the General Assembly adopted resolution 36/106, the operative paragraphs of which read as follows:

*The General Assembly,*

...

1. *Invites* the International Law 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;

2. *Requests* the International Law Commission to consider at its thirty-fourth session the question of the draft Code of Offences against the Peace and Security of Mankind in the context of its five-year programme and to report to the General Assembly at its thirty-seventh session on the priority it deems advisable to accord to the draft Code, and the possibility of presenting a preliminary report to the Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and the structure of the draft Code;

3. *Requests* the Secretary-General to reiterate his invitation to Member States and relevant international intergovernmental organ-

izations to present or update their comments and observations on the draft Code of Offences against the Peace and Security of Mankind, and to submit a report to the General Assembly at its thirty-seventh session;

4. *Requests* the Secretary-General to submit to the International Law Commission all the necessary documentation, comments and observations presented by Member States and relevant international intergovernmental organizations on the item entitled "Draft Code of Offences against the Peace and Security of Mankind";

5. *Decides* to include in the provisional agenda of its thirty-seventh session the item entitled "Draft Code of Offences against the Peace and Security of Mankind" and to accord it priority and the fullest possible consideration.

2. On 14 January 1982, the Secretary-General addressed a note to the Governments of Member States and a letter to the relevant international intergovernmental organizations, requesting their comments and observations on the subject.

3. The replies received as of the end of May 1982 from the Governments of eight Member States are reproduced below.

### Barbados

[Original: English]  
[28 April 1982]

1. The Code of Offences against the Peace and Security of Mankind is highly necessary in the present state of the world, where recent events have emphasized the insecurity and consequent apprehension of smaller and even larger States, and of various religious, cultural, ethnic, and other groups within those States. This code, long overdue, is also a warning to would-be aggressors and oppressors that the nations of the world are prepared to take action against them for the crimes against international law identified in the code, in punishment for those crimes. The code will be gladly welcomed by all peace-loving States and organizations dedicated to the well-being of mankind. It is likely to check, or at least curtail, the activities of those States, if any, which aim at world domination.

2. It may happen that a State is in occupation of a territory to which it no longer has any right. Since it would hardly be possible to organize armed bands *effectively within the occupied territory* for the purpose of its liberation, it would seem that the prohibition in article 2, paragraph (4), of the 1954 draft code of the toleration of the organization of armed bands in *other* territories would tend to perpetuate such unjustified occupation.

3. Paragraph (1) of article 2 does not seem to take into account the situation in which the authorities of a State send armed forces into another State ostensibly at the invitation of that State, but in reality to further its own aims; nor the situation in which a State, convinced of imminent, though not immediate, danger from a

neighbouring State, sends armed units into that neighbouring State to forestall the anticipated attack.

4. Paragraph (7) of article 2 may be difficult to apply. If State A violates its obligations under a treaty to limit or restrict its armaments, the relevant authorities in State B, a signatory to the treaty which is threatened by State A's breach, could hardly be guilty of a crime under international law if they adopted counter-measures. Situations may arise in which a State may be justified in using coercive measures of an economic kind to enforce its will on another State if the objective is its own self-defence or the protection of its nationals.

5. The draft code of offences might with advantage be referred back to the International Law Commission for further consideration.

### Byelorussian Soviet Socialist Republic

[Original: Russian]  
[28 May 1982]

1. The draft code prepared by the International Law Commission in 1954 is, on the whole, an acceptable basis for further work. It is rightly based on the concept of individual responsibility for the most serious and dangerous crimes against the peace and security of mankind.

2. The Byelorussian SSR considers that, in the further work on the draft, account should be taken of the new international legal instruments that have appeared since the original draft Code of Offences against the Peace and Security of Mankind was prepared. Among the instruments in question are: the Definition of

Aggression;<sup>1</sup> the provisions of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;<sup>2</sup> the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity;<sup>3</sup> the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations;<sup>4</sup> and the provisions defining breaches of States' obligations as regards disarmament that are contained in the international treaties and conventions adopted since the elaboration of the draft code.

3. The provisions of the Declaration on the Prevention of Nuclear Catastrophe<sup>5</sup> merit particular attention with a view to their inclusion in the draft code. It is provided in that declaration that statesmen who resort first to the use of nuclear weapons will be committing the gravest crime against humanity. Use should be made in the further work on the draft code of the provisions of the international conventions and agreements aimed at preventing such offences against the peace and security of mankind as the crimes of *apartheid*, genocide, racism, colonialism and acts that are punishable in accordance with the 1949 Geneva Conventions regarding the protection of war victims and their two Additional Protocols of 1977.<sup>6</sup>

4. In the present complex international situation, when imperialist circles are counting on exacerbating tension in the world and on preparation for war and would like to discard the legal and ethical rules that have been formed in the course of centuries with regard to relations between States, the elaboration of an international legal instrument defining the concept and describing the constituent elements of offences against the peace and security of mankind and confirming the principle of individual responsibility for their commission would be an important asset for the international community in the struggle against the most dangerous crimes against humanity, and in the struggle for the peace and security of peoples.

5. In the light of the foregoing, the Byelorussian SSR considers that the question of the elaboration of the draft Code of Offences against the Peace and Security of Mankind should appear as one of the main items in the agenda of the Sixth Committee of the General Assembly until work on it has finally been completed.

<sup>1</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>2</sup> United Nations, *Treaty Series*, vol. 754, p. 74.

<sup>3</sup> General Assembly resolution 3074 (XXVIII) of 3 December 1973.

<sup>4</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>5</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>6</sup> See United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

the draft Code of Offences against the Peace and Security of Mankind. The resumption of work on the code is acquiring an ever growing urgency in view of the overall current international situation, which is characterized by a trend towards an intensified arms race and by the emergence of notions of a limited nuclear war. That is why Czechoslovakia views this question as one of priority which requires the utmost attention.

2. The Czechoslovak Socialist Republic has explained its views on the draft code in a written statement dated 9 June 1980<sup>1</sup> and in the statements of Czechoslovak representatives in the Sixth Committee of the General Assembly, at its thirty-fifth session on 8 October 1980, and at its thirty-sixth session on 30 November 1981.<sup>2</sup> A suitable basis for further codification efforts is provided, in Czechoslovakia's view, by the draft code elaborated by the International Law Commission, because it rightly proceeds from the concept of individual criminal responsibility for crimes against the peace and security of mankind as they are set down in the Charter of the Nürnberg Tribunal.

3. The filling of the gaps which have appeared in the code as a result of the development of international law since 1954 is regarded by the Czechoslovak Socialist Republic as a necessary condition for the successful codification of the given issue. This requires, first of all, taking into account all the significant international legal documents relating to the question of the code. These have been mentioned in the statements of Czechoslovak representatives in the Sixth Committee and there is therefore no need to repeat them.

4. In this context, however, the Czechoslovak Socialist Republic deems it necessary to emphasize among the new documents the Declaration on the Prevention of Nuclear Catastrophe,<sup>3</sup> which provides that States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity. Under paragraph 2 of the Declaration: "There will never be any justification or pardon for statesmen who take the decision to be the first to use nuclear weapons." These ideas should undoubtedly find expression in the code under consideration, but they should also be adequately elaborated in its provisions. Of the greatest importance for further progress, in the view of the Czechoslovak Socialist Republic, is the creation of guarantees that this question will be accorded first priority, in order to advance the efforts for codification of this issue.

5. On some specific questions the Czechoslovak Socialist Republic wishes to comment as follows. The Definition of Aggression<sup>4</sup> represents a generally recognized interpretation of the basic provisions of the Charter of the United Nations and nothing stands in the way of its being incorporated into the draft code. The jurisdiction of the Security Council neither contradicts nor hinders an objective consideration of a case involving determination of an aggressor. Taking into account the responsibility of the Security Council for the

#### Czechoslovakia

[Original: English]  
[13 May 1982]

1. The Czechoslovak Socialist Republic wishes to reaffirm its keen interest in the resumption of work on

<sup>1</sup> A/35/210, p. 7.

<sup>2</sup> Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 15th meeting, paras. 40-43; *ibid.*, Thirty-sixth Session, Sixth Committee, 62nd meeting, paras. 1-6.

<sup>3</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>4</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

maintenance of international peace and security, it is necessary to respect this position.

6. The adoption of the code would mean that, in the future, no one could raise the objection *nullum crimen sine lege* when prosecuted for a given crime. In this context, the list of crimes should represent the most serious crimes, those which indeed constitute a threat to the peace and security of mankind.

In Czechoslovakia's view, the resumption of the codification work need not be made conditional on such a question as whether it is necessary for the code to contain specific sanctions or the question of the so-called "criminal responsibility of States".

7. The most important issue is the early elaboration of the code. The completion of work on this document and its speedy adoption would make a significant contribution to the preservation of peace and the strengthening of international security. It would also contribute to a more consistent respect for the norms of international law.

#### Finland

[Original: English]  
[23 March 1982]

The comments and observations of the Government of Finland on the draft Code of Offences against the Peace and Security of Mankind were communicated to the Secretary-General by its note of 6 March 1980, and were reproduced in the relevant report of the Secretary-General of 11 June 1980.<sup>1</sup> In this connection, reference is made to the statements by the delegation of Finland in the Sixth Committee of the General Assembly, at its thirty-fifth session on 6 October 1980, and at its thirty-sixth session on 27 November 1981.<sup>2</sup>

<sup>1</sup>A/35/210, p. 8.

<sup>2</sup>Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee, 11th meeting, paras. 55-58; *ibid.*, Thirty-sixth Session, Sixth Committee, 60th meeting, paras. 33-38.

#### German Democratic Republic

[Original: English]  
[10 May 1982]

1. In view of the aggravated international situation and the resultant risk of a new world war, which are deeply alarming the peoples of all continents, the German Democratic Republic wishes to reiterate that every effort must be made to counter any new dangers to the peace and security of mankind.

2. The potentials of weapons and other war material accumulated in the world today, were they ever to be used, would inflict a tremendous catastrophe on all mankind, it being understood that any first use of nuclear weapons would be one of the gravest crimes against humanity. Tendencies of neo-Nazism, which is a threat to international peace and security, have been reviving in various regions of the world. Some peoples are still denied the right to determine their own destinies and to develop without outside interference or alien oppression.

3. Consequently, the German Democratic Republic

considers that the elaboration and adoption of a Code of Offences against the Peace and Security of Mankind is a particularly topical issue today. The code would provide States with an effective instrument to prevent and punish grave international crimes and to deter potential criminals from committing such offences. The majority of States have commented favourably on the project, and some have stressed the necessity and urgency of continuing work on the code.

4. The Government of the German Democratic Republic, too, has repeatedly set forth in detail its views regarding the code, both in written comments<sup>1</sup> and in statements made before the Sixth Committee of the General Assembly. It considers that due care, commensurate with the high political significance of the document, should be applied in revising the draft prepared by the International Law Commission in 1954, in the light of the progressive development of international law and taking into account the constructive relevant proposals submitted by States.

5. At the same time it should be noted that divergent views on certain questions are not insurmountable obstacles to an early completion of the code. The Secretary-General's analysis of comments and proposed amendments received so far<sup>2</sup> provides a good basis for a revision of the draft. On the other hand, it should be recalled once again that the work on this project is based on General Assembly resolution 177 (II) on 21 November 1947, in which the Assembly entrusted the Commission with the task of preparing a draft Code of Offences against the Peace and Security of Mankind, which would be predicated on the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

6. In the view of the German Democratic Republic, the revision of the draft code and its finalization should continue to focus on further developing and updating the Nürnberg principles, taking into account recent international instruments and establishing and reaffirming the criminal responsibility of individuals for grave international crimes. The legal definition of the elements which constitute international crimes should be as clear, precise and concrete as possible.

7. In view of the purpose and objective of the code, it would seem appropriate that the gravest international crimes, which constitute a serious threat and an immediate danger to the peace and security of mankind, be included in it. Above all, this will mean defining as international crimes all forms and methods of the preparation, conduct and threat of conduct of wars of aggression; the crimes of colonialism and racism; the crime of *apartheid*; war crimes and crimes against humanity; and specific warfare methods, including in particular the use of nuclear and other mass destruction weapons. Those crimes, in terms of purpose and effect, are not only directed against the lives and security of individuals or peoples but threaten or violate international peace and security and can endanger the survival of mankind as a whole. In the code, these categories of international crimes should be legally established, further developed or reaffirmed, as the case may be,

<sup>1</sup>A/35/210/Add.1, pp. 2-4; and A/36/416, pp. 4-5.

<sup>2</sup>See "Analytical paper prepared by the Secretary-General pursuant to paragraph 2 of General Assembly resolution 35/49" (A/36/535).

based on a precise definition of their constituent elements and taking into account the latest relevant documents and international instruments. Thus conditions will be created ensuring the universal prosecution and punishment of such crimes and of those responsible for them.

8. The German Democratic Republic wishes to reiterate its position that the concept of individual criminal responsibility should be one of the underlying principles of the code. This does not mean annulling or replacing the international responsibility of States for the commission of such crimes. An express provision that the assertion of individual criminal responsibility shall not affect the international responsibility of States for such crimes could, for instance, be included in article 1.

9. Crimes against the peace and security of mankind are international crimes, the prosecution of which is a universal duty. The obligation to prosecute and punish such crimes is part of the international responsibility of States and makes it incumbent upon States, within the scope of their national legal systems, to adopt relevant legislative and other measures under which persons guilty of grave international crimes can be prosecuted and punished, without distinction as to their citizenship or the place of commission of the crime and irrespective of the public office they may hold. Where such offences are organized, supported or tolerated by a State, that State is responsible for them under international law, irrespective of the criminal responsibility of the person or persons having committed them.

10. In this connection, another aspect comes into play: because of their gravity, such offences must be prosecuted systematically, based on a universal duty to do so. Consequently, it is both a necessity and an obligation for States to combat international crimes in a co-operative and co-ordinated manner.

11. In the view of the German Democratic Republic, one of the foremost issues on which agreement must be reached concerns the structure and scope of the code. In the past, States have specified a great number of requirements which they wish to see considered in the process of supplementing and updating the constituent elements of international crimes to be included in the code. All these proposals certainly deserve close study with a view to determining whether they can be reflected in a code of international crimes.

12. As for the necessary amendment and updating of article 2 of the 1954 draft code, the German Democratic Republic has already submitted a number of proposals.<sup>3</sup> Like several other States, the German Democratic Republic takes the view that the code should contain a provision stating the non-applicability of statutory limitations to crimes against the peace and security of mankind.

13. While the German Democratic Republic continues to believe that the appropriate forum in which to continue work on the code is the Sixth Committee of the General Assembly which could set up a special working group for the purpose, it can also agree to the code project being handled by the Commission, provided an early completion of this urgently needed international instrument is ensured.

#### Ukrainian Soviet Socialist Republic

[Original: Russian]  
[1 June 1982]

1. The Ukrainian Soviet Socialist Republic notes with satisfaction the adoption by the General Assembly of resolution 36/106 concerning the resumption by the International Law Commission of work on the draft Code of Offences against the Peace and Security of Mankind, an instrument that is destined to play an important role in the elimination of the threat of war, the curbing of aggression and the consolidation of peace. The preparation of this document is particularly urgent under present circumstances, in view of the heightened international tension which has arisen as a result of the irresponsible action of imperialist circles in a number of countries that have embarked on a course of confrontation, escalation of the arms race and revival of the "cold war".

2. As is known, an acceptable basis for the continuation of work on the above-mentioned international legal instrument already exists, in the form of the draft code prepared by the Commission in 1954. This document reflects the principles of individual criminal responsibility for war crimes and crimes against peace or humanity that was recognized in the Charter and Judgment of the Nürnberg International Military Tribunal. However, the draft cannot be considered as meeting all the requirements arising out of the extremely important task of combating aggression and other crimes against peace and humanity.

3. Regrettably, not all the principles contained in the documents of the International Military Tribunal are adequately reflected in the draft code. In particular, article 7 of the Charter of the Tribunal<sup>1</sup> provides that:

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.

Article 7 of the Charter of the Tribunal is reproduced in article 3 of the 1954 draft code, but the words "or mitigating punishment" have been omitted. Consequently, the present wording of article 3 of the draft code creates the possibility of mitigation of the punishment of criminals. The extent of that mitigation could be equivalent to an absence of punishment.

4. Article 8 of the Charter of the International Military Tribunal provides that:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

This provision of the Charter is reproduced in article 4 of the draft code, with one fundamental change. In the draft code, the words "but may be considered in mitigation of punishment if the Tribunal determines that justice so requires" have been replaced by the words "if, in the circumstances at the time, it was possible for him not to comply with that order". This creates an even more dangerous loophole enabling criminals to escape punishment for their crimes against the peace and security of mankind. A criminal would only have to plead that he was unable not to comply with an order from his superiors, because they

<sup>3</sup> A/35/210/Add.1, pp. 3-4, paras. 7-14.

<sup>1</sup> United Nations, *Treaty Series*, vol. 82, p. 284.

threatened him with punishment, in order to escape punishment for his crimes.

5. It is altogether obvious that provisions of this kind in the 1954 draft code not only do not contribute to the struggle against war crimes, but create an opportunity to evade responsibility, thereby indirectly encouraging further crimes against peace and mankind. In this connection, it would seem advisable that, in the process of further work on the draft code, the wording of articles 3 and 4 of the code should be brought into line with that of articles 7 and 8 of the Charter of the International Military Tribunal.

6. It should also be borne in mind that there have been substantial changes in this sphere of international law in the period since the draft code was compiled. The past few decades have seen the adoption of a number of new legal rules aimed at preventing crimes against the peace and security of mankind, rules that enable the most dangerous infringements of the international legal order to be qualified as international crimes. Further work on the draft code is impossible without taking these normative instruments into account, for the code is, in particular, intended to define the concept of a crime against the peace and security of mankind, to describe the constituent elements of such crimes and to establish the principle of responsibility for them.

7. It should be noted that the legal instruments in question were adopted at various times, in varying historical circumstances and by different international organs. They differ significantly as regards their nature and legal force, the identity of the parties to them, the topics and territory to which they apply, their terminology and the clarity and completeness with which they define the constituent elements of individual international crimes. Consequently, the Code of Offences against the Peace and Security of Mankind must define in uniform terms and wording the content of all the most serious international crimes and must be of the nature of an international treaty.

8. For that reason, references to the constituent elements of international crimes appearing in the draft code must be made more precise and the list of those crimes must be supplemented to take account of the present state of international law. A particular example of the kind of crime that should be included in the category of offences against the peace and security of mankind is *apartheid*, a definition of which is to be found in the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*.<sup>2</sup> It would seem no less important for the draft to reflect, in due fashion, the basic ideas contained in the 1966 International Convention on the Elimination of All Forms of Racial Discrimination,<sup>3</sup> the International Covenants on Human Rights of the same year,<sup>4</sup> and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.<sup>5</sup>

<sup>2</sup>General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

<sup>3</sup>United Nations, *Treaty Series*, vol. 660, p. 212.

<sup>4</sup>General Assembly resolution 2200 A (XXI) of 16 December 1966, annex.

<sup>5</sup>United Nations, *Treaty Series*, vol. 266, p. 40.

9. In addition, account should be taken in the draft code of the Definition of Aggression,<sup>6</sup> the provisions of the two Additional Protocols of 1977 to the 1949 Geneva Conventions regarding the protection of war victims,<sup>7</sup> and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>8</sup> It would be extremely timely and important to include in the draft code the provisions of the Declaration on the Prevention of Nuclear Catastrophe adopted by the General Assembly at its thirty-sixth session, on the proposal of the delegation of the USSR.<sup>9</sup>

10. It would seem advisable for the code to contain a distinct section dealing with breaches of States' obligations in the sphere of disarmament. The basic material for the elaboration of this section should be the provisions of the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water;<sup>10</sup> the 1968 Treaty on the Non-Proliferation of Nuclear Weapons;<sup>11</sup> the 1971 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;<sup>12</sup> the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction;<sup>13</sup> the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques;<sup>14</sup> and other international legal instruments in the sphere of disarmament.

11. In view of the fact that, as a result of scientific and technical progress, man's activities are constantly extending into new areas, notably outer space, it would be entirely justified to embody in the draft code rules aimed at preventing the use against peace and security of achievements in the conquest of space. To this end, it would be appropriate to reflect in the draft code the provisions of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.<sup>15</sup> Furthermore, the inclusion in the Code of Offences against the Peace and Security of Mankind of articles providing for responsibility for the deployment in outer space of weapons of any kind would make an extremely significant contribution to the cause of averting what is, as a result of the activities of reactionary

<sup>6</sup>General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>7</sup>See United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

<sup>8</sup>General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>9</sup>General Assembly resolution 36/100 of 9 December 1981.

<sup>10</sup>United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>11</sup>*Ibid.*, vol. 729, p. 169.

<sup>12</sup>General Assembly resolution 2660 (XXV) of 7 December 1970; see also United Nations, *Juridical Yearbook 1970* (Sales No. E.72.V.1), p. 121.

<sup>13</sup>General Assembly resolution 2826 (XXVI) of 16 December 1971, annex; see also United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

<sup>14</sup>General Assembly resolution 31/72 of 10 December 1976, annex; see also United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 125.

<sup>15</sup>United Nations, *Treaty Series*, vol. 610, p. 206.

imperialist circles, a growing danger of the militarization of outer space.

12. The draft code should not be limited to an enumeration of the constituent elements of crimes. It must contain articles providing for concrete steps to prevent and punish crimes against the peace and security of mankind. Account must be taken to this end of the provisions of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>16</sup> and of the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.<sup>17</sup>

13. Particular mention should be made of the fact that the additions and refinements which the Commission makes to the draft code in the course of its work must not prejudice the principle that underlies that instrument, namely the principle of individual responsibility for crimes against peace, war crimes and crimes against humanity. In this connection, it would be inadvisable to include in the draft code crimes of a general criminal nature that are regulated by national legislation.

<sup>16</sup> *Ibid.*, vol. 754, p. 74.

<sup>17</sup> General Assembly resolution 3074 (XXVIII) of 3 December 1973.

#### Union of Soviet Socialist Republics

[Original: Russian]  
[26 May 1982]

1. The resumption of work on the draft Code of Offences against the Peace and Security of Mankind is particularly timely and important. In the current situation, in which the advocates of dangerous balancing on the brink of war would like to cast aside the legal and ethical rules that have been formed in the course of centuries with regard to relations between States, an international legal instrument defining the concept and describing the constituent elements of offences against the peace and security of mankind and confirming the principle of individual liability for such offences could be, in the hands of the international community, an effective instrument for the safeguarding of people's right to life and in the struggle against the crimes that are the most dangerous for mankind.

2. The present draft code is, on the whole, an acceptable basis for the continuation of work in this field. It is important to preserve the concept on which it is founded and which constitutes its most valuable feature, namely that of individual responsibility for crimes that are the most serious and dangerous for peace and mankind.

3. In the process of further work, account must, of course, be taken of the new international legal instruments that have made their appearance since 1954. For example, account should be taken in the draft of the Definition of Aggression<sup>1</sup> and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accord-

ance with the Charter of the United Nations.<sup>2</sup> The code could be an important complement to the existing international legal means for the solution of the key question of our age, that of averting the growing threat of a world war waged with nuclear missiles. It should duly reflect the fundamental idea of the Declaration on the Prevention of Nuclear Catastrophe,<sup>3</sup> in which it is stated, in particular, that statesmen who resort first to the use of nuclear weapons will be committing the gravest crime against humanity. Account should be taken in the section devoted to the breach of States' obligations in the sphere of disarmament of the relevant provisions of such agreements as: the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water;<sup>4</sup> the 1968 Treaty on the Non-Proliferation of Nuclear Weapons;<sup>5</sup> the 1971 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;<sup>6</sup> the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction;<sup>7</sup> and the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.<sup>8</sup>

4. The draft code should also reflect the international legal instruments in which there has been further development of the principle of individual responsibility for war crimes and crimes against humanity. These include: the International Convention on the Suppression and Punishment of the Crime of Apartheid,<sup>9</sup> the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;<sup>10</sup> the Additional Protocols of 1977 to the 1949 Geneva Conventions regarding the protection of war victims;<sup>11</sup> and the principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.<sup>12</sup> The draft Code of Offences against the Peace and Security of Mankind must remain, at all stages up to the completion of work on it, one of the main items in the agenda of the Sixth Committee of the General Assembly.

<sup>2</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>3</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>4</sup> United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>5</sup> *Ibid.*, vol. 729, p. 169.

<sup>6</sup> General Assembly resolution 2660 (XXV) of 7 December 1970; see also United Nations, *Juridical Yearbook 1970* (Sales No. E.72.V.1), p. 121.

<sup>7</sup> General Assembly resolution 2826 (XXVI) of 16 December 1971, annex; see also United Nations, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 118.

<sup>8</sup> General Assembly resolution 31/72 of 10 December 1976, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.78.V.5), p. 125.

<sup>9</sup> General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

<sup>10</sup> United Nations, *Treaty Series*, vol. 754, p. 74.

<sup>11</sup> See United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

<sup>12</sup> General Assembly resolution 3074 (XXVIII) of 3 December 1973.

<sup>1</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.



## Uruguay

[Original: Spanish]  
[23 April 1982]

1. The Government of Uruguay considers, as its representatives to recent sessions of the General Assembly have stated in the Sixth Committee, that the draft Code of Offences against the Peace and Security of Mankind should be the subject of further consideration by the International Law Commission, which should decide on the advisability or otherwise of approving a new legal text, on the basis of the examination of the matter in the various United Nations forums and in the light of all the codification work that has been carried out in regard to offences of an international character since the draft was adopted. The text should be accepted unanimously and its terms should be effectively implemented and so conceived that they do not operate to the detriment of justice and law.

2. As it has stated at previous sessions of the General Assembly in the Sixth Committee, Uruguay understands offences to mean, in accordance with article 1 of the Uruguayan Criminal Code, "any explicit act or omission provided for under the criminal law". For this to be so understood, there must be a rule of law and a sanction. An offence, therefore, is an act that is specifically unlawful, culpable, imputable and punishable by a penal sanction. The legal-technical essence of a criminal offence would be based on three requirements: classification, unlawfulness and culpability, the penalty constituting the differential element in the offence.

3. The 1954 draft code is incomplete. It does not embody the necessary elements of criminal law, and this could make it an ineffective instrument. It is therefore important to draw up procedural rules of law with a view to implementing the substantive provisions of the draft which the Commission is expected to reconsider.

The main observations which the Government of Uruguay has to make on the draft relate basically to the lack of any sanction applicable to the offender, the non-designation of the competent court, and the failure to classify types of offence, for instance, aggression, terrorism, hostage-taking, etc.

4. The code adopted must determine the judicial body which will hear and decide cases involving the kind of offences provided for under the code and which must, in addition, carry out its functions autonomously and independently. There must likewise be set up an international criminal court having compulsory jurisdiction over States and individuals. Uruguay regards

this as essential, since only by making such jurisdiction compulsory will total efficacy of the code in question be achieved, neither States nor individuals being able to derogate from it.

5. The Commission submitted the draft Code of Offences against the Peace and Security of Mankind to the General Assembly in 1954. Subsequent consideration of the draft code was, however, postponed until the General Assembly had adopted the Definition of Aggression. By resolution 3314 (XXIX), of 14 December 1974, the General Assembly defined acts of aggression and thus established the basis for determining wars of aggression. The draft code also governs other offences against the peace and security of mankind that have been defined as international crimes in other conventions.

6. These crimes include the crimes against humanity defined in the Charter of the International Military Tribunal of 1945,<sup>1</sup> the crime of genocide as defined under article II of the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>2</sup> as well as the crimes defined in the 1907 Hague Convention respecting the Laws and Customs of War on Land<sup>3</sup> and in the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War.<sup>4</sup> Crimes relating to slavery and the slave trade, piracy and abduction, and offences against diplomatic agents were not included in the original draft code; but they have been included, and interpreted as international crimes or offences, in a number of later conventions, and for this reason should receive special attention.

7. In the opinion of Uruguay, other crimes on which it will be necessary to place particular emphasis include hostage-taking, terrorism and the use of environmental modification techniques for military and other hostile purposes. Uruguay also considers that offences against diplomatic agents, as well as hostage-taking and terrorism in all its forms, must be given special attention by the Commission for review and inclusion in the draft code. Other matters that should likewise be considered in the draft code must include the question of the appointment of the court and its jurisdiction as well as the jurisdiction of national courts with regard to international crimes, and provisions on extradition and prosecution.

<sup>1</sup> United Nations, *Treaty Series*, vol. 82, p. 284.

<sup>2</sup> *Ibid.*, vol. 78, p. 277.

<sup>3</sup> J. Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1918), pp. 100 *et seq.*

<sup>4</sup> United Nations, *Treaty Series*, vol. 75, p. 287.

## CHECK-LIST OF DOCUMENTS OF THE THIRTY-FOURTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/348 [and Corr.1]	Third report on the law of the non-navigational uses of international watercourses, by Mr. Stephen M. Schwebel, Special Rapporteur	Reproduced in the present volume (p. 65).
A/CN.4/349/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see <i>Yearbook . . . 1982</i> , vol. II (Part Two), chap. I, para. 10.
A/CN.4/350 and Add.1–6 [and Add.6/Corr.1] and Add.7–11	Question of treaties concluded between States and international organizations or between two or more international organizations: comments and observations of Governments and principal international organizations on draft articles 61 to 80 and annex	Reproduced as annex to the report of the Commission ( <i>Yearbook . . . 1982</i> , vol. II (Part Two)).
A/CN.4/351 and Add.1 and 2 [and Add.2/Corr.1] and Add.3 [and Add.3/Corr.1]	Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts	Reproduced in the present volume (p. 15).
A/CN.4/352 and Add.1	The law of the non-navigational uses of international watercourses: replies of Governments to the Commission's questionnaire	<i>Idem</i> (p. 192).
A/CN.4/353	Eleventh report on the question of treaties concluded between States and international organizations or between two or more international organizations, by Mr. Paul Reuter, Special Rapporteur	<i>Idem</i> (p. 3).
A/CN.4/354 [and Corr.1] and Add.1 and 2	Third report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	<i>Idem</i> (p. 22).
A/CN.4/355	Filling of casual vacancies: note by the Secretariat	<i>Idem</i> (p. 1).
A/CN.4/355/Add.1 and 2	<i>Idem</i> . Addendum to note by the Secretariat: list of candidates and biographical data	Mimeographed.
A/CN.4/356 and Add.1 [and Add.1/Corr.1] and Add.2 and 3	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	Reproduced in the present volume (p. 231).
A/CN.4/357 [and Corr.1]	Fourth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem</i> (p. 199).
A/CN.4/358 and Add.1–4	Draft Code of Offences against the Peace and Security of Mankind: comments and observations received from Governments pursuant to General Assembly resolution 36/106	<i>Idem</i> (p. 273).
A/CN.4/359 [and Corr.1–4] and Add.1	Third report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem</i> (p. 247).
A/CN.4/360 [and Corr.1]	Third report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem</i> (p. 51).
A/CN.4/L.339	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly	Mimeographed.
A/CN.4/L.340	Statement by the Legal Counsel at the opening of the thirty-fourth session of the Commission	See <i>Yearbook . . . 1982</i> , vol. I, summary record of the 1698th meeting, paras. 7–26.

A/CN.4/L.341	Draft articles on the law of treaties between States and international organizations or between international organizations. Texts adopted by the Drafting Committee: article 2, para. 1 ( <i>c bis</i> ) and ( <i>h</i> ), article 5, article 7, para. 4, article 20, para. 3, articles 27 to 36, 36 <i>bis</i> , 37 to 80 and annex	Texts reproduced in volume I, summary record of the 1740th meeting, para. 2.
A/CN.4/L.342	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: article 1, article 2, para. 1 ( <i>a</i> ), and articles 7 to 9	<i>Idem</i> , 1749th meeting, paras. 26 and 47, and 1750th meeting, paras. 3 and 9.
A/CN.4/L.343	Draft report of the International Law Commission on the work of its thirty-fourth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10</i> (A/37/10). The final text appears in <i>Yearbook . . . 1982</i> , vol. II (Part Two).
A/CN.4/L.344 and Add.1–6	<i>Idem</i> : chapter II (Question of treaties concluded between States and international organizations or between two or more international organizations)	<i>Idem</i> .
A/CN.4/L.345 and Add.1	<i>Idem</i> : chapter V (Jurisdictional immunities of States and their property)	<i>Idem</i> .
A/CN.4/L.346	<i>Idem</i> : chapter III (State responsibility)	<i>Idem</i> .
A/CN.4/L.347 and Add.1	<i>Idem</i> : chapter IV (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.348	<i>Idem</i> : chapter VI (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> .
A/CN.4/L.349 and Add.1 and 2	<i>Idem</i> : chapter VII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.350	<i>Idem</i> : annex (Comments and observations of Governments and principal international organizations on articles 61 to 80 and annex of the draft articles on treaties concluded between States and international organizations or between international organizations, adopted by the International Law Commission at its thirty-second session)	<i>Idem</i> .
A/CN.4/L.351	Jurisdictional immunities of States and their property: revised texts of articles 11 and 12 submitted by the Special Rapporteur	Mimeographed.
A/CN.4/SR.1698–SR.1752	Provisional summary records of the 1698th to 1752nd meetings of the International Law Commission	Mimeographed. For the final text, see volume I.







---

### كيفية الحصول على منشورات الأمم المتحدة

يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم . اسلم منها من المكتبة التي تتعامل معها أو اكتب إلى : الأمم المتحدة ، قسم البيع في نيويورك أو في جنيف .

#### 如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

#### HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

#### COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

#### КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу : Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

#### COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

---