A/CN.4/SER.A/1989/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1989

Volume II
Part One

Documents of the forty-first session

UNITED NATIONS

A/CN.4/SER.A/1989/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1989

Volume II
Part One

Documents of the forty-first session

UNITED NATIONS
New York, 1992

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 forty-first 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/1989/Add.1 (Part 1)

UNITED NATIONS PUBLICATION

Sales No. E.91.V.5 (Part 1)

ISBN 92-1-133409-8
(complete set of two volumes)
ISBN 92-1-133406-3 (Vol. II, Part 1)
ISSN 0082-8289

CONTENTS

ABBREVIATIONS

ECA	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
ECE	Economic Commission for Europe
EEC	European Economic Community
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
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDA	International Development Agency
IFC	International Finance Corporation
ILA	International Law Association
IMF	International Monetary Fund
IMO	International Maritime Organization
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
SIPRI	Stockholm International Peace Research Institute
UNDRO	Office of the United Nations Disaster Relief Co-ordinator
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

*
* *

I.C.J. Reports	ICJ, *Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J., Series A	PCIJ, *Collection of Judgments* (Nos. 1–24, up to and including 1930)

*
* *

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.

STATE RESPONSIBILITY

(Agenda item 2)

DOCUMENT A/CN.4/425 and Add.1*

Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

[*Original: English, French*]
[*9 and 22 June 1989*]

CONTENTS

* Incorporating documents A/CN.4/425/Corr.1 and A/CN.4/425/Add.1/Corr.1.

ABBREVIATIONS

AJIL	*American Journal of International Law*
Annual Digest	*Annual Digest of Public International Law Cases*
BFSP	*British and Foreign State Papers*
Chronique, see RGDIP	
Collected Courses . . .	*Collected Courses of The Hague Academy of International Law*
ILM	*International Legal Materials*
ILR	*International Law Reports*
Kiss, *Répertoire*	A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*
Lapradelle-Politis	A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*
Martens, *Nouveau Recueil*, 2nd series	G. F. de Martens, *Nouveau Recueil général de Traités*, 2nd series
Moore	J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*
Moore, *Digest*	J. B. Moore, *A Digest of International Law*
Österr. Z. öff. Recht	*Österreichische Zeitschrift für öffentliches Recht*
Prassi italiana	S.I.O.I., *La prassi italiana di diritto internazionale*
Ralston	J. H. Ralston, *Venezuelan Arbitrations of 1903*
Recueil des cours . . .	*Recueil des cours de l'Académie de droit international de La Haye*
RGDIP	*Revue générale de droit international public*
"Chronique"	"Chronique des faits internationaux", edited since 1958 by C. Rousseau
UNRIAA	United Nations, *Reports of International Arbitral Awards*
Whiteman, *Damages*	M. M. Whiteman, *Damages in International Law*
Whiteman, *Digest*	M. M. Whiteman, *Digest of International Law*

Introduction

1. In accordance with the plan of work set forth in the preliminary report,[1] the present report deals with the substantive consequences of an internationally unlawful act, other than cessation and restitution in kind.[2]

2. The first consequence thus to be considered is reparation by equivalent. For the reasons explained in the preliminary report, reparation by equivalent, or pecuniary compensation, is the main and central remedy resorted to following an internationally wrongful act.[3] But the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from *restitutio* and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally grouped under the concept of "satisfaction and guarantees of non-repetition", or under the single concept of "satisfaction". The term "satisfaction" is, of course, used here in a technical, "international" legal sense as distinguished from the broader non-technical sense in which it is obviously used as a synonym of full compensation or full reparation (see paras. 18-19 and 106-145 below).

3. Although rather widely recognized, the distinction between satisfaction and pecuniary compensation is not without problems. A minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense referred to above. Another difficulty, which is considerable, not negligible, derives from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage, loss or *préjudice* respectively covered by pecuniary compensation and satisfaction: "material" and "moral".[4]

4. Compensation is generally described—in a sense quite rightly (see paras. 52 *et seq.* below)—as covering all the "material" injury "directly" or "indirectly" suffered by the offended State. Satisfaction is generally indicated as covering instead the "moral" injury sustained by the offended State in its honour, dignity and prestige and perhaps (according to some authorities) in its legal sphere (see paras. 13-16 below). The two adjectives, however, fail to give an exact picture of the areas of injury covered respectively by compensation and satisfaction. On the one hand, pecuniary compensation, allegedly covering material damage, is intended also to compensate for moral damage suffered by the persons of private nationals or agents of the offended State. Satisfaction, in its turn, is normally understood to cover not such moral damage suffered by nationals or agents but only moral damage to the State. A brief explanation, with some support from practice and literature, should therefore precede the separate treatment of reparation by equivalent, on the one hand, and satisfaction (with guarantees of non-repetition), on the other.

5. A further problem to be tackled in the present report is the impact of fault (in a broad sense) on the forms and degrees of reparation which are being considered, particularly on reparation by equivalent, satisfaction and guarantees of non-repetition. Whatever the merits of the theory of fault followed so far by the Commission with regard to the minimum requisites of an internationally wrongful act (see paras. 162-163 below), it seems indeed reasonable to assume that any degree of fault found eventually to characterize an internationally wrongful act may have an impact on the forms and degrees of reparation due from the offending State. Apart from the fact that delicts themselves may present different degrees of gravity from the point of view of fault, one should not forget that the draft articles cover crimes in addition to delicts: and crimes normally involve the highest degrees of fault.

6. The present report is thus divided into five chapters. Chapter I deals, for the reasons explained above (paras. 3-4), with the areas of injury covered respectively by compensation and satisfaction. Chapter II deals with reparation by equivalent or pecuniary compensation in its various elements, chapter III with satisfaction, and chapter IV with guarantees of non-repetition. Chapter V contains a few tentative considerations on the impact of fault upon the forms of reparation considered in the previous chapters, more notably on satisfaction and guarantees of non-repetition. Chapter VI presents the proposed new draft articles covering the remedies dealt with in chapters I-V. The new draft articles are meant to follow, within the framework of part 2 of the draft, articles 6 (Cessation) and 7 (Restitution in kind) as set forth in the preliminary report.[5]

---

[1] *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1, paras. 6-20.

[2] These two subjects were dealt with in the preliminary report (*ibid.*, paras. 21-63 and 64-131, respectively).

[3] *Ibid.*, especially paras. 117-118.

[4] The number and variety of adjectives used in the literature and the practice to describe the relevant damage (see below, paras. 7 *et seq.* and 52 *et seq.*) are such that it is deemed advisable not to embark on a long discussion of the noun. While most frequently understood in a very general sense, inclusive of any kind of negative consequence of an internationally wrongful act, the term "damage" is not infrequently used, especially in the less recent literature, in the narrower sense of physical or material damage. "Injury" and "loss" are perhaps more often used, as is the French *préjudice*, in the broadest sense implied in article 5 of part 2 of the draft as adopted by the Commission on first reading (*Yearbook ... 1986*, vol. II (Part Two), p. 39). It seems, nevertheless, that the four terms are often if not mostly used as synonyms. Unless otherwise indicated, the words injury, damage, loss and *préjudice* will be so used by the Special Rapporteur, always in the broadest sense.

[5] Document A/CN.4/416 and Add.1 (see footnote 1 above), para. 132.

CHAPTER I

Moral injury to the State and the distinction between satisfaction and compensation

A. Introduction

7. One reads frequently that the specific function of reparation by equivalent—as one of the forms of reparation in a broad sense—is essentially, if not exclusively, to compensate for material damage. Correct in a sense, statements such as these—an example of which is to be found in the preliminary report[6]—are ambiguous and call for important qualifications. It is true, indeed, that reparation by equivalent does not ordinarily cover the moral (or non-material) damage to the injured State. It is not true, however, that it does not cover moral damage to the persons of nationals or agents of the injured State.

8. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State's nationals or agents receive different treatment from the point of view of international law. A few remarks in that respect seem to be indispensable.

B. "Moral damage" to the persons of a State's nationals or agents

9. The most frequent among internationally wrongful acts are those which inflict damage upon natural or juridical persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the injury affects nationals or agents in their private capacity, is not always an exclusively material one. On the contrary, it is frequently also, or even exclusively, moral damage—and a moral damage which, no less than material damage, is susceptible of a valid claim for compensation. Notwithstanding the considerable lack of uniformity among national legal systems with regard to moral damage, the practice and literature of international law show that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated as an integral part of the principal damage suffered by the injured State.

10. One of the leading cases in that sense is the "*Lusitania*" case, decided by the United States-German Mixed Claims Commission in 1923. The case dealt with the consequences of the sinking of the British liner by a German submarine.[7] In regard to the measure of the damages to be applied to each one of the claims originating from the American losses in the event, the umpire, Edwin B. Parker, stated that both the civil and the common law recognized injury caused by "invasion of private right" and provided remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius's statement that "money is the common measure of valuable things".[8] Dealing in particular with the death of a person, he held that the preoccupation of the tribunal should be to estimate the amounts

> (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (*c*) *reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties**, as claimant may actually have sustained *by reason of such death**. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[9]

Now, apart from the umpire's considerations regarding the damages under points (*a*) and (*b*), which are relevant with regard to the broader concept of "personal injury", it is of interest to note what he stated with regard to the injuries described under point (*c*). According to him, international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. Such injuries, the umpire stated,

> are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated . . .[10]

These kinds of damages, the umpire added, were not "penalty".

11. The "*Lusitania*" case should not be considered as an exception. Although such cases have not occurred very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. Examples of this are the *Chevreau* case,[11] the *Gage* case,[12] and the *Di Caro* case.[13] In the latter instance, which concerned the killing of an Italian shopkeeper in Venezuela, the Italian-Venezuelan Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with.[14]

---

[6] *Ibid.*, para. 21.

[7] Decision of 1 November 1923 (UNRIAA, vol. VII, pp. 32 *et seq.*).

[8] *Ibid.*, p. 35.

[9] *Ibid.*, p. 35.

[10] *Ibid.*, p. 40.

[11] Decision of 9 June 1931 (France v. United Kingdom) (UNRIAA, vol. II, pp. 1113 *et seq.*). English trans. in AJIL, vol. 27 (1933), pp. 153 *et seq.*

[12] Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (UNRIAA, vol. IX, pp. 226 *et seq.*).

[13] Decision handed down in 1903 by the Italian-Venezuelan Mixed Claims Commission (UNRIAA, vol. X, pp. 597-598).

[14] The relevant language of the award read:

"But while in establishing the extent of the loss to a wife resultant upon the death of a husband it is fair and proper to estimate his

12. Another clear example of pecuniary compensation of moral damage suffered by a private party is the *Heirs of Jean Maninat* case.[15] Rejecting the claim for compensation of the material-economic damage, which he deemed to be insufficiently proved, the umpire awarded to the sister of Jean Maninat (victim of an aggression) a sum of money by way of pecuniary compensation for the death of her brother.[16] Mention should also be made of the *Grimm* case decided by the Iran-United States Claims Tribunal, but only to that part of the tribunal's decision in which moral damages seemed to be referred to and in principle to be considered as a possible object of pecuniary compensation.[17]

C. "Moral damage" to the State as a distinct kind of injury in international law

13. The moral injuries to human beings considered above should be distinguished, notwithstanding the somewhat confusing terminology generally used, from that other category of non-material damage which the offended State sustains more directly as an effect of an internationally wrongful act. This is the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige[18] and which is considered, at times, to be a consequence of any wrongful act regardless of material injury and independent thereof. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State's *right* in which any wrongful act consists, regardless of any more specific damage. According to Anzilotti, for example:

> ... The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an *ideal element**: honour, dignity, the ethical value of subjects. The result is that, when a State sees that *one of its rights** is ignored by another State, *that mere fact involves injury** that it is not required to tolerate, *even if material consequences do not ensue**; in no part of human life is the truth of the well-known saying "Wer sich Wurm macht er muss getreten werden" so apparent ...[19]

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as "political damage", this expression being used, preferably in conjunction with "moral damage", in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably "moral and political damage": a language in which it seems difficult to separate the "political" from the "moral" qualification.[20] The term "political" is probably intended to stress the "public" nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the "moral" damage to the State (which is exclusive of inter-State relations) from the "moral" damage more frequently referred to (at national as well as international level) in order to designate the non-material or moral damage to the persons of private parties or agents which affects the State, so to speak—and without accepting any distinction between "direct" and "indirect" damage[21]—less immediately at the level of its external relations.

14. In the Special Rapporteur's view, considering in particular the jurisprudential and diplomatic practice (especially the latter) set forth in chapter III below, the "moral" damage to the State so described is in fact distinct both from the material damage to the State and,

---

earning power, his expectation of life, and, as suggested, also to bear in mind his station in life with a view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or a wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations. For all this no human standard of measurement exists, since affection, devotion, and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honourable Commissioners as entering into the calculation and the additional elements adverted to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of 50,000 bolivars would be just." (*Ibid.*, p. 598.)

[15] Decision of 31 July 1905 of the Franco-Venezuelan Mixed Claims Commission (UNRIAA, vol. X, pp. 55 *et seq.*).

[16] The umpire stated *inter alia*:

> "In this case, unlike that of Jules Brun, there are other considerations than the loss which Justina de Cossé has suffered through the death of her brother Juan. There is no evidence that she was ever dependent upon him for care or support, or that he ever rendered either, or that she was so circumstanced as to need either, or that he was of ability or disposition to accord either. Therefore it is difficult to measure her exact pecuniary loss. There exists only the ordinary presumptions attending the facts of a widowed sister and a brother of ordinary ability and affection. Some pecuniary loss may well be predicated on such conditions. For this she may have recompense ..." (*Ibid.*, p. 81.)

[17] Decision of 18 February 1983 (ILR, vol. 71, pp. 650 *et seq.*, at p. 653). As it is of no interest for present purposes, the question whether the tribunal had jurisdiction under the Iran-United States Claims Settlement Declaration of 1981 is left aside. In other words, the Special Rapporteur takes no stand on the issue which in the *Grimm* case divided the tribunal's majority, on the one hand, and Judge Holtzmann (in his dissenting opinion), on the other hand.

[18] In this sense the expression "moral damage" is used, *inter alia*, by J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, 1878); French trans. by C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, 1895), p. 264; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I; French trans. by G. Gidel of 3rd Italian ed., *Cours de droit international* (Paris, 1929), p. 524; C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, 1924), vol. II, p. 119; C. Rousseau, *Droit international public*, vol. V, *Les rapports conflictuels* (Paris, Sirey, 1983), p. 13; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 358.

[19] Anzilotti, *Cours*, pp. 493-494.

[20] See the sixth report of F. V. García Amador on State responsibility, *Yearbook ... 1961*, vol. II, pp. 8 and 24, document A/CN.4/134 and Add.1, paras. 31 and 92; and F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", RGDIP, vol. 78 (1974), p. 936.

[21] See document A/CN.4/416 and Add.1 (footnote 1 above), paras. 107-108.

in particular, from the "private" moral damage to nationals or agents of the State. This "moral damage to the State" notably consists, on the one hand, in the infringement of the State's right *per se* and, on the other, in the injury to the State's dignity, honour or prestige:

(*a*) The first kind of injury can be described as "legal" or "juridical" damage, such damage being an effect of any infringement of an international obligation (and of the corresponding right). Indeed, as Mr. Ago said, "every breach of an engagement *vis-à-vis* another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State".[22] This is a kind of injury which differs from any other effect of the internationally unlawful act; and an injury that exists in any case, regardless of the presence of any material and/or moral damage. As noted by Reuter, "any breach of an international obligation includes moral damage"; in that sense one can say, according to the same author, that "damage is not, therefore, a *distinct* condition for international responsibility".[23]

(*b*) As regards the further components of the moral damage to the State, Personnaz has rightly noted that "the honour and dignity of States are an integral part of their personality".[24] It may be added, emphasizing Anzilotti's thought, that since such elements often "prevail by far over [the State's] material interests",[25] their infringement *per se* is very frequently invoked by States injured by an internationally wrongful act.[26]

Although conceptually distinct, components (*a*) and (*b*) of the moral damage to the State tend of course to be fused into a single "injurious" effect. Indeed, the juridical injury—namely, the mere infringement of the injured State's right—is felt by that State as an offence to its dignity, honour or prestige. Paraphrasing Anzilotti again, in not a few cases the damage coincides with—and gets to consist essentially of—the very infringement of the injured State's right. A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys—namely, in one of its most precious and politically most highly valued assets.[27]

15. It seems evident that the kind of injury now under consideration is a distinct one:

First, because it is not moral damage in the sense in which this term is used within inter-individual legal systems; it is moral damage in the specific sense of an injury to the State's dignity and juridical sphere;

Second, because it is one of the consequences of any internationally wrongful act, regardless of whether the latter caused a material, moral or other non-material damage to the injured State's nationals or agents;

Third, because in view of its distinct, unique nature, it finds remedy, as will be amply shown in chapter III, not in pecuniary compensation *per se* but in one or more of those special forms of reparation which are generally classified under the concept of "satisfaction" in the technical, narrow sense of the term.

16. The considerations contained in the two preceding paragraphs, which will find more adequate justification below (paras. 106 *et seq.*), may seem to be contradicted by the fact that the reparation for the offended State's moral injury (in the sense just specified) appears at times to be absorbed, in practice, into the sum awarded by way of pecuniary compensation. The award of a remedy for the moral damage in question seems thus hardly perceptible at first sight. More numerous cases are found, however, in international jurisprudence (paras. 111 *et seq.*) as well as diplomatic practice—but most especially in the latter (paras. 119 *et seq.*)—where the injured State's moral prejudice is manifestly covered by the specific kinds of remedies which are classified as "satisfaction". These remedies, which present themselves in a variety of forms, fall into a category of reparation clearly distinct from pecuniary compensation. It is accordingly proposed to deal with them in chapter III under the title of satisfaction.

17. It should nevertheless be noted, for the sake of completeness, that situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation. In the well known *Janes* case,[28] for example, the Mexico-United States General Claims Commission thought that "giving careful consideration to all elements involved . . . an amount of . . ., without interest, is not excessive as *satisfaction** for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes".[29] In the *Francisco Mallén* case, the same Commission, while awarding "compensatory

---

[22] See Mr. Ago's second report on State responsibility, *Yearbook . . . 1970*, vol. II, p. 195, document A/CN.4/233, para. 54.

[23] P. Reuter, "Le dommage comme condition de la responsabilité internationale", *Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Madrid, Tecnos, 1979), vol. II, p. 844.

[24] J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939), p. 277.

[25] Anzilotti, *Corso*, p. 425.

[26] See, *inter alia*, the "*Carthage*" and "*Manouba*" cases, decisions of 6 May 1913 (France v. Italy), UNRIAA, vol. XI, pp. 449 *et seq.* and 463 *et seq.* respectively; the *Corfu Channel* case, Merits, judgment of 9 April 1949 (*I.C.J. Reports 1949*, p. 4); and the "*Rainbow Warrior*" case (see footnote 344 below). See also chap. III below.

[27] Anzilotti, *Corso*, p. 425.

[28] Decision of 16 November 1925 (UNRIAA, vol. IV, pp. 82 *et seq.*).

[29] Para. 26 of the decision (*ibid.*, p. 90). The Commission criticized the tendency to equate the amount of compensation due for the failure to meet an obligation to show due diligence in pursuing the responsible persons with compensation for economically assessable injury. Its criticism was based on several motivations:

". . . If the murdered man had been poor or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government did *not* measure up to its international duty of providing justice, because in such a case the Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit." (*Ibid.*, p. 87, para. 20 *in fine*.)

damages" for the "*physical** injuries inflicted upon Mallén", decided that "an amount should be added as *satisfaction for indignity suffered, for lack of protection and for denial of justice*"*.[30] The same Commission made an identical point in the *Stephens Brothers* case.[31] The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature. According to Personnaz:

> . . . It is true here, as indeed in most cases, that it is impossible to restore things to their previous state; but the meaning of the term reparation has to be understood. It should not be interpreted in the narrowest sense, namely, redoing what has been destroyed, wiping out the past. It simply affords the victim the opportunity to obtain *satisfaction** equivalent to what he has lost: the real role of damages is one of satisfaction rather than compensation.[32]

And Christine D. Gray notes more recently, with regard to the same situations:

> . . . Apparently the amount [of damages] depends on the gravity of the injury involved, and this suggests that the award is intended as *pecuniary satisfaction** for the injury rather than as *compensation** for the pecuniary losses resulting from it. . . .[33]

D. The distinct role of satisfaction

18. The practice and the literature referred to in the preceding paragraph do not seem really to contradict the distinction between moral damage to persons, susceptible of pecuniary compensation, on the one hand, and moral damage to the State as an inherent consequence of any internationally wrongful act and a possible object of the specific remedy of satisfaction in a technical sense, on the other hand. As used in some of the cases and literature cited in that paragraph, the term "satisfaction" is to be understood, in the opinion of the Special Rapporteur:

(*a*) either in the very general, *non-technical* sense in which that term is used as a synonym of reparation in the broadest sense (reparation's function being to "satisfy", or to "give satisfaction to", the injured party, whether an individual or a State);

(*b*) or in a sense closer to the *technical* meaning of the term and in a context within which the moral damage to an *individual* is absorbed into, and thus identified with, the moral damage to the *State* as the international person to which the individual "belongs".

19. However one interprets the particular segments of practice and literature considered in paragraph 17 above, the said segments represent in any case a minority of both the relevant practice and the literature. They do not affect, in the Special Rapporteur's view, the distinction between the moral injury to the persons of nationals or agents, on the one hand, and the moral injury that any wrongful act causes to the State, on the other hand. Both are, of course, damage to the State as an international person. But the first is indemnifiable, in so far as restitution in kind does not suffice, *by pecuniary compensation alone*. The moral damage to the State, which is more exclusively typical of international relations, is a matter for satisfaction in a technical sense, dealt with as such in chapter III. This will be amply confirmed by the sections of that chapter devoted respectively to the literature (paras. 106 *et seq.*), the jurisprudence (paras. 111 *et seq.*) and, especially, the diplomatic practice concerning satisfaction (paras. 119 *et seq.*).

---

[30] Decision of 27 April 1927 (UNRIAA, vol. IV, p. 173 *et seq.*, at pp. 179-180).

[31] Decision of 15 July 1927 (UNRIAA, vol. IV, pp. 265 *et seq.*). In this case, which concerned the murder of a United States national by a patrol of the Mexican *defensa social* (qualified by the Commission as a part of the Mexican armed forces)—an event which had caused only remote and rather slight material damages—the Commission stated:

> ". . . when international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained or other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (J. H. Ralston, *Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American-German Mixed Claims Commission in the *Vance* case (*Consolidated edition, 1925*, 528) seems not to take account of damages of this type sustained by a brother whose material losses were 'too remote in legal contemplation to form the basis of an award'. . . . The same Commission, however, in the *Vergne* case, awarded damages to a mother of a bachelor son . . . though 'the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meagre and unsatisfactory' (*Consolidated edition, 1926*, at 653). It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of *satisfaction**, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages *in the character of reparation** (compensation)." (*Ibid.*, p. 266.)

[32] Personnaz, *op. cit.*, pp. 197-198.

[33] C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 33-34.

CHAPTER II

Reparation by equivalent

A. General concept, problems involved and method

1. CONCEPT AND GOVERNING PRINCIPLES

20. In general terms, reparation by equivalent consists of the payment of a sum of money compensating the injured State for prejudice not remedied by restitution in kind and not covered by other forms of reparation in a broad sense. Notwithstanding the "primacy" of restitution in kind as a matter of equity and legal principle, reparation by equivalent is the most frequent and quantitatively the most important among the forms of reparation. This is the consequence of the fact that restitution in kind is very frequently inapt to ensure a complete reparation.[34]

21. Of course, reparation by equivalent is governed, as is any other form of reparation, by the well known principle that the result of reparation in a broad sense—namely of any of the forms of reparation or a combination thereof—should be the "wiping out", to use the dictum of the *Chorzów Factory* case (Merits), of "all the consequences of the illegal act" in such a manner and measure as to establish or re-establish, in favour of the injured party, "the situation which would, in all probability, have existed if that act had not been committed".[35] Considering the major role of compensation, it is especially with regard to that remedy that the so-called Chorzów principle is to exercise its function in the regulation of the consequences of an internationally wrongful act. Considering in particular the incompleteness frequently characterizing restitution in kind, it is obviously through pecuniary compensation that the Chorzów principle can eventually be given effective application. It is indeed by virtue of that principle that pecuniary compensation fills in, so to speak, any gaps, large, small or minimal, which may be left in full reparation by the noted frequent inadequacy of *restitutio in integrum*.

22. It is equally obvious that even such a sweeping principle of full or integral compensation is not by itself sufficient to settle all the issues involved in reparation by equivalent.[36] These issues include:

(1) The compensatory function of reparation by equivalent and the question of "punitive damages";

(2) The question whether "moral" damage is to be compensated as well as "material" damage;

(3) The problem of indemnification of "indirect" as well as "direct" damage;

(4) "Causal link", "causation" and multiplicity of causes;

(5) The relevance of the injured State's conduct;

(6) The question of *lucrum cessans* as distinguished from *damnum emergens*;

(7) The relevance of the gravity of the wrongful act and of the degree of fault of the offending State;

(8) The obligation to pay interest and the rate thereof;

(9) The determination of *dies a quo* and *dies ad quem* in the calculation of interest;

(10) The alternative: compound versus simple interest.

2. FUNCTION AND NATURE OF REPARATION BY EQUIVALENT

23. Consisting as it does in the payment of a sum of money substituting for or integrating restitution in kind, reparation by equivalent is qualified by three features distinguishing it from other forms of reparation. The first feature is its aptitude to compensate for injuries which are susceptible of being evaluated in economic terms. Compensation by equivalent is thus intended to substitute, for the injured State, for the property, the use, the enjoyment, the fruits and the profits of any object, material or non-material, of which the injured party was totally or partly deprived as a consequence of the internationally wrongful act. Pecuniary compensation thus comes into play, even when the object of the infringed obligation was not a previous undertaking to pay a sum of money, in a "residual" or "substitutive" function. The second feature is that, although a measure of retribution is present in any form of reparation, reparation by equivalent performs by nature an essentially compensatory function. The afflictive-punitive function is typical of other forms of reparation, most notably of satisfaction and guarantees of non-repetition. The third feature is that the object of reparation by equivalent is to compensate for all the economically assessable injuries caused by the internationally wrongful act, but only for such injuries.

24. The essentially compensatory function of reparation by equivalent is generally recognized and frequently emphasized in the relevant literature. One may recall

[34] See the preliminary report, document A/CN.4/416 and Add.1 (footnote 1 above), paras. 114-118.

[35] *P.C.I.J., Series A, No. 17*, judgment of 13 September 1928, p. 47.

[36] As noted, for example, by L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, 1938):

"The assertion that the *full* damage should be compensated is certainly not likely to provide a satisfactory method of assessment. If it means that international tribunals have normally endeavoured to award reparation *for the actual material damage caused*, then it is true. But such a proposition, while denoting a general tendency, is far too vague to contain precise indications. So it remains to be determined whether there are any methods an international judge or arbitrator can use to proceed to estimate the harm that he wants the amount of the reparation to match as closely as possible." (P. 175.)

Eagleton,[37] Jiménez de Aréchaga,[38] Brownlie[39] and Graefrath.[40] Explicit indications in the same sense are less frequent but none the less clear in jurisprudence. In the "*Lusitania*" case, for example, the umpire, Edwin P. Parker, expressed himself clearly (notwithstanding the use of the term "satisfaction" in a very broad, non-technical sense) when he stated:

> . . . the words exemplary, vindictive, or punitive as applied to *damages* are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. . . .[41]

25. A sharp distinction between payment of moneys by way of compensation and payment of moneys for punitive purposes—with a decided exclusion of the latter from the notion of reparation by equivalent—manifested itself in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*, in which the arbitral tribunal unambiguously separated compensatory and punitive consequences of the German conduct and declared its total lack of competence on the consequences of the second kind.[42]

3. Existing rules: their determination and progressive development

26. Notwithstanding the relative abundance of jurisprudence and State practice covering most of the issues listed above (para. 22), most authors are inclined not to recognize the existence of any rules of general international law more specific than the Chorzów formulation. They are mostly sceptical even about the possibility of drawing from the practice reliable (uniform) standards of indemnification. Eagleton stated, for example, that "international law provides no precise methods of measurement for the award of pecuniary damages".[43] Reitzer developed the point further,[44] and similar ideas are ex-

---

[37] C. Eagleton, *The Responsibility of States in International Law* (New York, 1928):

> "The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment . . . It has usually been said that the damages assessed *should be for the purpose only of paying the loss suffered**, and that they are thus *compensatory rather than punitive in character**. . . ." (P. 189.)

[38] E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968):

> ". . . *punitive or exemplary damages**, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, *are incompatible with the basic idea underlying the duty of reparation**. . . ." (P. 571.)

[39] I. Brownlie, *System of the Law of Nations: State Responsibility*, part I (Oxford, Clarendon Press, 1983):

> "In the case of token payments for breaches of sovereignty by intrusions or other non-material loss, the role of payment is more or less that of providing 'pecuniary satisfaction'. However, it is unhelpful to describe such assessments in terms of 'penal damages'. *The purpose of the award of compensation is to provide what is by custom recognized as a recompense**. . . ." (P. 223.)

[40] B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses of The Hague Academy of International Law, 1984-II* (The Hague, Nijhoff, 1985), vol. 185:

> ". . . Imposing penalties on sovereign States or nations is not only a political, but also a legal question in our days. Imposing penalties on another State is clearly incompatible with the principle of sovereign equality of States as interpreted by the Declaration on Principles of Friendly Relations . . .
>
> "We therefore cannot agree that under international law, today, the purpose of damages is 'to punish or at least to reprove a State for its conduct—either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future'. Such a conception can only serve to justify excessive claims for indemnification as a fine or penalty. It would lead to the abuse of international responsibility as an instrument for the humiliation of weaker States as it was shown by the imperialist past." (P. 101.)

[41] UNRIAA, vol. VII, p. 39. See also para. 114 below.

[42] Decision of 30 June 1930 (Portugal v. Germany) (UNRIAA, vol. II, pp. 1035 *et seq.*). The tribunal stated:

> "In addition to reparation for actual damage caused by the acts committed by Germany during the period of neutrality, Portugal claims an indemnity of 2,000 million gold marks because of 'all the offences against its sovereignty and for the violations of international law'. It makes this claim on the grounds that the indemnity under this heading 'will demonstrate the gravity of the acts in terms of international law and the rights of peoples' and 'it will help . . . to show that such acts cannot continue to be performed with impunity. Apart from the sanction of disapproval by conscience and by international public opinion, they would be matched by material sanctions . . .'.
>
> "It is therefore very clear that it is not in reality an indemnity, or reparation for material or even moral damage, but rather sanctions, a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation. Yet it is obvious that, by assigning an arbitrator the task of determining the amount of the claims for the acts committed during the period of neutrality, the High Contracting Parties did not intend to vest him with powers of repression. Not only is paragraph 4, under which he is held competent, contained in Part X of the Treaty, entitled 'Economic clauses', whereas it is Part VII that deals with 'Sanctions', but it would be contrary to the clearly expressed intentions of the Allied Powers to say that they contemplated imposing pecuniary *penalties* on Germany for the acts it committed, since article 232, paragraph 1, expressly recognizes that even simple reparation of the actual losses it had caused would exceed its financial capacity. The sanction claimed by Portugal therefore lies outside the competence of the arbitrators and the context of the Treaty." (*Ibid.*, pp. 1076-1077.)

[43] Eagleton, *op. cit.*, p. 191.

[44] According to Reitzer:

> ". . . Clearly, an arbitrator is driven to a solution that consists in determining the reparation on the basis of his own wisdom and personal sense of justice. There is a *parallelism* between general international law and arbitral and judicial international law. On the one side, the assessment by the injured party, on the other, the assessment by the judge. *In submitting a case to arbitration, the parties replace the unilateral will of the injured State—itself an interested party—with the will and the discretion of a disinterested third party.*
>
> "This phenomenon of the freedom of the judge in determining the extent of the reparation could not go unnoticed by the science of international law. Many writers emphasize the notable part played by the personal views of the judge or the arbitrator, without always realizing the full significance of this proposition.
>
> "This freedom is also found in countless arbitration agreements and *compromis*, in which the arbitrator is authorized to decide on the reparation *ex aequo et bono* or 'according to justice and equity', or has the widest powers conferred on him, sometimes to the express exclusion of strict law.
>
> "Still more significant, however, is that even when such a clause was not inserted in the instrument vesting him with jurisdiction, the arbitrator considered he was able to decide by equity. This was true more especially of the mixed claims commissions, which regarded themselves as veritable courts of equity. But statements in this sense are not lacking in arbitral awards themselves.
>
> ". . .

(*Continued on next page.*)

pressed by Verzijl.[45] Graefrath, for his part, observes that "it seems that the unlimited variety of cases and specific circumstances do not allow for more than guidelines as far as these issues are concerned". He finds this to be particularly true "when we are dealing with material damage, and all the more so, when we have to determine an indemnification for *immaterial damage**, i.e., unlawful detention, bodily harm or death, violation of rights without causing material damage".[46] Gray expresses similar doubts.[47]

27. In the opinion of the Special Rapporteur, the lack of international rules more specific than the Chorzów principle is probably not so radical as a considerable part of the doctrine seems to believe. He finds comfort in so thinking in the fact that even in the less recent literature one finds indications that the field is not so lacking in regulation. Verzijl admits, for example, that "lines" can be identified "along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered".[48] This contradicts, in a sense, Eagleton's statement that international law "provides no precise methods of measurement for the award of pecuniary damages" (see para. 26 above). A relatively more positive view is also expressed by Anzilotti. After noting the evident similarity of international dicta with the rules of the law of tort in municipal legal systems and the natural tendency of tribunals and commissions to have recourse to rules of private law, particularly of Roman law, he specified that in so doing international tribunals do not apply national law as such. More persuasively they apply international legal principles modelled on municipal principles or rules. Anzilotti speaks notably of such rules as being materially identical with, albeit formally different from, municipal rules, obviously in the sense that they have become rules of international law by virtue of an international law-making process.[49] The influence, albeit relative, of rules of private law, notably of Roman law, is also acknowledged by other writers, such as Nagy[50] and Čepelka.[51] Reitzer himself, who seemed to deny altogether the existence of any international rules or principles in the field,[52] acknowledges the existence of different views, according to which:

> . . . States which submit a case to an impartial body definitely do so with the *conviction* that there are well-established rules on the quantum of the reparation, rules that the judge is compelled to follow. The slightest loss of such a conviction means that States would hesitate to hand over their disputes to an arbitrator whose decision could well lead to disagreeable surprises.

And he adds:

> It has even been claimed that, in the absence of applicable rules of international law, and unless the *compromis* authorizes him to rule *ex aequo et bono*, the arbitrator should refuse to make a decision.[53]

But Reitzer rejects these views as unfounded and recognizes that arbitrators have recourse largely to general principles of municipal law.[54] After citing the *Delagoa*

(*Footnote 44 continued.*)

> ". . . The impressive number of *compromis* giving the judge full discretion would suffice to show that States have no fears regarding such discretion. The Hague Codification Conference can, however, also be cited in support of the opposite view. The replies by many States to point XIV of the Preparatory Committee show that they were well aware of the uncertainty, indeed the non-existence, of customary rules on the measurement of reparation that could be a useful guide for the arbitrator. It is also apparent that those States intended to give the greatest possible discretion to the arbitrator deciding these matters." (*Op. cit.*, pp. 160-162.)

[45] J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI:

> "The standards of indemnification are so varied according to the specific cases and kinds of damage that it is hardly feasible to formulate general rules on the subject. It would only be possible to draw up a long list of reparation awards, in addition to the few Court decisions surveyed above, to indicate the lines along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered. There is indeed an endless variety of possible injuries: homicides, mutilations, the infliction of wounds; incarcerations, tortures, detentions, unjust punishments; expulsions; destructions, seizures, theft; denial of justice; lack of government protection, or failure to apprehend or punish the offenders, etc. It goes without saying that the methods of reaching an adequate measure of compensation must necessarily differ widely. The victim may be dead and others may claim as his successors in title. The reparation may follow a long time after the delict. The damage may have consisted of personal injury, loss of property, deprivation of a concession, confiscation, loss of a profession or a bread-winner, the staining of a reputation, insult, moral grief, etc." (Pp. 746-747.)

[46] Graefrath, *loc. cit.*, p. 94.

[47] According to Gray:

> ". . . The basic principle of full reparation that can be derived from the various municipal legal systems—in civil law and communist countries expressed in terms of *damnum emergens* and *lucrum cessans*, in common law countries in terms of putting the claimant in the position he would have been in if there had been no injury to him —represents very little advance on the determination that an obligation to make reparation has arisen. Clearly this basic principle cannot be a practical guide to the assessment of damages, as can be seen from the fact that although legal systems share this aim, their methods of assessment and the results arrived at vary considerably. Moreover, the basic principle is subject to important qualifications and exceptions in every legal system." (*Op. cit.*, p. 8.)

[48] See footnote 45 above.

[49] Anzilotti is not unaware, on the other hand, that not all municipal rules have acquired the force of international rules or principles. An example, according to Anzilotti, would have been the non-transposition into international law of the municipal rule under which moral damages were not indemnifiable in some national legal systems (*Corso*, pp. 429 *et seq.*).

[50] K. Nagy, "The problem of reparation in international law", *Questions of International Law: Hungarian Perspectives*, H. Bokor-Szegö, ed. (Budapest, Akadémiai Kiadó, 1986), vol. 3, pp. 178-179.

[51] Č. Čepelka, *Les conséquences juridiques du délit en droit international contemporain* (Prague, Karlova University, 1965):

> ". . . international practice has—over approximately the last 180 years—worked out at least some *subsidiary criteria* for determining the extent of the damage caused by the offence and the amount of the indemnity to be paid. The criteria in question are based essentially on the general principles of law. Naturally, this in no sense means bringing these principles of municipal law into international law, for the general principles of law do not form part of general international law; that does not rule out the fact that straightforward subsidiary criteria will, by international custom, in the subsequent evolution of international practice, become stable rules of ordinary international law." (P. 29.)

[52] See footnote 44 above.

[53] Reitzer, *op. cit.*, pp. 161-162.

[54] According to Reitzer: "A scrutiny of arbitral awards unquestionably reveals that arbitrators have quite often referred to these general principles [recognized in municipal law]. They are also to be found in the *compromis*. This phenomenon cannot be passed over in silence." And although he contends that the general principles so described do not constitute "compulsory norms of the general law of nations", he admits that it is natural, given the existence of a "very old and highly developed system of legal norms" (namely Roman law and civil law), that the international judge "has not failed to draw on this source". The more so, he adds, as "the two *de facto* situations reveal undeniable similarities". (*Ibid.*, p. 163.)

Bay Railway case,[55] Reitzer concluded that

> Without, therefore, forming part of general international law, the general principles of private law have exerted considerable influence on international arbitrators and judges using discretionary powers in their decisions. . . .[56]

In this passage by Reitzer the difference from Anzilotti concerns only the status of the general principles referred to.

28. The noted admissions (and contradictions) of a part of the doctrine suggest that a less pessimistic and more balanced view would probably be justified with regard both to the existence of rules or principles governing compensation in international relations and to the usefulness of an attempt at their progressive development on the part of the Commission. On the one hand, the number and variety of concrete cases is so high that it is natural that the study of jurisprudence and diplomatic practice should lead one to exclude the very possibility of finding or even conceiving very detailed rules applying mechanically and indiscriminately to any cases or groups of cases. This excludes not only the actual existence (*de lege lata*) of very detailed rules but also the advisability of producing any such rules as a matter of progressive development. It does not exclude, nevertheless, either the existence of more articulate rules than the Chorzów principle or the possibility of reasonably developing any such rules and obtaining their adoption.

29. As regards the existing law, the large number of cases that have occurred have given rise to so many arbitral or judicial decisions and agreed settlements on most of the specific issues arising in the area that it seems reasonable that whenever relatively uniform solutions on any given issue can be identified, a corresponding relatively specific rule or standard can be assumed to exist. As noted by Anzilotti and Reitzer, the rules and standards applied by international judicial bodies are often very similar to, if not identical with, the corresponding rules and standards of municipal law (Roman law, civil law or common law). This means, in the opinion of the Special Rapporteur, not so much an application of municipal legal rules by mere *renvoi*; it means rather that, through the work of international judicial bodies and the agreed settlements achieved directly between themselves, States have gradually worked out and accepted rules and standards on compensation. Even where such rules and standards were originally modelled partly on municipal law, they may well be found to be now in existence as part of general international law. There seems thus to be enough to justify an attempt on the part of the Commission at both the determination and the codification of such rules or principles.

30. Of course, one should not expect the discovery of absolute rules to result in their being applied automatically and mechanically in every case and under any circumstances. It is common knowledge that in no field of the law, whether national or international, can rules or principles be applied mechanically: and it is especially so when the matter involved is one of the quantification of losses—often non-material—to be compensated in each particular case. Any rule which is not conceived for just a single case needs some measure of adaptation—by judges, arbitrators or interested parties themselves—to the features and circumstances of each one of the innumerable concrete cases to which it applies. It is perhaps just because of the great variety of the kinds of wrongful acts and of their circumstances, particularly the variety of the kinds of damage caused, that so many doubts are raised with regard to the existence of international legal rules on pecuniary compensation.

31. In particular, the fact that the rules are bound to be relatively general and flexible does not imply that they are mere "guiding principles" or "guidelines" and not susceptible of codification in a narrow sense. These are rules setting forth the rights of the injured State and the corresponding obligations of the offending State.

32. It should be further considered that, in the field of international responsibility more than in any other, the Commission is not entrusted only with a task of strict codification. According to the letter of the relevant provision of the Charter of the United Nations, the part of the Commission's task that comes foremost is progressive development. It follows, in the Special Rapporteur's view, that whenever the study of the doctrine and practice of pecuniary compensation indicates a lack of clarity, uncertainty or, so to speak, a "gap" in existing law, it should not be inevitable for the Commission to declare a *non liquet*. An effort could and should be made to examine the issue *de lege ferenda* in order to see whether, in what direction and to what extent the uncertainty could be removed or reduced or the "gap" filled in as a matter of development. This should be done, of course, in the light of a realistic appraisal of the needs of the international community, of available private law sources and analogies, and under the guidance of realism and common sense.

33. Within the said reasonable limits, the incorporation of elements of progressive development into the draft articles seems to be particularly indicated by the nature of the subject-matter of State responsibility in general and pecuniary compensation in particular. As often stressed by members of the Commission as well as by scholars at large, the Commission's draft on State responsibility deals mainly, unlike other drafts, with so-called "secondary" legal situations. The Commission is dealing, precisely, with the prospective situations or conflicts that may derive from future wrongful acts in any areas of international law: situations and conflicts with regard to which any State can find itself with an equal degree of probability either in the position of offending, "responsible" State or in the position of an "injured" State. Normally one is thus not confronted—as is the case when one deals mainly or exclusively with the codification and development of the so-called "primary" rules —with given actual or foreseeable conflicting interests and positions, such as those that inevitably emerge when one deals (*de lege lata* or *ferenda*) with the régime of international watercourses, the régime of the sea, the régime of international economic relations or the law of the environment.[57] Of course, even in the regulation of an

[55] See footnote 96 below.

[56] Reitzer, *op. cit.*, p. 165.

[57] In areas such as these, whatever the degree to which common interests come to bear in order to facilitate agreement on *lex lata* or *lex ferenda*, one always encounters, on every single issue, the obstacle (difficulty) represented by such contrasts as those dividing upstream States from downstream States, coastal States from land-locked States (or oceanic coastal States from closed-seas coastal States) or developing States from developed States.

area such as State responsibility, there are issues with regard to which similar potential contrasts of interests may manifest themselves: for instance, between States poor and rich, large and small, strong and weak, on issues such as those concerning the measures admissible to secure reparation and the pre-conditions and conditions of the lawfulness thereof. In so far, however, as the purely substantive consequences of a wrongful act are concerned, and particularly with regard to the rules that obtain or should obtain in the field of pecuniary compensation, all States would seem roughly to share the same "prospective" or "hypothetical" interests. All States should therefore share a high degree of common interest with regard to leniency or generosity *vis-à-vis* the offending or the injured State respectively.[58] This consideration might perhaps help to assess better the possibility of incorporating elements of progressive development in the draft articles concerning reparation in general and reparation by equivalent in particular. This also applies, in the Special Rapporteur's view, to satisfaction.

B. "Direct" and "indirect" damage; causal link and multiplicity of causes

1. "Direct" and "indirect" damage

34. Once agreed that all the injuries and only the injuries caused by the wrongful act must be indemnified,[59] the effort of doctrine and practice has always been to distinguish the consequences that may be considered to have been caused by a wrongful act, and hence indemnifiable, from those not to be considered as such and therefore not indemnifiable.[60]

35. For some time in the past this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the scant utility of such a distinction.[61] Whatever may be meant by "indirect" damage in certain municipal legal systems,[62] this expression has been used in international jurisprudence to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and damage that would justify their qualification as "indirect".[63] As noted by Hauriou, the most striking application of the rule excluding "indirect" damages was

> the *Alabama* case, where the Geneva tribunal, in a spontaneous statement prior to the decision, warned the parties that claims for indirect losses could in no way be taken into account. But the principle is scrupulously observed in all international disputes and, to our knowledge, there is, apart from the United States-German Mixed Claims Commission case, not one in which the arbitrator, after qualifying damage as indirect, has awarded compensation. . . .[64]

Reitzer points out, however, that

> Although they have rejected it, mixed commissions and tribunals have by no means supplied a clear notion of indirect damage. Indeed, they have used the term without realizing the sense of the words used. It is not surprising, therefore, that the same injury is dismissed as being indirect in one case, yet admitted in another case, or "that the question of its nature is not raised, or that the arbitrator goes ahead and qualifies it as direct".[65]

36. Whatever the doctrine may say, practice has kept its distance from the notion of "indirect" damage for the purpose of identifying the demarcation line of indemnifiable injury. Worthy of mention in this connection is the following extract from administrative decision No. II of the United States-German Mixed Claims Commission dated 1 November 1923, which set down some of the basic principles to be followed in deciding the cases submitted:

> It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of. . . .[66]

In the *South Porto Rico Sugar Company* case, the same Commission further stated that the term "indirect" used with regard to damage was "inapt, inaccurate and ambiguous", and that the distinction sought to be made between "direct" and "indirect" damage "is frequently illusory and fanciful and should have no place in international law".[67]

2. Continuous (uninterrupted) causal link

37. Rather than the "directness" of the damage, the criterion is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. Authors seem generally to agree on this point. For injury to be

---

[58] Whatever a State may feel it might "lose" within the framework of the legal situation envisaged in a draft article for a possible offending State would be counterbalanced by what that same State would gain from that situation whenever it found itself in the position of an injured party.

[59] This is what Personnaz defines as "the principle of equivalence in the reparation of the harm" (*op. cit.*, pp. 98-101).

[60] An accurate analysis of the problem is made in the substantial work by B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973), particularly pp. 185-223.

[61] Cf. Personnaz, *op. cit.*, p. 135; Eagleton, *op. cit.*, pp. 199-202; Morelli, *op. cit.*, p. 360; Bollecker-Stern, *op. cit.*, pp. 204-211; Gray, *op. cit.*, p. 22.

[62] According to Nagy:

> ". . . Both the concept and the problem of indirect damage were taken over by international law from the domestic law of bourgeois States; such distinction had been unknown to Roman law. This concept was first introduced into the French legal system, which made a great impact on the development of the European legal systems, by works of the French jurists Dumoulin and Domat in 1681 and 1777 respectively. By indirect damage these authors meant a loss of pecuniary value bearing but a remote relationship to the illegal act and originating from other causes as well; whereas direct damage results solely from an act imputable to the wrongdoer. The prevalent view argued against compensation for such damage, and it came to be expressed also in article 1151 of the Code Napoléon. The domestic laws of some States make no adequately clear distinction between direct and indirect damage, many legal systems do not even make such distinction, nor is this question unambiguously answered by the science of international law. . . ." (*Loc. cit.*, p. 179.)

[63] In that sense, see Anzilotti, who notes that international tribunals, rather than qualifying an injury as indirect and therefore non-indemnifiable, have qualified as indirect an injury which they considered should not be indemnified (*Corso*, p. 431), but mainly A. Hauriou, whose article "Les dommages indirects dans les arbitrages internationaux" (RGDIP, vol. 31 (1924), p. 203) has undoubtedly represented an important phase in the study of the subject. According to this author, "whenever the theory of indirect damage is mentioned, the purpose is relentlessly to rule out this category of damage"; and further on, "Unfortunately, from an examination in collections of arbitral awards of the application of this rule, it is impossible not to find inconsistent decisions" (p. 209).

[64] Hauriou, *loc. cit.*, p. 209.

[65] Reitzer, *op. cit.*, p. 180.

[66] UNRIAA, vol. VII, p. 29.

[67] This was one of the *War-Risk Insurance Premium Claims* cases; decision of 1 November 1923 of the Mixed Claims Commission (UNRIAA, vol. VII, pp. 62-63).

indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect:[68] and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage his act would cause. As Bollecker-Stern explains, it is presumed that the causality link exists whenever the objective requirement of "normality" or the subjective requirement of "predictability" is met.[69] Indeed, these two conditions—normality and predictability—nearly always coexist (in the sense that the causing of the damage could also have been predicted if it were within the norm).[70] And although this has been denied at least by one author (who holds that only the objective criterion of normality should be used to ascertain the damages due),[71] practice seems not to show any preference in favour of the "normality" criterion. For example, among the replies of Governments on point XIV (Reparation for the damage caused) of the questionnaire submitted to them by the Preparatory Committee of the Conference for the Codification of International Law,[72] Germany[73] and Denmark[74] expressed themselves in favour of predictability. The Netherlands[75] and the United States[76] were in favour of normality.

38. Predictability prevails in judicial practice. One clear example is the decision in the *Portuguese Colonies* case (Naulilaa incident).[77] The injuries caused to Portugal by the revolt of the indigenous population in its colonies were attributed to Germany because it was alleged that the revolt had been triggered by the German invasion. The responsible State was therefore held liable for all the damage which it could have predicted, even though the link between the unlawful act and the actual damage was not really a "direct" one. On the contrary, damages were not awarded for injuries that could not have been foreseen:

> ... it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should not necessarily rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author's will and not foreseeable on his part. ...[78]

39. It does not, therefore, seem correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the "normality" or "naturalness" which seems to be an undeniable prerequisite for identifying the causality link. Administrative decision No. II of the United States-German Mixed Claims Commission, mentioned above (para. 36), once again provides a valuable example of the way in which the test of normality is applied in identifying the causality link:

> ... It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act. ...[79]

40. The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice, one notes a tendency to identify the criterion in question with the principle of *proxima causa* as used in

---

[68] See especially Personnaz:

> "... the following must be considered as consequences of the injurious act and therefore taken into consideration in determining the scope of the obligation to make reparation: all of the facts connected with the original act by a link of cause and effect, in other words, all of the facts leading back in an unbroken chain to the first act." (*Op. cit.*, p. 136.)

and Eagleton:

> "... all damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain of causation, should be integrally compensated ..." (*Op. cit.*, pp. 202-203.)

[69] Bollecker-Stern, *op. cit.*, pp. 191-194.

[70] See, for example, G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours ..., 1929-III* (Paris, 1930), vol. 28:

> "The criterion of 'normality' in the consequences is the criterion that international jurisprudence often uses to determine the basis for reparation of indirect damage. And this criterion, viewed from the subjective standpoint, coincides to some extent with that of 'predictability', which is also used in international jurisprudence. It is the same thing, examined from two different points of view." (P. 251.)

and Reitzer:

> "... This idea [namely, 'adequate causality'] is also expressed in the proposition that any damage resulting from the injurious act in the foreseeable *ordinary course* of daily life must be indemnified." (*Op. cit.*, p. 183.)

[71] In that sense, A. P. Sereni, *Diritto internazionale*, vol. III, *Relazioni internazionali* (Milan, Giuffrè, 1962), states that "the injury caused by the unlawful act is indemnifiable even if it was not predictable" (p. 1551); and he cites in this respect the *Portuguese Colonies* case (Naulilaa incident) (UNRIAA, vol. II, pp. 1031-1033, 1037, 1074-1076).

[72] League of Nations, document C.75.M.69.1929.V.

[73] "Our first thought should be to examine very carefully the relationship of cause and effect. In the domain of international law particularly, quite unforeseen consequences might arise if it were possible to make a State responsible for damages caused by a concatenation of extraordinary circumstances which could not be foreseen in the normal course of events. This is a point on which the modern doctrine of international law and the practice of arbitration courts are substantially concordant. ..." (*Ibid.*, p. 146.)

[74] "Reparation should include, according to the decision of the Court, not only proved losses, but also losses or profits and indirect damage in so far as the latter could be foreseen at the time the wrong was done and could be avoided by any economic sacrifice on the part of the injured person." (*Ibid.*, p. 147.)

[75] "... Compensation must be given for any damage which can reasonably be regarded as the consequence of the act alleged against the State. ..." (*Ibid.*, p. 149.)

[76] "Losses of profits, when proved with reasonable certainty and when a causal connection could be established, have been allowed." (Document C.75(a).M.69(a).1929.V, p. 25.)

[77] Decision of 31 July 1928 (Portugal v. Germany) (UNRIAA, vol. II, pp. 1011 *et seq.*).

[78] *Ibid.*, p. 1031.

[79] The Commission added:

> "... Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" (UNRIAA, vol. VII, p. 30).

private law.[80] Brownlie, referring to the *Dix* case,[81] says that

> . . . There is some evidence that international tribunals draw a similar distinction, and thus hold governments responsible "only for the proximate and natural consequences of their acts", denying "compensation for remote consequences, in the absence of evidence of deliberate intention to injure".[82]

Following the disintegration of the *Cosmos 954* Soviet nuclear satellite over its territory in 1978, Canada stated in its claim:

> In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.[83]

41. It seems therefore that an injudicious use of the adjective "proximate" (with reference to "cause") in order to indicate the type of relation which should exist between an unlawful act and indemnifiable injury is not without a certain degree of ambiguity. That adjective would seem utterly to exclude the indemnifiability of damage which, while linked to an unlawful act, is not close to it in time or in the causal chain.

42. To sum up, the causal link criterion should operate as follows:

(i) Damages must be *fully* paid in respect of injuries that have been caused immediately and *exclusively* by the wrongful act;[84]

(ii) Damages must be *fully* paid in respect of injuries for which the wrongful act is the *exclusive* cause, even though they may be linked to that act not by an immediate relationship but by *a series of events each exclusively linked with each other by a cause-and-effect relationship.*

43. As Bollecker-Stern algebraically puts it:

> . . . As long as it can be definitely proved that Ai [the unlawful act] is the direct and sole cause of P_1 [the "immediate" damage], that P_1 is the sole and direct cause of P_2 etc., up to P_n, with no link missing in the natural and logical chain between the unlawful act and the final injury, the latter will then be indemnifiable. . . .[85]

Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted. As noted by Salvioli:

> . . . It is argued in international jurisprudence that reparation should be made only when no extraneous fact has broken the link of causality between the cause—the act—and the consequence—the injury. This principle is in itself correct, but it should be applied with care. For example . . . if the unlawful act has led to a fact, even if it is extraneous, or has exposed the injured party to its influence, it cannot be contended that the relationship of causality has been broken. Injuries in this category must be indemnified.[86]

3. Causal link and concomitant causes

44. Consideration must be given to cases in which the injuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the unlawful act plays a decisive but not exclusive role. In such cases, to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of partial damages, in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded to be determined on the basis of the criteria of normality and predictability. Salvioli,[87] Eagleton[88] and other authors[89] explain the point well.

45. Economic, political and natural factors and actions by third parties are just a few of the innumerable elements which may contribute to a damage as concomitant causes. One example is the *Yuille, Shortridge and Co.*

---

[80] According to Graefrath:

". . . it is a principle of private law that is applied, the principle of *proxima causa*. A loss is regarded as a normal consequence of an act, if it is attributable to the act as a proximate cause." (*Loc. cit.*, p. 95.)

[81] Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (UNRIAA, vol. IX, pp. 119 *et seq.*, at p. 121).

[82] Brownlie, *op. cit.*, p. 224.

[83] ILM, vol. XVIII (1979), p. 907, para. 23 of the claim.

[84] J. Combacau, "La responsabilité internationale", *in* H. Thierry and others, *Droit international public*, 4th ed. (Paris, Montchrestien, 1984), speaks in such a case of a "causalité au premier degré: celle qui unit sans aucun intermédiaire le fait générateur au dommage" (p. 711).

[85] Bollecker-Stern, *op. cit.*, p. 211. These are what Hauriou had already classified as "remote" or "second-degree" injuries, in order to indicate "the injurious facts that occur as a repercussion of the principal injury, but the origin of which none the less lies in the initial injury caused by the State and incurring its responsibility" (*loc. cit.*, p. 219). In that sense, cf. Personnaz:

". . . The causality relationship is a question of fact and must be established with certainty: when it exists, reparation is due, however removed in time or space the injury may be; conversely, the obligation disappears if the relationship is broken." (*Op. cit.*, p. 129.)

[86] Salvioli, *loc. cit.*, p. 247.

[87] According to Salvioli,

". . . Sometimes, damage *x* may be *the effect of more than one cause, each independent of the other*, but together they have combined to produce the damage or produce the damage to a particular entity. This is the classic situation of *concomitant causes* and, as such, it lies, strictly speaking, outside the scope of indirect damage. Yet when an unlawful act by a particular subject is one of these causes (natural factors or acts by a third party), part of the damage must obviously be attributed to the unlawful act, and it will always be possible to transform the ideal part of the damage into an *actual share of the compensation* payable by the guilty party. The difficulty in determining the part of the damage to be attributed to the unlawful act cannot allow the judge purely and simply to reject the injured party's claim. . . ." (*Loc. cit.*, pp. 245-246.)

[88] Eagleton considers that

". . . if other elements enter into the production of the harm alleged, compensation should be made in proportion to the damage actually caused by the respondent's act. . . ." (*Op. cit.*, p. 203.)

[89] Personnaz states that

". . . when the judge finds two or more links of causality between the damage and a number of factors, he will examine the one that seems the most normal and the original factor that is most likely to have caused the act. If each has played a part, each must be assigned a proportion of the responsibility." (*Op. cit.*, p. 143.)

According to Gray:

"If a State is liable only for the direct consequences of its own unlawful act it should not have to pay full compensation for injuries partly caused by external factors. . . ." (*Op. cit.*, p. 23.)

On the concomitance of factors other than the wrongful act itself in the causation of damage and the consequences thereof on the *quantum* of compensation, see the thorough analysis by Bollecker-Stern, *op. cit.*, titles III and IV.

case.[90] This concerned an English wine-exporting company with registered office in Portugal, which was wrongly found liable by the Portuguese courts after an irregular procedure. The main injury for which the company sought reparation was represented by the costs it had sustained in the course of the hearing. "Accessory injuries" were the fall in sales, since the company's activities had been partly paralysed. As summed up by Hauriou,

> . . . the question was precisely to determine whether the hearing was the sole cause of the fall in sales or whether other causes were involved. It was obvious that extraneous circumstances had contributed to the decline in the company's profits. The arbitrators noted, for example, a crisis in wine production from 1839 to 1842, as well as losses from the bad conditions under which some wine consignments had been made.
>
> Consequently, the damage qualified as "indirect", namely the decline in the company's profits, is the result of different causes. Some relate to the denial of justice suffered by the company, but others are totally extraneous.[91]

46. It would be pointless to try to find any rigid criteria to apply to all the cases and to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would be absurd to think in terms of laying down in a universally applicable formula the various hypotheses of causal relationship and to try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due.[92] The application of the principles and criteria discussed above can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors. As Reitzer rightly describes the relevant doctrine:

> . . . Causality is the chain of an infinite number of causes and effects: the injury sustained is due to a multitude of factors and phenomena. An international judge must say which of them have produced the injury, *in the normal course of things*, and which, indeed, are extraneous. He must, more particularly, decide whether, according to the criterion of *normality*, the injury is or is not attributable to the act in question. This calls for a choice, a selection, an assessment, of the facts which, in themselves, are all of equal value. In this work of selection, an arbitrator is compelled to do things according to his own lights. It is he who breaks the chain of causality, so as to include one category of acts and events and to exclude another, guided by his wisdom and his perspicacity alone. Whenever the arbitrator finds nothing useful in the precedents, his freedom of judgment *takes over*.[93]

[90] Decision of 21 October 1861 (Great Britain v. Portugal) (Lapradelle-Politis, vol. II, pp. 78 *et seq.*).

[91] Hauriou, *loc. cit.*, p. 216.

[92] Anzilotti, *Corso*, p. 431.

[93] Reitzer, *op. cit.*, pp. 184-185. Very appropriate are, *inter alia*, the remarks made by Hauriou (*loc. cit.*, p. 220), and Personnaz, according to whom

> "The existence of relationships [of causality] is a question of fact and must be established by the judge; it cannot be locked in formulas, for it is a case-by-case matter." (*Op. cit.*, p. 129.)

He states further on:

> "It is a question that cannot be resolved by principles, but solely in the light of the facts of the particular case, and in examining them the judge will, if there are no restrictions in the *compromis*, have full powers of appraisal." (P. 135.)

4. The injured State's conduct as a concomitant cause

47. A concomitant cause the presence of which may affect the amount of compensation is the lack of "due diligence" or the presence of any degree of negligence on the part of the injured State. It is widely agreed that where the injured State contributed to causing the damage, or to the aggravation thereof, compensation would be reduced in amount accordingly.[94] The relevance of the injured State's negligence has been recognized and acted upon in a number of cases.

48. In the "*Costa Rica Packet*" case, decided by arbitrator F. de Martens in 1897,[95] Great Britain obtained compensation for the unlawful detention of the ship's captain and the loss of the fishing season. The amount of compensation was, however, reduced by the arbitrator, in consideration of a number of circumstances, such as the early release of the arrested captain of the ship and the availability, during his absence, of the ship's second in command, which would have allowed the resumption of the fishing and the consequent reduction of the loss caused by the captain's arrest by Dutch authorities.[96] Similarly, in the *Delagoa Bay Railway* case[97] the arbitrators were asked to settle a claim in the dispute between Portugal, on the one hand, and the United Kingdom and the United States of America, on the other, over the cancellation of the franchise for the Lourenço Marques railway line, 35 years before its expiry date:

> All the circumstances that can be adduced against the concessionnaire company and for the Portuguese Government mitigate the latter's liability and warrant . . . a reduction in the reparation. . . .[98]

49. Another case of interest is the *John Cowper* case,[99] about which Salvioli says:

> Considerations of the same kind (*responsibility of the injured party*) probably influenced the arbitrator in the Cowper case when he rejected

[94] Salvioli, *loc. cit.*, pp. 265-266; Čepelka, *op. cit.*, p. 31; Graefrath, *loc. cit.*, p. 95; Gray, *op. cit.*, pp. 23-24; but mainly Bollecker-Stern, *op. cit.*, pp. 265 *et seq.*, title III.

[95] Decision of 25 February 1897 (Great Britain v. Netherlands) (Moore, vol. V, pp. 4948 *et seq.*).

[96] The arbitrator stated:

> "Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale-fishing season;
>
> "Whereas, on the other hand, Mr. Carpenter, on being set free, was in a position to have returned on board the ship *Costa Rica Packet* in January 1892 at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship until April 1892 in the port of Ternate without a master, or, still less, to sell her at a reduced price;
>
> "Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the *Costa Rica Packet* ought to have been fit to take the command and to carry on the whale-fishing industry;
>
> "And whereas, thus, the losses sustained by the proprietors of the vessel *Costa Rica Packet*, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequence of this precautionary detention;
>
> ". . ." (Moore, vol. V, p. 4953.)

and, as noted by Gray, the arbitrator decided that "a reduced amount of damages should accordingly be allowed" (*op. cit.*, p. 23).

[97] Decision of 29 March 1900 (Martens, *Nouveau Recueil*, 2nd series, vol. XXX, pp. 329 *et seq.*).

[98] *Ibid.*, p. 407.

[99] United States of America v. Great Britain, convention of 13 November 1826 (Lapradelle-Politis, vol. I, pp. 348 *et seq.*).

the demand for compensation for lost profits (loss of harvests for *ten consecutive years* from 1815 to 1824), claimed as a consequence of the initial damage, the abduction of slaves. True, after the slaves were taken away the owner could not cultivate his land, but it is no less true that, if the owner had displayed the usual diligence of a head of family, he could have replaced the slaves by other workers.[100]

50. A different decision, which confirms the rule, seems to have been rightly taken by the PCIJ in the *S.S. "Wimbledon"* case.[101] This case related to reparation due from Germany for damage caused to the French charterers of the ship as a result of the refusal of the German authorities to allow the ship to pass through the Kiel Canal (in violation of article 380 of the Treaty of Versailles). This refusal having been found to be a source of liability, there remained to determine the amount of compensation. There was no doubt about the offending State's obligation to pay damages for the detour to which the ship had been forced as a consequence. A doubt, however, arose with regard to the injury represented by the fact that the ship had harboured at Kiel for 11 days, following refusal of passage, before taking an alternative course (by Skagen). Implicitly, the Court admitted that the conduct of the ship's captain in that respect had to be *considered* as a possible circumstance affecting the amount of compensation. While thus confirming the rule with its authority, the Court did not believe, however, that the captain's conduct had left anything to be desired. Indeed, the Court stated:

> . . . As regards the number of days it appears to be clear that the vessel, in order to obtain recognition of its right, was justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage.[102]

No reduction was decided of the amount of compensation.

51. While generally accepting the essential correctness of the practice, the authors who have considered the matter rightly raise the question of the foundation of the rule on "contributory negligence". Mention is made of "*concours de fautes*", "*responsabilité du lésé*", "clean hands", etc. A more convincing explanation of the practice in question is that it is merely an application of the rule of causation and of the principle and criteria to be resorted to in any case of multiplicity of causes. It is in that sense that Bollecker-Stern,[103] Reitzer,[104] Salvioli,[105] Roth,[106] Salmon[107] and others express themselves. The Special Rapporteur would be inclined to concur.

C. The scope of reparation by equivalent

1. General

52. As outlined in the introduction (para. 4 above), pecuniary compensation is generally described as covering the "material" injury suffered by the offended State which has not already been covered and is not coverable by restitution in kind. Correct in a sense, as said in the preceding chapter, this definition has to be understood as related to the proper meaning of the expression "material injury"[108] in the sphere of international law and relations and, mainly, by way of contrast with the term "moral injury" in the "international" sense indicated above (paras. 13-16).

53. Material damage to the State would thus include both:

(i) damage caused to the State's territory in general, to its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft, spacecraft, etc. (so-called "direct" damage to the State);[109] and

(ii) damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State).[110]

2. Personal damage

54. The second class of material damage considered (para. 53(ii)), namely the so-called "indirect" damage to the State, embraces—for the reasons explained above (paras. 9-11)—both the "patrimonial" loss sustained by

---

[100] Salvioli, *loc. cit.*, p. 267.

[101] Judgment of 17 August 1923, *P.C.I.J., Series A, No. 1.*

[102] *Ibid.*, p. 31.

[103] According to Bollecker-Stern, who discusses the various theories (*op. cit.*, especially pp. 310-313):

> ". . . This is also the solution advocated by the Spanish Government, through Mr. Weil, in the *Barcelona Traction* case. Discussing the part played by Barcelona Traction in bringing about the situation for which it claimed reparation from Spain, Mr. Weil said that 'reparation should be proportionate to the causal influence of the unlawful act, alleged to have been committed by the respondent State, in producing the damage. Reparation will therefore be ruled out completely, or reduced, as appropriate, to take account of interference by extraneous causes, and particularly the conduct of the victim itself'." (Pp. 311-312.)

[104] Reitzer, *op. cit.*, p. 198.

[105] Salvioli, *loc. cit.*, p. 266.

[106] A. Roth, *Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten* (Berlin, 1934), p. 83.

[107] J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international, 1964* (Paris), vol. X, p. 265.

[108] Although "material damage" is the expression most frequently used to identify the scope of pecuniary compensation, it is difficult to find in the literature any definitions that are not merely tautological, such as "injury of a material interest" (Morelli, *op. cit.*, p. 359).

[109] Examples of "direct" damage to the State are found in such cases as the *Corfu Channel* case (Merits), *I.C.J. Reports, 1949*, p. 4, and the case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports, 1980*, p. 3. In the literature, see in particular Brownlie, *op. cit.*, pp. 236-240.

[110] That the damage suffered by the State through its nationals (and, it should be added, through its agents in their private capacity) is a "direct" damage to the State itself—notwithstanding its frequent qualification as "indirect" damage—is explained in masterly fashion by Reuter:

> ". . . the modern State *socializes* all private assets by taxation, as it *socializes* part of private expenditures by taking over health costs or part of the risks attached to human existence. In an even more general way, the State now actually picks up all the elements of economic life. All property and all income, all debts and all expenditures, even of a private character, are set down in a system of *national accounts* and its teachings are one of the tools of the economic policy of all governments and thus under its sway.
>
> "Nowadays, therefore, it can no longer be said that the damage sustained by private individuals *is attributed to the State** by a *purely formal mechanism**; economically that is so: it is the Nation, represented by the State, that bears the burden, at least to some extent, of *the loss first suffered by a private individual**." (*Loc. cit.*, pp. 841-842.)

private persons, physical or juridical, and the "moral" damage suffered by such parties.[111] For the same reasons, the class of so-called "indirect" damage to the State includes, *a fortiori*, the "personal" damage—other than "moral" damage—caused to the said private parties by the wrongful act. This refers, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, etc.

55. Injuries of the latter kind, in so far as they are susceptible of economic assessment, are treated by international jurisprudence and State practice according to the same rules and principles as those applicable to the pecuniary compensation of material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries the treatment afforded to strictly "patrimonial" damages.[112]

56. A typical example is that of the death of a private national of the State concerned. In awarding pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods or services susceptible of economic evaluation.[113] One should recall in this respect the first two points made by the umpire in the "*Lusitania*" case (see para. 10 above). According to the umpire, the damage to be compensated in case of death should be calculated on the amount: "(*a*) which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision".[114]

57. This approach to reparation was clearly followed by the ICJ in the *Corfu Channel* case (United Kingdom v. Albania).[115] The Court upheld the United Kingdom's claims in respect of the casualties and injuries sustained by the crew and awarded a sum covering "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc.".[116]

58. The *Corfu Channel* case shows that pecuniary compensation is awarded not only in cases of death but also in cases of physical or psychological injury. After reviewing the relevant judicial practice, M. M. Whiteman states: "The most that can be said is that an effort is usually made to base the allowance of damages primarily upon the actual monetary loss shown to have been sustained."[117] Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the *William McNeil* case,[118] where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities whilst in prison. The British-Mexican Claims Commission pointed out that:

> . . . It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression.[119]

Having noted that after his recovery McNeil had practised a rather lucrative profession, the Commission took the view that "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained".[120]

59. This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the "*Topaze*" case, decided by the British-Venezuelan Mixed Claims Commission. In view of the personality and the profession of the private victims, the Mixed Commission decided in that case to award a sum of $100 a day to each injured party for the whole period of their detention.[121] The same method was followed in the *Faulkner* case by the Mexico-United States General Claims Commission, except that this time the daily rate was estimated at $150 in order to take account of inflation.[122]

3. Patrimonial damage

60. Among the kinds of damage covered by the notion of "material damage to the State" to be remedied by pecuniary compensation, the main and most frequent

---

[111] Private parties include, as well as the State's nationals, agents of the State in so far as they are privately affected by the internationally wrongful act.

[112] For such an interpretation of international jurisprudence, see, *inter alia*, García Amador, document A/CN.4/134 and Add.1, paras. 125-128; Verzijl, *op. cit.*, pp. 750-752; and, in particular, Personnaz, *op. cit.*, pp. 196 *et seq.*, according to whom "corporal" injury is usually considered, by international courts, under three distinct aspects: *pretium doloris*, namely an indemnity for physical suffering (so-called "moral damage" in a narrow sense); indemnity for medical care and assistance; and compensation for the economic loss (prejudice) derived from the physico-psychical injury. In a different sense, see Gray, who believes that

> ". . . Apparently the amount depends [often] on the gravity of the injury involved, and this suggests that the award is intended as *pecuniary satisfaction** for the injury rather than as compensation for the pecuniary losses resulting from it. . . ." (*Op. cit.*, pp. 33-34.)

[113] See Personnaz, *op. cit.*, pp. 253 *et seq.* According to Bollecker-Stern, the hypothesis of the death of the original victim (of the wrongful act) represents the only significant exception to the general principle under which the "third party" would not possess an independent title to claim compensation from the offending party (*op. cit.*, pp. 258-259).

[114] See footnotes 8 and 9 above.

[115] Judgment of 15 December 1949 (Assessment of the amount of compensation), *I.C.J. Reports 1949*, p. 244.

[116] *Ibid.*, p. 249.

[117] Whiteman, *Damages*, vol. I, p. 627.

[118] Decision of 19 May 1931 of the British-Mexican Claims Commission (UNRIAA, vol. V, pp. 164 *et seq.*).

[119] *Ibid.*, p. 168.

[120] *Ibid.*

[121] UNRIAA, vol. IX, p. 387 *et seq.*, at p. 389.

[122] Decision of 2 November 1926 (UNRIAA, vol. IV, pp. 67 *et seq.*, at p. 71).

one is that generally identified as "patrimonial damage".[123] This expression is used in order to designate damage involving the assets of a physical or juridical person, including possibly the State, but "external" to the person.[124]

61. It could be said, indeed, that patrimonial damage has always represented the area in which pecuniary compensation finds its most natural scope. It is in relation to such damage that the principles, norms and standards of implementation of such a remedy have been developed by jurisprudence and diplomatic practice.

62. It is mainly in connection with this kind of injury that jurisprudence and doctrine have deemed it convenient to have recourse to distinctions and categories which are typical of private (civil or common) law and to adapt them to the peculiar features of international responsibility. Authors generally agree, in particular, that compensation of patrimonial damage must make good not only *damnum emergens* but also *lucrum cessans*. It need hardly be recalled that the former term indicates the loss of property caused by the wrongful act (*quantum mihi abest*), and the latter the loss of the profits that could have been derived therefrom (*quantum lucrari potui*). Although, however, there have been hardly any difficulties with regard to reparation for *damnum emergens*,[125] compensation for *lucrum cessans* has at times given rise to problems, both in jurisprudence and in doctrine. It seems therefore indispensable to deal more specifically, in the following section, with *lucrum cessans*.

D. Issues relating to *lucrum cessans*

1. Main problems

63. The main problems arising with regard to *lucrum cessans* are those connected with the aforementioned distinction between "direct" and "indirect" damages (paras. 34-36) and with the correct determination of the extent of profits to be compensated, particularly in the case of wrongful acts affecting property rights on "going concerns" of an industrial or commercial nature.

2. The role of causation in the determination of *lucrum cessans*

64. In a few not very recent cases some obstacles arose, in the treatment of *lucrum cessans*, from the confusion of the concept of profit with the notion of "indirect" damage. This is what occurred in the "*Canada*" and *Lacaze* cases. In the "*Canada*" case,[126] a United States whaler had become stranded on the rocks along the Brazilian coast, and while the crew did what they could to salvage the ship, the Brazilian authorities used force to prevent them from completing their task. The whaler was lost and Brazil was found liable. However, even though Brazil was required to pay compensation for the loss of the ship, the court did not allow any damages to make up for the profits the ship would have earned in pursuing the fishing season, on the ground that such profits were uncertain and hence non-indemnifiable: ". . . the ship and the whole capital might have been lost early in the voyage, or the expedition might have been entirely unsuccessful and without profit".[127] In the *Lacaze* case a French trader in Argentina had been the victim of harassment by the courts and arbitrary detention. This had caused him to forfeit profits in the period during which he had been unable to carry on trade. Nevertheless, the tribunal refused to allow compensation for loss of earnings because of the "indirect" character of these damages.[128]

65. Contesting anyway the appropriateness of the notion of "indirect damage" the literature has for some time now decidedly rejected any equivalence between "indirect damage" and *lucrum cessans*.[129] It consequently declares itself in favour of the indemnifiability of *lucrum cessans* whenever there is the necessary presumption of causation. Opposing notably the dictum of the arbitral tribunal in the "*Alabama*" case,[130] whereby "prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies",[131] the prevailing

---

[123] Mainly but not exclusively when the injury consists of damages suffered by private parties, expressions such as *dommages patrimoniaux* (Personnaz, *op. cit.*, pp. 156 *et seq.*), *dommages aux biens* (García Amador, document A/CN.4/134 and Add.1, para. 31), *dommage économique* (Rousseau, *op. cit.*, p. 12), "property damage" (Gray, *op. cit.*, p. 38), and "damages to property rights in their widest meaning" (G. Schwarzenberger, *International Law* (London, Stevens, 1957), vol. I, p. 664) are frequently used.

[124] Although it can certainly occur that a damage of this nature affects the State in a (so-called) "direct" or "more direct" way, this kind of damage, of course, more frequently has its foundation in an injury to a private party, namely to a national of the injured State. This would be the hypothesis considered by the PCIJ in the *Chorzów Factory* (Merits) case when it noted that, although the issue before it was one of injury to the claimant State, the private damage offered "a convenient scale for the calculation of the reparation due to the State" (*P.C.I.J. Series A, No. 17*, p. 28).

[125] In that sense, see *inter alia* Čepelka, *op. cit.*, p. 30; and Bollecker-Stern, *op. cit.*, pp. 211-214.

[126] Decision of 11 July 1870 (United States of America v. Brazil) (Moore, vol. II, pp. 1733 *et seq.*).

[127] *Ibid.*, p. 1746.

[128] Decision of 19 March 1864 (France v. Argentina) (Lapradelle-Politis, vol. II, pp. 290 *et seq.*, at p. 298). Mention may also be made of the "*Alabama*" case (see footnote 130 below), with regard to which Bollecker-Stern writes:

> "Thus, in the *Alabama* case, the loss of prospective earnings by the American fishing vessels and whalers confiscated by the Confederate cruisers, which, it should be noted, had been classed by the claimant as being part of the direct damage, were not taken into consideration for compensation, as the tribunal had declared that such earnings "cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies". Nevertheless, this categorical assertion takes on its true dimension only if we remember that, alongside the claim for prospective earnings, the United States had also claimed, if the main claim was rejected, compensation equivalent to 25 per cent of the value of the destroyed vessels to offset the loss of profits, and that the tribunal accepted this claim. It is therefore difficult, bearing this in mind, to affirm that there should be no reparation for loss of prospective earnings, because of the manifest contradiction between the refusal *a priori* to make indemnification and the actual compensation that was awarded in practice." (*Op. cit.*, p. 216.)

[129] See, for example, Hauriou, *loc. cit.*, pp. 213 *et seq.*

[130] Decision of 14 September 1872 (United States of America v. Great Britain) (Moore, vol. I, pp. 653 *et seq.*).

[131] *Ibid.*, p. 658.

doctrine contends that for the purpose of indemnification it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act. It is sufficient—also and especially for *lucrum cessans*—to be able to presume that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not occurred. Salvioli makes a relevant point when he states:

> . . . The *certainty* of prospective profits, in other words, of something which has not yet materialized but can materialize in the future, is a *contradictio in terminis*. If the judge rejects the claim because the earning of profits—in the future—is not demonstrated, in actual fact he gives no reason for his decision. This amounts to saying: in no case do I want to award compensation for prospective profit. *Lucrum cessans* is always an eventuality; but it is essential to determine, from actual past and present circumstances, the degree of probability of the eventuality.
>
> . . .
>
> This, to put it more clearly, means the duty to pay compensation for *the loss of the profits that would have been made in a normal situation* —if the wrongful act had not been committed.[132]

More specifically, Bollecker-Stern observes that the main feature of *lucrum cessans* is simply that one is dealing with a *fait eventuel*.[133] But *eventualité* in itself does not exclude the possibility that the damage—namely, the fact of preventing something of value from becoming part of someone's patrimony—may be considered to be a more or less immediate consequence of the unlawful act. The only difference between *lucrum cessans* and *damnum emergens* is that, apart from the presumption of causation—which at all events must exist between the wrongful act and the injury for the damage to be indemnifiable—in the case of *lucrum cessans* a further presumption is required: the presumption, so to speak, of existence—namely that, in the normal and foreseeable order of things, the particular profit for which damages are claimed would, if the wrongful act had not been committed, in all probability have been obtained.[134] Now, if it is evident that a negative reply in the case of either of the two presumptions would exclude the award of pecuniary compensation for *lucrum cessans*, it is wholly admissible for *lucrum cessans* to be indemnified when all the necessary conditions concur for establishing both presumptions. As Bollecker-Stern puts it:

> . . . It is apparent from this analysis that *lucrum cessans* that is normal and reasonable in the ordinary course of events, as in this case, is indemnifiable damage.[135]

66. On this conclusion there seems to be a high degree of agreement in the literature;[136] and the majority of the court decisions seems to move in favour of the indemnifiability in principle of *lucrum cessans*. The decision in the "*Cape Horn Pigeon*" case[137] is a classic example. That case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility, and the only thing the arbitrator had to do was establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occasioned but also the profits which the injured party had been deprived of because of the seizure.[138] In the *Delagoa Bay Railway* case[139] the arbitrators held that the general principle applicable to indemnification

> . . . can only be that of damages, of *id quod interest*, consisting, under the universally accepted rules of law, of *damnum emergens* and *lucrum cessans*: the injury sustained and the profits lost.[140]

This was also the conclusion reached by the judges in the "*William Lee*" and *Yuille, Shortridge and Co.* cases: a conclusion diametrically opposed to the position taken by the courts in the very similar "*Canada*" and *Lacaze* cases mentioned earlier (para. 64). In the "*William Lee*" case the United States was awarded *lucrum cessans* for the profits the unlawfully seized whaler would have been able to earn during the normal continuation of the fishing season.[141] In the *Yuille* case, the United Kingdom was awarded damages for the profits the company would have earned if its activities had not been interrupted by lengthy and irregular proceedings instituted by the Portuguese authorities.[142] The decision on the *Shufeldt* claim,[143] brought by an American citizen whose property had been expropriated by executive decree in Guatemala, placed great stress on the requisite of predictability with regard to *lucrum cessans*. The arbitrator held that:

> The *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or *speculative**.
> . . . this is essentially a case where such profits are the direct fruit of the contract and may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.[144]

Lucrum cessans also played a role in the *Chorzów Factory* case (Merits). The PCIJ decided that the injured party should receive the value of the property by way of

---

[132] Salvioli, *loc. cit.*, pp. 256-257.

[133] Bollecker-Stern, *op. cit.*, p. 199; in the same sense, see also Personnaz:

> ". . . the point is to decide not on a situation that actually exists but on a case that remains a possibility. It is only possible to work on simple hypotheses." (*Op. cit.*, p. 183.)

[134] Bollecker-Stern, *op. cit.*, p. 200.

[135] *Ibid.*, pp. 218-219.

[136] See, for example, Reitzer, *op. cit.*, pp. 188-189; Eagleton, *op. cit.*, pp. 197-203; Jiménez de Aréchaga, *loc. cit.*, pp. 569-570; Brownlie, *op. cit.*, p. 225; Gray, *op. cit.*, p. 25.

[137] Decision of 29 November 1902 (United States of America v. Russia) (UNRIAA, vol. IX, pp. 63 *et seq.*).

[138] The arbitrator stated:

> "Whereas the general principle of civil law whereby damages should include compensation, not only for the injury sustained but also for the profits lost, also applies to international litigation, and, in order to apply it, the amount of the profits need not be fixed with certainty and it is sufficient to demonstrate that in the natural order of things it would have been possible to earn profits that are lost because of the act that has given rise to the claim;
>
> "Whereas in this case it is not a question of *indirect* damage but of *direct* damage, the amount of which must be assessed;
>
> ". . .
>
> "Accordingly,
>
> "The arbitrator holds and decides the following:
>
> "The defendant Party shall pay the claimant Party, for the applications submitted by the rightful claimants in the *Cape Horn Pigeon* case, the sum of 38,750 United States dollars, with interest of 6 per cent per annum on that sum, from 9 September 1892 until the day of full payment." (*Ibid.*, pp. 65-66.)

[139] Martens, *Nouveau Recueil*, 2nd series, vol. XXX, pp. 329 *et seq.*

[140] *Ibid.*, p. 407.

[141] Decision handed down on 27 November 1867 by the Lima Mixed Commission (Moore, vol. IV, pp. 3405-3407).

[142] See footnote 90 above. Other instances of unequivocal statements in favour of the possibility of compensating *lucrum cessans* may be found in Bollecker-Stern, *op. cit.*, p. 219.

[143] Decision of 24 July 1930 (United States of America v. Guatemala) (UNRIAA, vol. II, pp. 1079 *et seq.*).

[144] *Ibid.*, p. 1099.

damages not as it stood at the time of expropriation but at the time of indemnification.[145] As Gray puts it, the Court "apparently . . . assumed that the factory would have increased in value between the date of dispossession and that of the judgment, otherwise its choice of date would not have benefited the claimant".[146]

3. "Abstract" and "concrete" evaluation of *lucrum cessans*

67. Once it was established that *lucrum cessans* was, under certain circumstances, indemnifiable, authors endeavoured to analyse judicial practice in order to identify the most appropriate methods for calculating damages with a view to ensuring that compensation is as close as possible to the damage actually caused. As a result, two distinct methods have emerged which are widely used to determine *lucrum cessans*: the so-called "*in abstracto*" and "*in concreto*" systems. As explained by Personnaz:

> The *in abstracto* system uses mechanical or uniform methods taken from situations analogous with the case in point and the judge takes them as the criterion to be applied automatically. Conversely, in the *in concreto* system the point of departure is reality, the basis is concrete facts, and account is taken of the technical elements of the real situation.
>
> . . . The first system is the simplest and the quickest, since only an automatic determination is required, but it may well lead to errors of evaluation. It should be used when investigation into the real damage would involve too many difficulties and too much uncertainty, and it plays a compromise role. The second system, however, draws closer to reality and avoids the above-mentioned drawbacks, but it is difficult to apply and an accurate knowledge of the facts is needed.
>
> Accordingly, the judge sometimes finds it beneficial to combine a number of systems and so obtain a closer approximation. . . .[147]

68. The *in abstracto* method, which is more commonly used, consists in attributing interest on the amounts due by way of compensation for the principal damage. Indeed, this method raises typical problems, which it is advisable to analyse separately (see paras. 71 *et seq.* below). Suffice it for the moment to say that the *in abstracto* system often seems to be used as the result of a negotiated settlement between the parties, while a judge can always replace the award of the principal damages and interest by a higher lump sum taking account of the fact that the real profits accruing to the property would certainly have been greater than those calculated in terms of interest, including compound interest. A typical example is the *Fabiani* case, in which the arbitrator awarded a lump sum for *lucrum cessans* which was approximately twice the amount that would have been awarded by way of compound interest.[148]

69. Less "abstract", although usually characterized as *in abstracto* as well,[149] are other methods of assessing *lucrum cessans* which are based upon paradigms that seem to be more concrete than interest. These other methods—used in the case of business activities—are based either upon the profits earned by the same physical or juridical person in the period preceding the unlawful act, or upon the profits earned during the same period by similar business concerns.[150]

70. The so-called *in concreto* system is used when the estimate is "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question".[151] One example is the *Cheek* case,[152] in which the arbitrator awarded damages explicitly in order to place the estate of the injured party as far as possible in the same position as it would have been in without the unlawful act, which involved complicated calculations and valuations "to arrive at a probable figure for lost profits".[153]

4. *Lucrum cessans* in the particular case of unlawful taking of a "going concern"

71. The determination of *lucrum cessans* involves naturally the most problematical choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial or industrial concern. A proper analysis of the relevant practice should also take into account in a measure that part of international jurisprudence which has dealt with the lawful expropriation of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation—and notably compensation for lost profits—in case of unlawful taking.

---

[145] *P.C.I.J., Series A, No. 17*, pp. 47-48. The Court made the following observations on this point:

> ". . . Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts . . . should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, *the amount of such profit should be added to the compensation to be awarded**." (P. 53.)

[146] Gray, *op. cit.*, p. 80.

[147] Personnaz, *op. cit.*, p. 185.

[148] Decision of 30 December 1896 (France v. Venezuela) (Martens, *Nouveau Recueil*, 2nd series, vol. XXVII, pp. 663 *et seq.*). As the arbitrator explained the award:

> ". . . The compound interest in the sum of . . . francs does not, however, represent . . . the full amount of which Fabiani was deprived by non-recovery of the sums in the arbitral award. If Fabiani had been able to take advantage of these sums and use them in his business, it is likely that he would have made more profit than the compound interest on the principal in the time for which he would be authorized to collect interest. . . ." (*Ibid.*, p. 705.)

[149] Salvioli, *loc. cit.*, p. 263; Gray, *op. cit.*, p. 26.

[150] For instances of a valuation of the first kind, see the following cases: *Yuille, Shortridge and Co.* (footnote 90 above); "*Masonic*" (Moore, vol. II, p. 1055); "*William Lee*" (footnote 141 above); "*Cape Horn Pigeon*" (footnote 137 above). For instances of a valuation of the second kind, see the following cases: *James Hamilton Lewis* (UNRIAA, vol. IX, pp. 66 *et seq.*); "*C. H. White*" (*ibid.*, pp. 71 *et seq.*); *Irene Roberts* (Ralston, p. 142).

[151] Gray, *op. cit.*, p. 26; in the same sense, see Salvioli, *loc. cit.*, p. 263, and Reitzer, *op. cit.*, p. 189.

[152] Decision of 21 March 1898 (United States of America v. Siam) (Moore, vol. V, p. 5068).

[153] Gray, *op. cit.*, p. 26.

72. Once again, the precedent most frequently recalled is the PCIJ's judgment in the *Chorzów Factory* case (Merits), in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation.[154] It was after formulating that distinction (and assuming the case before it to be one of unlawful expropriation) that the PCIJ set forth that famous principle of full compensation according to which the injured party was entitled to be re-established in the same situation which would, in all probability, have existed if the wrongful taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of *restitutio in integrum*, as distinguished from the technical and narrow sense in which the expression is sometimes used to indicate *naturalis restitutio*. According to the Court, full compensation could be achieved by different means. Whenever possible, one should apply *naturalis restitutio* (*restitution in kind, restitution en nature*) or *restitutio in integrum stricto sensu*, as described in the preliminary report. Whenever and to the extent that such a remedy did not ensure full compensation (namely *restitutio in integrum* in the broad literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby, up to the amount necessary for such full compensation[155] (see para. 66 above).

73. It is on the same principle that the Permanent Court of Arbitration decided the *Lighthouses* case.[156] Considering the activity which was the object of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to compensation equivalent to the profits the company would have earned from the concession for the rest of the duration of the contract.[157] This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It depended notably, it seems, on the fact that the contract article contemplating the possibility of the "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventuality, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree".[158] Within such a contractual context, any question with regard to compensation was bound to be settled by the discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay for it if it exercised its agreed right of redemption).

74. The same principle of full compensation was the basis of the decision handed down in 1963 in the *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company* (NIOC) case, in which the injured party obtained compensation for both the loss corresponding to the expenses incurred for the performance of the contract and the net lost profits.[159] As regards the assess-

[154] For a lawful expropriation the Court declared that the payment of fair compensation would have been sufficient, the standard of "fairness" being met whenever compensation was equivalent to the value of the concern at the time of dispossession, with the addition of interest until the time of effective payment. This would have been, according to the Court, the standard of indemnification required by international law for the nationalization of foreign property. In the second case (where the taking was unlawful), one could not assume that an unlawful act could become a lawful one, or vice versa, through the payment or the refusal of an indemnity. To apply here the standard applied to lawful expropriation would have meant, according to the Court, "rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned". (*P.C.I.J., Series A, No. 17*, pp. 46-47.)

[155] The Court's logical scheme was: a *wrongful* act implies an obligation of *full reparation* (or *restitutio in integrum* in a broad sense), such full reparation being effected by (*a*) *naturalis restitutio* (or equivalent sum), plus (*b*) compensation for any further damage.

[156] Decision of 24/27 July 1956 (France v. Greece) (UNRIAA, vol. XII, pp. 155 *et seq.*).
The case concerned the withdrawal on the part of the Greek Government of a lighthouse administration concession 20 years in advance of the date on which the contract would have expired. The action of Greece was considered to be contrary to the provisions of the contract and as such *unlawful*, in that it had not been accompanied either by the payment of "compensation" or by the guarantee of any such payment in the future.

[157] As explained by the tribunal,

"The concessionaire firm have from this fact, therefore, the right to compensation for the redemption of the concession which ought, so far as possible, to be equal to the benefit of which they have been deprived by reason of the forcible taking over of the concession *25 years before its due expiry**. To assess the compensation, reference must be made to the [date] on which took place the wrongful act (*voie de fait*) of the Greek Government which gave rise to that right to compensation and the damage suffered by the firm can only be assessed by reference to data existing at the time when the concession was taken over. Subsequent events, which were unforeseen at that time both by the Greek Government which seized the concession and by the firm which was dispossessed of it, cannot be taken into consideration in a case of a grant of compensation which ought to have been not only determined but also put at the disposal of a concessionaire before the latter's removal. The Greek argument, which would take into account subsequent events, and which would be to the advantage of Greece, must therefore be rejected. The tribunal adopts the opinion expressed by the Franco-Italian Conciliation Commission concerning certain claims of the same concessionaire, dated 21 November 1953 (Decision No. 164), that, in an exactly comparable situation, it was not only equitable but also in conformity with the terms of the concession to put the firm in the position in which it would have been if the redemption had been effected *de facto* and formally at the moment of the taking over of the lighthouses. . . ." (ILR, 1956, vol. 23, pp. 300-301.)

[158] The tribunal cited an article of the concessionary contract, according to which:

". . . it remains understood that the Imperial Government still retains the right to take over the lighthouse administration however many years the concession shall still have to run, subject to the payment of all compensation which may be determined by the parties or by arbitration in case of failure to agree. In any case the Imperial Government is to pay such compensation before the lighthouse administration passes into its hands, or at least guarantee the payment thereof." (*Ibid.*, pp. 299-300.)

[159] Decision of 15 March 1963 (ILR, vol. 35 (1967), pp. 136 *et seq.*). According to the arbitrator (who referred to the study by Hauriou (*loc. cit.*, pp. 211 *et seq.*) and the various precedents cited therein):

". . . the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. . . . This rule is simply a direct

(*Continued on next page*)

ment of such lost profits, the arbitrator noted, however, that that was "a question of fact to be evaluated by the arbitrator"; and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles—such as wars, disturbances, economic crises or slumps in prices—which could affect the operations during the several decades during which the agreement was to last",[160] the arbitrator awarded compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the company. In this case, while *lucrum cessans* was decidedly included in the compensation, the arbitrator did not indicate any preference of principle for one or the other of the possible methods of evaluation.

75. Although the *LIAMCO* v. *Government of Libya* case[161] concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to *naturalis restitutio*, some considerations were made concerning "cases of wrongful taking of property". The arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a concession agreement "entitles Claimant in lieu of specific performance to full damages including *damnum emergens* and *lucrum cessans*".[162] Again, however, nothing was specified with regard to the method by which *lucrum cessans* should, in such cases, be assessed. Something more seems to emerge from *AMINOIL* v. *Kuwait*.[163] Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF),[164] which was unsuitable for the calculation of lost profits compensation in a case of lawful take-over, might be adequate in a case of unlawful expropriation—this in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. A confirmation comes from *AMCO Asia Corporation* v. *Indonesia*,[165] a case of unlawful taking. After recalling the principle of full compensation as being inclusive of *damnum emergens* and *lucrum cessans*—the latter not to exceed the "direct and foreseeable prejudice"—the tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in the *AMINOIL* case: namely, that DCF should be considered one of the most appropriate methods of evaluation of a going concern unlawfully taken.[166]

76. The latter conclusion does not find confirmation, however, in the *Amoco International Finance Corporation* v. *Iran* case, partly decided by an award of 14 July 1987 by the Iran-United States Claims Tribunal,[167] part of which is devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation.[168] In evaluating the parties' contentions, the tribunal confirmed the distinction between lawful and unlawful expropriations, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking".[169] The study of that case suggests that the tribunal saw a certain discrepancy between the evaluation of *lucrum cessans* in the case of unlawful taking (such evaluation to be confined in any case to the profits lost up to the time of settlement), on the one hand, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession, on the other. The tribunal, however, does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand.[170]

(*Footnote 159 continued.*)

deduction from the principle *pacta sunt servanda*, since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals . . ." (ILR, vol. 35 (1967), pp. 185-186.)

[160] *Ibid.*, pp. 187 and 189.

[161] Decision of 12 April 1977 (ILR, vol. 62 (1982), pp. 141 *et seq.*).

[162] *Ibid.*, pp. 202-203.

[163] Decision of 24 March 1982 (ILM, vol. XXI (1982), pp. 976 *et seq.*).

[164] In the words of the tribunal:

"a method based on the sum total of the anticipated profits, reckoned to the natural termination of the Concession, but discounted at an annual rate of interest in order to express that total in terms of its 'present value' on the day when the indemnification is due; and without taking account of the value of the assets that would have been transferred to the concessionary Authority, 'free of cost', upon that termination.

". . .

". . . This calculation is based on a projection of the quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of concession. . . ." (*Ibid.*, pp. 1034-1035.)

[165] Decision of 21 November 1984 (ILM, vol. XXIV (1985), pp. 1022 *et seq.*).

[166] According to the tribunal:

". . . the only prejudice to be taken into account for awarding damages is the loss of the right to operate the Kartika Plaza, that is to say the loss of a *going concern*.

"Now, while there are *several methods** of valuation of going concerns, *the most appropriate one in the present case** is to establish the *net present value* of the business, based on a reasonable projection of the foreseeable *net cash flow** during the period to be considered, said net cash flow being then *discounted** in order to take into account the assessment of the damages at the date of the prejudice, while in the normal course of events, the cash flow would have been spread on the whole period of operation of the business." (*Ibid.*, p. 1037, para. 271 of the award.)

[167] ILM, vol. XXVII (1988), pp. 1314 *et seq.*

[168] *Ibid.*, pp. 81 *et seq.*, paras. 189-206.

[169] *Ibid.*, p. 82, para. 192. The tribunal stated further:

". . . The legal bases of the two concepts [reparation of the damage caused by a wrongful expropriation, and payment of compensation in case of lawful expropriation] are totally different and, logically, the practical methods to be used in order to derive the amount due should also differ. . . ." (*Ibid.*, pp. 82-83, para. 194.)

[170] ". . . the tribunal need not express an opinion upon the admissibility of such a projection [of future earnings] when the reparation must wipe out all the consequences of an illegal taking, but it certainly cannot accept it for the compensation due in case of a lawful expropriation." (*Ibid.*, p. 105, para. 240.)

E. Interest

1. Allocation of interest in the literature and in practice

(a) *The literature*

77. Notwithstanding some theoretical differences, authors seem to agree that interest on the amount of compensation for the principal damage is due under international law not less stringently than under municipal law. The view expressed by Anzilotti and other authors,[171] who denied the existence of an international rule to that effect,[172] was already opposed at the time by Lapradelle. According to the latter, there was a general presumption that the creditor could have reinvested the amounts due to him.[173] Salvioli made the same point.[174]

78. In the opinion of the Special Rapporteur, the positive view, which seems to be generally shared by contemporary authors, finds its main support in the concept of "full compensation". Once admitted that reparation must "wipe out" all the injurious consequences of a wrongful act, and once admitted that pecuniary compensation includes not only *damnum emergens* but also *lucrum cessans*, it seems correct to hold that the payment of interest, obviously a part of the latter, is the subject of an international obligation.[175] This would appear to be the position of Schoen,[176] Personnaz,[177] Salvioli[178] and, more recently, Graefrath[179] and Nagy.[180] The awarding of interest seems to be the most frequently used method for compensating the type of *lucrum cessans* stemming from the temporary non-availability of capital. According to Subilia,

> ... interest, an expression of the value of the utilization of money, is nothing more than a means open to the judge for *a priori* determination of the injury sustained by a creditor from the non-availability of the principal for a given period. ...[181]

79. It will be shown further on that it is on the basis of the same general principle that the contemporary literature holds that *dies a quo* must be the date on which the damage actually occurred, and *dies ad quem* the date on which monetary compensation is actually paid. But on these issues, as well as on the rate of interest, it is better to look first at the relevant jurisprudence.[182] Indeed, substantial differences emerge from the study of the practice (notwithstanding its uniform support for the principle that allocation of interest is due) with regard to *dies a quo*, *dies ad quem* and rate of interest.

(b) *Practice*

80. International practice seems to be in support of awarding interest in addition to the principal amount of compensation. Compared with dozens of decisions which, with or without express reference to international law or equity, have awarded interest,[183] the only case in which interest has been denied as a matter of principle (and not because of the circumstances of the claim) seems to have been the "*Montijo*" case.[184]

---

[171] Views reported by, *inter alia*, Personnaz, *op. cit.*, pp. 217 *et seq.*, and J.-L. Subilia, *L'allocation d'intérêts dans la jurisprudence internationale* (thesis, University of Lausanne) (Lausanne, Imprimerie Vaudoise, 1972), pp. 126 *et seq.*

[172] Anzilotti criticized the automatic (mechanical) transposal into international law of municipal rules which presuppose conditions that are absent or different in the relations between States, in his article "Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di danaro", *Rivista di diritto internazionale* (Rome), vol. VII (1913), p. 61; and in his *Corso*:

> "... except for a legal rate of interest that automatically applies between States as between private parties, a delay in the payment of a sum of money only warrants compensation for the harm that is actually demonstrated to have ensued, and no presumption is made in favour of the creditor State, even if the harm is then compensated by granting interest on the sum in arrears, to the extent required by the circumstances of the case." (*Corso*, p. 430.)

A position similar to this (strangely not very clear) one seems to have been taken at the time by K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, F. Stier-Somlo, ed. (Stuttgart, 1920), vol. III, 1st part, *a*, p. 212. See also P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, p. 73; and Morelli, *op. cit.*, pp. 360-361.

[173] Lapradelle, commentary on the *Dundonald* case (Lapradelle-Politis, vol. III, pp. 456 *et seq.*); in the same sense, see W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 513.

[174] Salvioli, *loc. cit.*, pp. 278-279.

[175] According to Rousseau,

> "... It is simpler and better to award interest on arrears on the basis of the general principle that any indemnifiable damage should include the payment of appropriate compensation; and in this regard, a delay in paying a cash debt undoubtedly causes the creditor damage of that kind. ..." (*Op. cit.*, p. 244.)

[176] P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau), vol. 10, supplement 2 (1917), pp. 128-129.

[177] Personnaz, *op. cit.*, p. 186.

[178] Salvioli, *loc. cit.*, p. 261.

[179] Graefrath, *loc. cit.*, p. 98.

[180] Nagy, *loc. cit.*, pp. 182-183.

[181] Subilia, *op. cit.*, p. 142.

[182] The various doctrinal positions on the three above-mentioned issues are well described (summed up) by Subilia, *op. cit.*, pp. 120-125.

[183] Relevant judicial decisions in that sense are listed in the paragraphs concerning *dies a quo*, *dies ad quem* and interest rate (paras. 82-106 below).

[184] Decision of 26 July 1875 (United States of America v. Colombia) (Moore, vol. II, pp. 1421 *et seq.*). As reported by Subilia (*op. cit.*, p. 63), the claim was brought against Colombia by the United States on account of the seizure of the steamship "*Montijo*" by Panamanian insurgents while in navigation along the coast of Panama (which formed part of the Federation of Colombia at that time). Having remained for some time in the hands of the insurgents, the ship had later been used by the Government after the failure of the revolution, and was finally returned to the owners. Dissenting from the American arbitrator's view, the umpire, Robert Bunch, motivated his decision not to award interest in the following terms:

> "As regards the opinion ... that interest at the rate of 5 per cent per annum should be allowed from the 1st of January 1872 to the date of payment of the claim, the undersigned is not prepared to say that such an allowance would not be strictly justifiable. He nevertheless decides against it for the following reasons:
>
> *First.* Because there is no settled rule as to the payment of interest on claims on countries or governments;
>
> *Secondly.* Because it seems open to question whether interest should accrue during the progress of diplomatic negotiations, which are often protracted in their character;
>
> *Thirdly.* That this reason applies with special force to negotiations which result in an arbitration or friendly arrangement;
>
> *Fourthly.* That, whilst doing what he considers strict justice to the claimants by giving to them the full value of the use of their vessel during her detention, he desires to avoid any appearance of punishing the Colombian people at large for an act with which very few of them had anything to do, and which affected no Colombian interests beyond those of a few speculators in revolutions in Panama." (Moore, vol. II, p. 1445.)

See also Personnaz, *op. cit.*, p. 229, and Gray, *op. cit.*, p. 30.

81. By way of examples of the prevailing jurisprudence, reference may be made to a few of the positive decisions. In *Illinois Central Railroad Co.* v. *Mexico*, decided in 1926 by the Mexico-United States General Claims Commission, the dictum was explicit. Mexico had been found in breach of a contract to purchase from an American company a locomotive for which it had not paid. The Commission held that fair compensation should comprise not only the principal amount due under the contract but also compensation, in the form of interest, for the loss of the use of that sum during the period within which payment continued to be withheld.[185] The United States Foreign Claims Settlement Commission's motivations in the *Lucas* case are also clear regarding damages for the destruction of two buildings during Italian military operations in Yugoslavia.[186] Another important example is Administrative Decision No. III of the United States-German Mixed Claims Commission, dated 11 December 1923, which considered interest to be a natural part of the damages due for loss of property.[187]

[185] Decision of 6 December 1926 (UNRIAA, vol. IV, pp. 134 *et seq.*). According to the Commission:

". . . None of the opinions rendered by tribunals . . . with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the Convention, 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld. . . ." (*Ibid.*, p. 136.)

[186] Decision of 11 July 1957 (ILR, vol. 30 (1966), pp. 220 *et seq.*). According to the Commission:

"There are no definite rules governing the payment of interest in international war damage claims although the great majority of the authors express the view, which is supported by the decisions in numerous cases and by international agreements, that such payment is justified, and that a 'just and adequate compensation must include the payment of interest'. . . ." (*Ibid.*, p. 222.)

After recalling several cases in which international judicial practice had awarded interest, the Commission added that:

". . . there is no legal or practical reason why the payment of interest in this case should in principle not be recognized. Legally, the Italian Government as the tort feasor, on the theory of culpability generally recognized in international law, is responsible for the payment of the damages with the monetary interest from the day the damage was committed until the day of payment. . . .

"From the practical point of view, the denial of the payment of interest could result, in the case that the total of the awards is less than the deposited sum, in an unjustified return of the remainder to the wrongdoer." (*Ibid.*, p. 223.)

[187] According to that decision:

". . . the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking, the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation. This measure will be met by fixing the value of the property taken as of the time and place of taking and adding thereto an amount equivalent to interest at 5 per cent per annum from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during the period of neutrality.

". . .

". . . This construction yields a rule in harmony with the great weight of decisions of international arbitral tribunals in similar cases in which the terms of submission did not expressly or impliedly prohibit the awarding of interest." (UNRIAA, vol. VII, pp. 66-68.)

[188] Decision of 2 October 1903 (UNRIAA, vol. X, pp. 697 *et seq.*); the umpire stated:

"Considering finally that at the time when Colombia contracted the obligation it was a principle of justice, as it is today, according to the legislation of the most advanced nations, that the debtor is to be considered in default by the sole fact of the non-performance of his obligation, without the necessity of making demand after the day of the expiration of the term allowed him;

"By reason of the foregoing, which is proved by the evidence, it must be decided that Venezuela is obliged to make reparation to Mexico for the damages and injuries resulting from delay in the fulfilment of its obligation, by paying interest at the rate of 6 per cent per annum, upon the original capital of the debt, counting from the 7th day of October, 1827." (*Ibid.*, p. 703.)

See also the cases cited by Subilia, *op. cit.*, p. 76, footnote 3.

[189] Decision of 29 March 1933 (UNRIAA, vol. III, pp. 1405 *et seq.*). English trans. in AJIL, vol. 28 (1931), pp. 760 *et seq.*

[190] AJIL, p. 806. A reference to calculation of interest from the time of the taking is also present in the *Chorzów Factory* case (Merits) (*P.C.I.J., Series A, No. 17*, p. 47).

[191] Other cases where *dies a quo* has been set at the time of the loss are mentioned by Salvioli, *loc. cit.*, p. 280.

2. *Dies a quo*

82. Regarding the day from which interest should be calculated, three positions have emerged in judicial practice. One, rather frequent, is to calculate interest as from the day on which the damage occurred. This always happens when the principal damage itself consisted of the loss of, or failure to collect, a sum of money in cash and collectable—a situation usually arising in cases of breach of contract. An example is the decision of the Mexican-Venezuelan Mixed Claims Commission in the *Del Rio* case, in which the umpire ruled that interest be calculated as from the date established by the parties for the reimbursement of the loan, rejecting the submission that interest should be calculated only from the day on which the demand for payment had been made.[188] But the allocation of interest from the day of the injurious event is frequent also in cases in which the exact monetary assessment of the principal damage is only made at the time of the decision. This has often occurred in cases of expropriation. An example is the *Forests in Central Rhodopia* case,[189] in which the umpire, Östen Undén, stated that the award of interest was in response to a general principle of law, adding that:

According to the general principles of international law, interest-damages must be determined on the basis of the value of the forests, respectively of the exploitation contracts, at the date of the actual dispossession, that is, on September 20, 1918, in addition to an equitable rate of interest estimated on that value from the date of dispossession. . . .[190]

In a different instance, the "*Cape Horn Pigeon*" case mentioned above (para. 66), interest was calculated from the day on which the ship was seized and applied to the sum awarded in compensation for the temporary detention of the ship, namely for loss of foreseeable profits.[191]

83. Much less frequent are decisions in which *dies a quo* is considered to be the day on which the *quantum* decision was rendered. One such ruling was made by the PCIJ in the *S.S. "Wimbledon"* case. In this case, which was described above (para. 50), the court decided that interest

"should run, not from the day of the arrival of the *Wimbledon* at the entrance to the Kiel Canal, as claimed by the applicants, but from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established."[192] The date of the decision was also taken as *dies a quo* by the Franco-Mexican Claims Commission of 1924 with regard to a number of expropriations and other internationally wrongful (non-contractual) acts. According to the umpire, Jan Verzijl, in the *Pinson* case, it is only at the moment the judgment is pronounced that the international claim "turns into a right to demand a specific sum and this amount should start to bear interest".[193] The United States-German Mixed Claims Commission also made a distinction between "liquidated" and "unliquidated" claims in its Administrative Decision No. III, mentioned above (para. 81). According to that Commission, interest on an unliquidated claim should be awarded only when the exact amount of the loss has been fixed.[194]

84. A third method, often resorted to in judicial practice, is the computation of interest from the date on which the claim for damages was filed at national or international level. In its decision in *Christern and Company*,[195] the 1903 German-Venezuelan Mixed Claims Commission formulated criteria which it followed, in so far as interest was concerned, in its later decisions. The umpire was confronted with two opposing positions. On the one hand, the German commissioner considered that interest should accrue from the day on which the injurious event occurred, on the basis of a presumption of knowledge on the part of the Venezuelan authorities. The Venezuelan commissioner, on the other hand, observed that interest was to be allocated only in the case of "claims based upon contracts expressly stipulating for interest" and, in any event, "no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela". While believing in principle that the "presumption of knowledge" argument put forward by the German commissioner should be given consideration, the umpire thought that this argument should not be applied in too rigid a fashion, especially in view of the complex nature of States as persons of international law. On the other hand, the umpire considered the formal requirements indicated by Venezuela for interest to accrue to be excessive. He was of the opinion that some evidence that a claim had been filed with Venezuelan authorities would be sufficient. Whether the injured party's action was sufficient for such a purpose should be assessed, in his view, on a case-by-case basis.[196]

85. As recalled above (para. 83), the question of interest was considered at length in several of its aspects in the *Pinson* case. In particular, the umpire believed that interest should be allocated only in the case of "liquid contractual debts, for a fixed amount". As for *dies a quo*, he stated:

> . . . It might be wondered what date the interest should be due—the date on which the revolutionary debt was contracted or the loan was demanded, or the date of notice (*mise en demeure*) to the debtor State. Since the French agent has chosen as the initial date the last of the dates mentioned in the above dilemma, the Commission cannot award interest from an earlier date.[197]

In the *Campbell* case, interest was awarded as of the date on which the injured private party had filed its brief with

---

[192] *P.C.I.J., Series A, No. 1*, p. 32.

[193] Decision of 19 October 1928 (UNRIAA, vol. V, pp. 327 *et seq.*, at p. 452).

[194] The umpire, Edwin B. Parker, delivered the opinion of the Commission as follows:

> "Under the Treaty of Berlin as construed by this Commission in that decision as supplemented by the application of article 297 of the Treaty of Versailles (carried into the Treaty of Berlin) Germany is financially obligated to pay to the United States all losses of the classes dealt with in this opinion. The amounts of such obligations must be measured and fixed by this Commission.
>
> "There is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded, but when the amount of the loss shall have been fixed by this Commission the award made will bear interest from its date. To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor.
>
> "But where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation merely, as of the time when the actual loss occurred, such amount, so ascertained, plus damages in the nature of interest from the date of the loss, will ordinarily fill a fair measure of compensation. To this class, which for the purposes of this opinion will be designated 'property losses', belong claims for property taken, damaged or destroyed". (UNRIAA, vol. VII, p. 65.)

[195] UNRIAA, vol. X, pp. 363 *et seq.*

[196] *Ibid.*, pp. 366-367. In the umpire's words:

> "There is much force in the argument of the Commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the acts of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*. It is generally presumed that governments are ready and willing to pay all just claims against them. This is a corollary to that other presumption of law which is of universal application—*omnia rite acta praesumuntur*. If such is the case in respect of individuals it must certainly be true in respect of governments. The umpire is not prepared to go the full length of the argument of the Commissioner for Venezuela as to the formality necessary to constitute a sufficient demand in all cases, but he is of the opinion that some evidence of a demand upon the government for payment of a claim is necessary to start the running of interest in all cases which the Government of Venezuela has not either stipulated for interest or given an obligation from which an agreement to pay interest can fairly be implied. The sufficiency of the demand is to be decided according to the particular facts in each case." (*Ibid.*, p. 367.)

[197] UNRIAA, vol. V, p. 451. On account of this, the umpire decided that:

> "(*c*) On the compensation for contractual debts for a definite amount and for forcible loans, interest will be payable at a rate of 6 per cent per annum, as from the date on which the claim was brought to the knowledge of the Mexican Government or was the subject of an action before the National Claims Commission." (*Ibid.*, p. 453.)

Therefore, in so far as *dies a quo* was concerned, the umpire's remarks do not appear to be particularly decisive. He did not intend to solve the problem of the choice between the date of the wrongful act and the date of the *mise en demeure* (equivalent to the date of the claim) by stating that either one was more correct under international law. His main preoccupation seems to have been not to go beyond the request of the injured party.

the Portuguese authorities. The amount of the principal award was established on a lump-sum basis, *ex aequo et bono*, with specific reference to the time elapsed from the moment of the injury to that of the filing of the brief.[198] The date of the claim, preferred in this decision to the time of injury, does not seem to have been chosen as being in conformity with a rule of international law. It is rather an integral part of a decision which already contemplated the lump-sum coverage of the damage up to the moment the brief had been filed.

86. The date of the claim was also the choice of the British-Venezuelan Mixed Claims Commission in the *Kelly*[199] and *Stevenson*[200] cases. As in *Christern and Company* (see para. 84 above), the possibility that the respondent Government was aware of the injured party's claim was considered relevant in the *Stevenson* case for the accruing of interest. This is what one can infer from the rather laconic statement in the award: "Interest as damages begins only after default". In the "*Macedonian*" case, King Leopold I of Belgium was required to decide, on the basis of equity, a claim by the United States of America regarding a sum of money illegally taken from United States citizens by the Chilean authorities.[201] The issue was decided in the sense that:

> Whereas, however, nothing was done by the United States Government to hasten a settlement until March 19, 1841;
>
> . . .
>
> We are of the opinion that, in addition to the principal of [$42,240], the Government of Chile should pay that of the United States interest on this sum at the rate of 6 per cent per annum from March 19, 1841, to December 26, 1848.[202]

It thus appears that the arbitrator did not intend to suggest the existence of a norm of international law according to which interest should accrue from the time of the claim. He rather intended to take account of the fact that the injured party had not acted with diligence in putting forward its claim. It would have been unfair, according to the arbitrator, to charge the Chilean Government with an additional onus for the 20-year delay in the filing of the international claim by the injured party.[203] The Foreign Claims Settlement Commission of the United States also chose the date of the claim in two more recent cases: the *Proach* case[204] and the *American Cast Iron Pipe Company* case.[205]

87. In the *Cervetti* case, decided by the Italian-Venezuelan Mixed Claims Commission in 1903,[206] the Italian party claimed that fair reparation for the seizure of goods belonging to an Italian trader could not be made simply by restitution of the monetary equivalent of the seized goods, an appropriate interest being also due as from the moment of the seizure. Venezuela maintained that since the Italian claim had only been notified officially to the Venezuelan Government at the hearing before the Commission, it would be unfair to allow interest to run on amounts which the Venezuelan Government had not been aware of until that particular moment. Ralston, the umpire, awarded interest that was not, however, calculated on the basis claimed by Italy.[207] In fact, Ralston appears to have subjected the award of interest to a specific, *ad hoc*, mechanism, the prevailing purpose of which was to avoid charging the responsible State with an extra financial onus, over and above the amount of the principal damage, for a period during which it could not be presumed that that international person had been aware of its obligation to furnish compensation. Only such a "method of procedure" would ensure in international relations—according to the umpire—the *ratio* of justice which, in relations between individuals in muni-

---

[198] Decision of 10 June 1931 (United Kingdom v. Portugal) (UNRIAA, vol. II, pp. 1145 *et seq.*, at p. 1158).

[199] UNRIAA, vol. IX, pp. 398 *et seq.*

[200] UNRIAA, vol. IX, pp. 494 *et seq.* The following explanation was given by the umpire:

> ". . . There is no proof that the respondent Government had been informed previously of the claims of 1859 and 1865. Those of 1869 originated after the convention creating the Claims Commission. Certainly the respondent Government could make no compensation until a claim had been duly presented, and hence it could not be, until then, in default. Interest as damages begins only after default." (*Ibid.*, p. 510.)

[201] Decision of 15 May 1863 (Moore, vol. II, pp. 1449 *et seq.*). More specifically, the following question was put:

> "3. Does the Government of Chile owe the interest in addition to the principal; and if so, from what date and at what rate should interest be paid?" (*Ibid.*, p. 1465.)

[202] *Ibid.*, p. 1466.

[203] The criterion based on the date of the claim was also adopted by the United States-Venezuelan Mixed Claims Commission in the "*Alliance*" case, but no reason for this choice was given (UNRIAA, vol. IX, pp. 140 *et seq.*, at p. 144).

[204] Decision of 10 December 1962 (ILR, vol. 42, pp. 189 *et seq.*).

[205] Decision of 19 October 1966 (ILR, vol. 40, pp. 169 *et seq.*). The formula adopted in those two cases was the following:

> ". . . there is no settled rule in universal effect as to the period during which the interest shall run. Various terminal dates have been applied by different Commissions, including the date of the original injury, the date of the notice of the claim, or the date of payment. . . . The Commission notes further that the date the claim arose in this case is the date of loss." (*Ibid.*, pp. 173-174.)

The expression "the date the claim arose" does not suggest a choice in favour of the "date of claim" as opposed to the "date of injury". It appears to indicate not the specific moment at which the claim was made—distinct from the time of injury—but rather the moment at which the injured party became entitled to compensation.

[206] UNRIAA, vol. X, pp. 492 *et seq.*

[207] Ralston stated:

> "According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been '*mis en demeure*'. Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power, and even against its express instruction. So far is this principle carried that in the United States no interest whatever is allowed upon any claim against the Government except pursuant to express contract.
>
> In view, however, of the conduct of past mixed commissions, the umpire believes such an extreme view should not be adopted. It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan Government or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the '*mise en demeure*' as to disputes between individuals." (*Ibid.*, p. 497.)

cipal law, is ensured by the *mise en demeure*. The same reasoning was applied by the Permanent Court of Arbitration in the *Russian Indemnity* case[208] relating to compensation due to Russia under article 5 of the 1879 Constantinople Peace Treaty and paid by Turkey 20 years later than the agreed date.[209] The reasoning of the Permanent Court of Arbitration in this case appears to be similar to that followed in the *Cervetti* case. In addition, there are repeated references to equity—as opposed to existing rules of international law—as a criterion for assessment.

88. This brief review of case-law calls for the following comments. Decisions tend in most cases to justify the choice of the time of claim as *dies a quo* with the exigency of not burdening the "responsible" State with the payment of interest for a period during which it had no knowledge of the existence of its obligation. Only the submission of the injured party's claim can be assumed as evidence of the other party's knowledge. Of course, there is a difference according to whether one refers to the moment of the presentation of the claim by the injured private person at municipal level or by the injured State at the international level. Considering however that the damage suffered by private parties is also damage suffered by their State, both moments are equally relevant for the purpose of the presumption of the wrongdoing State's knowledge. In either case the international equivalent of the *mise en demeure* of municipal law would be ensured. In several decisions, in support of the need for such a requirement, the fact that an analogous requirement is met in municipal law by the principle of *mise en demeure* is highlighted. Equity requires, according to the relevant dicta on the subject, that—especially if account is taken of the complex nature of the subjects of international law—the reasons underlying this similar principle of internal law be duly considered at international level.

89. It is, however, important to note that in almost all the cases considered, preference for the "date of claim" was suggested by additional considerations which were specific to each case. These considerations were:

(*a*) The fact that the injured party's claim only included interest as of the date of the claim, and that the arbitrator did not wish to go *ultra petita* (*Pinson* case);

(*b*) The fact that the injured party introduced its claim a long time after the date of injury, thus neglecting that diligence which an injured party should apply in reducing as far as possible the injurious consequences of the unlawful act. In such a case the injured party's negligence clearly and rightly works (as in the "*Macedonian*" case) in the sense of proportionally reducing the burden of the offending State's burden;

(*c*) The fact that the principal sum to be compensated had already been fixed on a lump-sum basis so as to cover the entire period from the date of the injury to the date of the claim (*Campbell* case).

90. The doctrine generally criticizes that part of international jurisprudence which places *dies a quo* at the time of the decision (or of the settlement). Of course, the authors who adopt this attitude do not overlook the fact that arbitrators often proceed, at the time of decision, to a global assessment of the amount due, in such a manner as to cover the whole damage caused, from the time of occurrence of the wrongful act to the time of the award. Such assessments clearly cover the whole period during which interest is of relevance prior to the decision.[210] The placing of *dies a quo* at the time of decision is otherwise rejected. Salvioli, for instance, believes that one would accept the time of decision or settlement as *dies a quo* in so far as one considered that the right of the injured State to recover damages together with interest (*dommages-intérêts*) derived from the decision, the latter being envisaged as a "constitutive" judgment. If one considered, on the contrary, that the majority of the relevant international decisions were merely "declaratory" of the right of the injured State, the choice of the time of decision as *dies a quo* would be unjustified.[211] Brownlie, for his part, rejects the tendency to exclude or reduce interest in certain cases on the basis of a questionable distinction between "liquidated" and "unliquidated" damages.[212]

---

[208] Decision of 11 November 1912 (Russia v. Turkey) (UNRIAA, vol. XI, pp. 421 *et seq.*).

[209] Pointing out that most European legislation required a *mise en demeure*, the tribunal concluded, with regard to interest, that:

"... there is no occasion, and it would be contrary to equity, to assume that a debtor State is subject to stricter responsibility than a private debtor in most European legislation. Equity requires, as its theory indicates and as the Imperial Russian Government itself admits, that there shall be notice, demand in due form of law addressed to the debtor, for a sum which does not bear interest. The same reasons require that the demand in due form of law shall mention expressly the interest, and combine to set aside responsibility for more than simple legal interest." (AJIL, vol. 7 (1913), pp. 194-195.)

[210] Very clear in the above sense are the dicta of the Permanent Court of Arbitration in the *Lighthouses* case (see para. 73 above):

"It remains to examine the question, fully discussed in the course of the proceedings, whether interest is payable on the sums awarded to the parties.

"The Tribunal remarks in the first place that in this field no more than in many others do there exist strict rules of law of a general nature which prescribe or forbid the award of interest. The Tribunal cannot therefore accept the arguments of the two Agents who refer to the matter, although in opposing senses. Here again, the solution depends largely on the character of each individual case.

"If the Tribunal had adopted the method of fixing the amount of the debts, at the time of their origin, in the currencies of origin, and consequently of allowing the effect of the devaluations of those currencies to fall on the parties, there would have been some reason to allow the latter to benefit similarly from interest. ...

"... In expressing this actual past value as exactly as possible in terms of present-day currency, the Tribunal deliberately excluded all the vicissitudes of the currencies of origin. It has, so to speak, thrown a bridge across the stirring period of the years which have elapsed and placed itself consciously in the present. In these circumstances, justice as well as logic require that no interest covering the past be awarded." (ILR, 1956, vol. 23, pp. 675-676.)

[211] Salvioli, *loc. cit.*, p. 281; in the same sense, see Personnaz, *op. cit.*, p. 255.

[212] To use Brownlie's own words:

"... It is sometimes stated that in the case of personal injuries, death, and mistreatment of various kinds, interest should not be awarded in excess of the more or less arbitrary pecuniary satisfaction awarded in such cases. This formulation of the position is difficult to follow. If in principle true compensation includes interest on the compensation (as due at the time of injury or death), the fact that the sum awarded is in some sense 'unliquidated' or arbitrary is not incompatible with the payment of interest on the compensation. The fact that the 'lump sum' awarded includes interest, notionally so to speak, does not contradict the *principle* that compensation should include interest on the damages as at the time of injury." (*Op. cit.*, p. 228.)

91. Doctrine does not seem to be unanimous in accepting the view that *dies a quo* should be the time of the international claim. Salvioli considered this to be an unacceptable solution.[213] A similar position is taken by Subilia.[214] Others express doubts. Personnaz, for example, suggests that:

The term "claim" should now be clarified: what act could constitute a sufficient claim to entitle the claimant to interest? The question cannot be solved properly; and mostly, international judges have had the broadest latitude in this regard.[215] Gray, for her part, criticizes the assurance of those who reject the date of the claim and favour the date on which injury occurred, since it "would not always lead to a just result where the delay in settling the claim was caused by the claimant State".[216] Gray seems thus to favour, as the *dies a quo*, the day of the claim.

92. The Special Rapporteur believes that the *dies a quo* should be the date of the damage (injury). He would agree with Brownlie that:

. . . In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong. . . .[217]

[213] Salvioli writes:

"It is true that the international dispute commences when the State takes its national's case in hand, but it should not be inferred from this theoretically correct proposition that the phase preceding the dispute between the State and the individual is of no legal value. It is still true that the State does not replace its national and indeed asserts its own right, which is different in nature from the right of the individual, but the undeniable link that *actually* exists between the individual's claim and the claim of his State does not allow us to regard the preceding internal phase as being non-existent for the purposes of the international relationship. . . ." (*Loc. cit.*, pp. 283-284.)

[214] Subilia believes that to place *dies a quo* at the time of the claim

". . . means in effect attributing to the injured party the harm that necessarily follows from observance of the rule of exhaustion of internal remedies, a rule to which diplomatic protection is subordinated. When one realizes how long such a procedure can sometimes be, it will be seen that the system may ultimately deprive the injured party of a considerable part of the reparation." (*Op. cit.*, p. 147.)

[215] Personnaz, *op. cit.*, p. 241. Further on he writes:

"Should the requirement be for an international claim against another State, or would an internal claim submitted to the authorities of the offending State be enough? Practice proves to be quite divergent in this regard." (*Ibid.*)

He concludes as follows:

"Is it admissible for an internal claim to be regarded as enough to bring the demand to the knowledge of the Government? From the point of view of the victim and the theoretical standpoint, the answer seems to be 'yes', for the victim has been active in submitting the demand; moreover, once the victim has entrusted its claim to its State, that State alone is qualified to put forward an international claim and is wholly in charge of it; it can, if it wishes, postpone the claim *sine die*.

"However, such a solution might be unfair for the offending State, for if, as we have seen, it cannot be presumed to have knowledge of the acts of its public officials, how would it be informed of all the claims made to one of its agents or its ministers? At what time will the claim be deemed to be of sufficiently common knowledge? Even if we reject the objection regarding the confusion between the international system and the internal system and if we bear in mind, as did the Permanent Court of International Justice in its judgment No. 2, the internal procedure that constitutes a legal fact and cannot be passed over in silence because of the possible difficulties in determining the exact date of the initial claims, it seems more practical to take the international claim as the point of departure." (*Ibid.*, pp. 242-243.)

[216] Gray, *op. cit.*, p. 31.

[217] Brownlie, *op. cit.*, p. 229. In the same sense, amply, see Subilia, *op. cit.*, pp. 144-156.

3. *Dies ad quem*

93. Judicial practice regarding *dies ad quem* is somewhat more uniform. Gray sums it up nicely, evidently referring to Subilia's work:

In their choice of the date until which interest is allowed tribunals again come to different conclusions. *Most common is the date of the decision or of the final award** . . . This is sometimes based on the erroneous impression of the tribunal that it has no jurisdiction to make an order for the payment of interest after its functions have terminated. This was the reasoning apparently accepted by the various Venezuelan commissions of 1903, and the 1868 and 1923 United States-Mexican commissions. Interest is allowed until the date of payment of the award more often in individual arbitrations than by claims commissions. This was the date accepted in the *Portendick* claims, the *Delagoa Bay Railway Company* case, the *Rhodope Forests* case, and the *Cape Horn Pigeon*.[218]

94. Doctrine largely agrees that *dies ad quem* should be the date on which compensation is actually paid. However, Brownlie recently distanced himself from this position and said that

. . . There is . . . a presumption based upon ordinary legal logic that the *terminus ad quem* is the date of the award, or the date of ultimate settlement of the claim, in the case of provisional awards and valuation procedures.[219]

4. Interest rate

95. It has been noted, with regard to practice, that the rate is rarely commented upon, "and it is not possible to determine the reasons which led the arbitrators to choose one rate rather than another".[220] In many cases, particularly in cases decided by claims commissions, interest awarded is calculated on the basis of the statutory rate adopted in the respondent State. For example, the International Claims Commission of the United States stated in the *Senser* case—a case concerning arbitrary confiscation of property in Yugoslavia belonging to United States citizens—that

Under settled principles of international law which, by the International Claims Settlement Act of 1949, the Commission is directed to apply (sec. 4 (*a*)), interest is clearly allowable on claims for compensation for the taking of property where, in the judgment of the adjudicating authority, considerations of equity and justice render such allowance appropriate.

The Commission added:

. . . As to the rate at which [interest is] allowable, we refer again to established principles of international law which suggest the use of the rate allowable in the country concerned.[221]

The Commission accordingly applied the said principles and ruled that all claims against Yugoslavia should be calculated with interest at 6 per cent as practised in Yugoslavia.[222]

96. Decisions in isolated cases tend to vary. Some of them use the rate applied by the respondent State; others use the rate in force in the claimant State or the commercial rate or the creditor's home rate.[223] It is interesting in this regard to consider, on the one hand, the decision in

[218] Gray, *op. cit.*, p. 31; Subilia, *op. cit.*, pp. 88-92.

[219] Brownlie, *op. cit.*, p. 229.

[220] Subilia, *op. cit.*, p. 94.

[221] ILR, 1953, vol. 20, pp. 240-241.

[222] Final decision handed down on 15 June 1954 (see Whiteman, *Digest*, vol. 8, pp. 1189-1190).

[223] Gray, *op. cit.*, p. 32.

the "*Lord Nelson*" case, in which it is stated that "it is a generally recognized rule of international law that interest is to be paid at the rate current in the place and at the time the principal was due",[224] and, on the other hand, the contrary decision in the *Royal Holland Lloyd* case, in which it was stated, with regard to the rate of interest, that "there was in this matter no rule of general application".[225] Mention should also be made of the decision of the PCIJ in the well known "*Wimbledon*" case, in which it was stated that

> As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 per cent claimed is fair; . . .[226]

97. Writers generally seem to hold that this is a question to be solved on a case-by-case basis with a view to ensuring "full compensation". However, there is a certain support for the criterion used in the "*Wimbledon*" case that the interest rate should be the one "normally carried by *loans granted to States* at the time the injury is sustained".[227] Subilia holds that it could be useful to refer to the lending rate laid down annually by IBRD, particularly in cases of damage caused directly to a State without the intervention of private individuals. He believes that when the United Nations codifies the law of State responsibility, a conventional rate (of about 6 per cent) should be adopted, accompanied by the possibility that each State may be given the opportunity to prove that the damage is greater and hence obtain a higher rate.[228] It is desirable that the Commission express itself on the solution to be preferred.

5. Compound interest

98. Compound interest has been considered by jurisprudence rather infrequently. In the *Norwegian Shipowners' Claims* case,[229] the arbitral tribunal considered the possibility of allocating compound interest. After noting that such interest had never yet been allocated, it found that the claimants had not advanced sufficient reasons why an award of compound interest should be made.[230]

99. Different conclusions were reached in three subsequent cases. In the *Compagnie d'électricité de Varsovie* case (Merits), the City of Warsaw was deemed to be responsible for the injury sustained by the company as a result of lack of implementation of a previous arbitral decision relating to a concession of which the company was the beneficiary. The arbitrator, D. Asser, decided that the City should pay, in addition to the main amount of compensation, "a sum in Swiss francs equivalent on the day of payment to the value of 3,532,311 gold roubles, with compound interest of 5 per cent a year from 1 January 1935 up until the day of payment".[231] Compound interest was thus allocated only as of the date up to which the injured party had calculated the amount of damage it had sustained (an amount which was considerably reduced by the arbitrator). This decision was in no way motivated by the judge or objected to by the parties. In the *Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan* case, which concerned that railway company and the Governments of Austria and Yugoslavia, the arbitrators decided in favour of compensation for the company, which had been unlawfully injured by the modification of a concession agreement. Compound interest was awarded once more without any indications of principle. In this case also the compound interest was apparently considered to be a non-controversial issue.[232] In the *Fabiani* case, compound interest, albeit not allocated, seems to have been considered a means of ensuring full compensation. In the words of the arbitrator:

> . . . If Fabiani had been able to take advantage of these sums and use them in his business, it is likely that he would have made more profit than the compound interest on the principal in the time for which he would be authorized to collect interest. . . .[233]

100. Of those three cases, the two in which compound interest was allocated are more recent, while in the *Fabiani* case, which is antecedent, compound interest was not rejected in principle, although in fact it was not awarded. In the *Norwegian Shipowners' Claims* case, too, the non-allocation of compound interest does not appear to have been based on principle; the tribunal simply did not consider that the injured party had brought forward sufficient reasons to justify a decision that would have been in contrast with the prevailing case-law.

101. An explanation on the question of compound interest is to be found in the decision of the arbitrator, Max Huber, in the *British claims in the Spanish Zone of*

---

[224] Decision handed down on 1 May 1914 by the 1910 Great Britain-United States Arbitral Tribunal (UNRIAA, vol. VI, pp. 32 *et seq.*, at p. 34).

[225] Judgment handed down on 7 December 1931 by the United States Court of Claims (*Annual Digest . . . 1931-1932*, vol. 6, pp. 442 *et seq.*, at p. 446).

[226] *P.C.I.J., Series A, No. 1*, p. 32. As regards the moment from which the interest rate should be calculated, it has often been held that it should be the time when the amount on which interest is due should have been paid. Here again, however, the jurisprudence is not uniform. See Subilia, *op. cit.*, pp. 97-98.

[227] Nagy, *loc. cit.*, pp. 183-184. In the same sense, see A. Verdross, *Völkerrecht*, 5th ed. (Vienna, Springer, 1964), p. 404; and Brownlie, *op. cit.*, p. 229.

[228] Subilia, *op. cit.*, pp. 160-163.

[229] Decision of 13 October 1922 (Norway v. United States of America) (UNRIAA, vol. I, pp. 307 *et seq.*).

[230] The tribunal stated:

> "In coming to the conclusion that interest should be awarded, the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimants' property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid; finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships. The Tribunal is of opinion that the claimants are entitled to special compensation in respect of interest and that some of the claimants are, in view of the circumstances of their cases, entitled to higher rates of interest than others. The claimants have asked for compound interest with half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made." (*Ibid.*, p. 341.)

[231] Decision of 23 March 1936 (France v. Poland) (UNRIAA, vol. III, pp. 1689 *et seq.*, at p. 1699).

[232] Decision of 12 May 1934 (UNRIAA, vol. III, pp. 1795 *et seq.*, at p. 1808).

[233] See footnote 148 above.

Morocco case.[234] Compared with that in the *Norwegian Shipowners' Claims* case, Huber's decision appears to lay down stricter requirements for the allocation of compound interest. He considers the existence of "particularly strong and quite special arguments" to be necessary in order to justify a decision in contrast with the prevailing case-law.[235]

102. In the *Portuguese Colonies* case (Naulilaa incident), Portugal filed a claim for compound interest at a rate of 30 per cent "for prospective earnings" following a loss of cattle. After noting the exorbitant amounts claimed by the injured State and the prevailingly negative attitude of jurisprudence with regard to the award of compound interest, the tribunal allocated simple interest. According to the arbitrators:

> . . . It has not been proved and it is entirely unlikely that *net* profits of the order indicated could normally have been made if the parties concerned had remained in possession of the tools of work whose loss is attributable to Germany. Moreover, since the things in question were not irreplaceable, the owners, by purchasing similar ones, could have obtained the same earnings. If they receive the full value, plus the normal rate of interest from the date of the loss, they are therefore fully compensated.[236]

103. The above decision appears thus to reject compound interest because this method of calculation would have resulted in a sum greatly in excess of the actual *lucrum cessans*.

104. The rejection by the German-Venezuelan Mixed Claims Commission of a claim for compound interest in the *Christern and Company* case[237] seems also to have been based essentially on the "law of precedents". A merely implied rejection of claims for compound interest, in consideration of the lack of motivation, seems also to characterize, according to Subilia,[238] the decisions in the *Deutsche Bank*[239] and *Dundonald* cases.[240]

105. Although a majority of negative decisions on compound interest may seem to emerge, international jurisprudence is, in the opinion of the Special Rapporteur, not really conclusive in the negative sense:

(*a*) Among the negative decisions one should distinguish:

(i) the decision that simply adjusts an ill defined negative orientation of previous case-law (*Christern and Company*);

(ii) decisions which, while recalling previous case-law, indicate however that in special circumstances the mechanism of compound interest could be useful in fulfilling the requirement of full compensation (*British claims in the Spanish Zone of Morocco* and *Norwegian Shipowners' Claims*);

(iii) the decision that considers that in the specific case the compound interest mechanism would result in a sum exceeding by far the actual *lucrum cessans* (*Portuguese Colonies*);

(iv) the decision which, on the contrary, considers that compound interest, while acceptable in principle, would lead in the specific case to insufficient compensation (*Fabiani*).

(*b*) As for the cases in which compound interest was awarded, the lack of motivation would seem to suggest that compound interest was considered to be an essential, non-controversial element of reparation by equivalent.

The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State.

---

[234] Decision of 1 May 1925 (United Kingdom v. Spain) (UNRIAA, vol. II, pp. 615 *et seq.*).

[235] Huber stated:

> "As to the choice between simple interest and compound interest, the Rapporteur must first note that arbitration case-law in regard to compensation to be awarded by one State to another for damage sustained by the latter State's nationals on the former State's territory . . . is unanimous, as far as the Rapporteur is aware, in dismissing compound interest. In the circumstances, particularly strong and quite special arguments need to be advanced to accept this type of interest. Such arguments do not appear to exist, since the circumstances of the claims before the Rapporteur do not differ in principle from those of the cases that have produced the case-law in question.
>
> "This is true, *inter alia*, of some situations in which compound interest would seem to be better suited to the nature of things than is simple interest, namely cases in which the property that the compensation awarded is intended to replace increases by geometric rather than arithmetic progression, as happens, for instance, in the case of herds of cattle." (*Ibid.*, p. 650.)

[236] UNRIAA, vol. II, p. 1074.

[237] The umpire of the Commission stated:

> "The decision in that case also decides the liability of Venezuela for the loan to the State of Zulia. The Commissioner for Germany, however, allows the claimants the full amount of this item of their claim, 10,459.41 bolivars, with the usual interest. This amount includes interest at 1 per cent a month, compounded with yearly rests, and increases the original amount of the item thereby 4,589.37 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest. . . ." (UNRIAA, vol. X, p. 424.)

[238] Subilia, *op. cit.*, p. 101.

[239] Decision of 22-23 October 1940 (Germany v. Romania) (UNRIAA, vol. III, pp. 1893 *et seq.*, at p. 1901).

[240] Decision of 6 October 1873 (Great Britain v. Brazil) (Lapradelle-Politis, vol. III, pp. 441 *et seq.*, at p. 447).

CHAPTER III

Satisfaction (and punitive damages)

A. Satisfaction in the literature

106. As stated in chapter I, satisfaction is very frequently mentioned in the literature as one of the forms of reparation for an internationally wrongful act. It was noted there that two not incompatible tendencies seem to emerge from the literature with regard to the specific function of this remedy. A considerable number of authors, only a few of whom were mentioned earlier (paras. 13 and 14 above), consider satisfaction as the specific remedy for the injury to the State's dignity, honour or prestige. Such is notably the position of Bluntschli,[241] Anzilotti,[242] Visscher,[243] Morelli,[244] Jiménez de Aréchaga[245] and others.[246] It was also noted that a number of the said authors believe that the specific function of satisfaction is performed also with regard to the juridical injury suffered by the offended State. By such injury they understand the infringement of the offended State's juridical sphere deriving from any internationally unlawful act, regardless of whether a material injury is present.[247] It was concluded in chapter I that, in the specific sense in which it is so widely used in the literature, the term "satisfaction" has moved away from its etymological meaning, even though it is precisely "in the first etymological meaning of the verb 'to satisfy', which is to fulfil, to settle what is owed"[248] that the term recurs at times in the practice and the literature.

107. Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy. It is also identified by the typical forms it assumes, which differ from *restitutio in integrum* or compensation.[249] Bissonnette[250] and Przetacznik[251] mention regrets, punishment of the responsible individuals and safeguards against repetition.[252] Bissonnette adds saluting the flag and expiatory missions in the context of the expression of regrets. But the forms of satisfaction are not limited to the three referred to above.[253] Very frequent mention is also made of the

---

[241] According to Bluntschli:

"When an offence is committed against a State's honour or dignity, the offended State has the right to demand satisfaction." (*Op. cit.*, p. 264, art. 463.)

[242] According to Anzilotti:

". . . Basic to the idea of satisfaction is the idea of non-material damage or, as the English put it, 'moral wrong', which, as already stated, may even consist merely in ignoring the right of a State. The primary goal of satisfaction is to make good the affront to dignity and honour . . ." (*Corso*, p. 426.)

[243] According to Visscher:

"An act against international law may, regardless of the material harm it causes, entail *moral* injury to another State that consists of an offence against its honour or its prestige . . ." (*Loc. cit.*, p. 115.)

[244] According to Morelli:

"In the case of an unlawful act that consists of harm or that in any way involves harm to a moral interest, such as honour or dignity (and a violation of any of a State's rights may, in given circumstances, entail harm of this kind), the form of reparation due (possibly along with reparation dependent on simultaneous injury to material interests) consists of *satisfaction*." (*Op. cit.*, p. 358.)

[245] Jiménez de Aréchaga writes with regard to satisfaction:

"This third form of reparation is appropriate for non-material damage or moral injury to the personality of the State." (*Loc. cit.*, p. 572.)

[246] P. A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, University of Geneva) (Annemasse, Impr. Grandchamp, 1952), p. 161; Personnaz, *op. cit.*, p. 277; Garcia Amador, document A/CN.4/134 and Add.1, para. 92; Sereni, *op. cit.*, p. 1552; Przetacznik, *loc. cit.*, p. 944; Rousseau, *op. cit.*, p. 218; Graefrath, *loc. cit.*, p. 84.

[247] This role of satisfaction is particularly stressed by Anzilotti and Bluntschli. According to Anzilotti:

". . . Injury is implicit in the anti-juridical character of the act. The violation of the rule in actual fact always disrupts the interest that the rule protects and, consequently, the subjective right of the person to whom the interest belongs; this is even truer in that injury, in international relations, is in principle moral injury (disregard of the worth and dignity of the State as a person under the law of nations) rather than material injury (economic or patrimonial in the true sense of the word)." ("La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", RGDIP, vol. XIII (1906), pp. 13-14.)

According to Bluntschli:

"If the breach consists of an actual violation of established rights or disturbance of the *de facto* situation in a foreign Power, that Power is entitled not only to demand cessation of the injustice and restoration of the previous *de jure* or *de facto* situation, and damages if necessary, but also satisfaction by punishment of the guilty and, depending on the circumstances, further guarantees against a recurrence of the breach." (*Op. cit.*, Fr. trans., p. 265, art. 464.)

[248] Bissonnette, *op. cit.*, p. 40. He is, however, firmly against this understanding of satisfaction.

[249] According to Bissonnette:

"An examination of practice, and particularly an examination of diplomatic correspondence, none the less reveals demands for reparation that cannot be classed as either *restitutio in integrum* or damages. This is true of demands for excuses or regrets, saluting the flag, punishment of the guilty, resignation or suspension of guilty public officials, or assurances that certain acts will not be repeated . . ." (*Op. cit.*, p. 24.)

This aspect is also indicated in the writings of Anzilotti, *Corso*, p. 426; Visscher, *op. cit.*, p. 119; Eagleton, *op. cit.*, p. 189; Sereni, *op. cit.*, p. 1552; Morelli, *op. cit.*, p. 358; Jiménez de Aréchaga, *loc. cit.*, p. 572; Brownlie, *op. cit.*, p. 208; Rousseau, *op. cit.*, pp. 218 *et seq.*; Gray, *op. cit.*, p. 42; M. Giuliano, *Diritto internazionale*, vol. I, *La società internazionale e il diritto*, 2nd ed. with T. Scovazzi and T. Treves (Milan, Giuffrè, 1983), p. 593.

[250] Bissonnette, *op. cit.*, pp. 85 *et seq.*

[251] Przetacznik, *loc. cit.*, pp. 945 *et seq.*

[252] These three categories were already included in article 13 of the draft convention on international responsibility of States for injuries on their territory to the person or property of foreigners, submitted by L. Strisower during the preparatory meetings for the Lausanne session (September 1927) of the Institute of International Law (*Annuaire de l'Institut de droit international, 1927*, vol. 33, part I, pp. 560-561).

[253] *Contra* C. Dominicé, "La satisfaction en droit des gens", *Mélanges Georges Perrin* (Lausanne, Payot, 1984), who denies that contemporary international law provides for an obligation to express regrets, to punish the responsible person or to give assurances against repetition (pp. 105 *et seq.*).

payment of symbolic sums or nominal damages,[254] or of the decision of an international tribunal declaring the unlawfulness of the offending State's conduct.[255] In addition, frequent mention is made—although not without objections—of pecuniary satisfaction.[256]

108. A crucial question is whether satisfaction is punitive or afflictive, or compensatory in nature. Satisfaction is considered to be purely reparatory (in the sense that it should have no consequence beyond what in internal law is generally provided for as a consequence of a civil tort) by Ripert,[257] Bissonnette,[258] Cheng[259] and Jiménez de Aréchaga.[260] An afflictive nature of satisfaction (together with *punitive damages*) appears to be recognized instead by Bluntschli,[261] Anzilotti,[262] Eagleton,[263] Lauterpacht,[264] Personnaz,[265] García Amador[266] and

[254] Anzilotti states:

". . . there is nothing to prevent—and there are a number of examples—satisfaction from consisting of the payment of a sum of money, not intended as compensation for actual material damage sustained, but representing a sacrifice that is a symbol of making amends for the wrong committed." (*Corso*, p. 426.)

Pecuniary satisfaction is also mentioned by Eagleton, *op. cit.*, p. 189; Sereni, *op. cit.*, p. 1552; Morelli, *op. cit.*, p. 358; Przetacznik, *loc. cit.*, pp. 968 *et seq.*; Giuliano, *op. cit.*, p. 593; Rousseau, *op. cit.*, p. 220; Gray, *op. cit.*, p. 42. Bissonnette (*op. cit.*, pp. 127 *et seq.*), who firmly believes in a reparatory (in the civil law sense) idea of satisfaction, is instead against admitting such a form of satisfaction because it would, in most cases, have a punitive character. In relation to Bissonnette's theoretical construction, Gray says:

"According to Bissonnette . . . the function of satisfaction is to repair moral injury to a State, but on this question as to when such injury exists Bissonnette unfortunately closes his circular argument by saying that there is a moral injury when the appropriate remedy is satisfaction. . . ." (*Op. cit.*, pp. 41-42.)

Schwarzenberger and Dominicé are also against this idea. Schwarzenberger writes:

". . . As international judicial practice permits monetary compensation to be awarded for other than material damage, it appears an unnecessary over-complication to distinguish it from pecuniary satisfaction. Whether symbolical or excessive, any award of damages is a form of monetary compensation. . . ." (*Op. cit.*, p. 658.)

Dominicé, for his part, states:

"Moreover, since nowadays States do not demand pecuniary satisfaction, either in their submissions in the courts and tribunals or, apparently, in their diplomatic practice, it has to be recognized that it no longer enters into consideration." (*Loc. cit.*, p. 111.)

[255] Morelli, *op. cit.*, p. 358; Gray, *op. cit.*, p. 42.

[256] Visscher, *op. cit.*, p. 119; Personnaz, *op. cit.*, pp. 298 and 572; Brownlie, *op. cit.*, p. 209; Rousseau, *op. cit.*, p. 220; Graefrath, *op. cit.*, p. 86; Gray, *op. cit.*, p. 42.

[257] According to G. Ripert, "Les règles du droit civil applicables aux rapports internationaux", *Recueil des cours . . ., 1933-II* (Paris), vol. 44:

"In private law, an action regarding liability is an action for compensation; it is not criminal in character, and civil law is not concerned with punishment of the guilty. This idea must be maintained, even in compensation for moral injury, although in this case, after the compensation, the victim's patrimony increases. Compensation for moral injury is probably somewhat confused, since the victim receives substitute satisfaction; however, it is compensation, not punishment." (P. 622.)

[258] According to Bissonnette:

"It is therefore a kind of reparation that is different from *restitutio in integrum* and damages. It can only be compensatory, since restitution is the only direct kind of reparation. Like restitution it is mostly non-pecuniary, but it differs from restitution in that it is not restitutive in character. Again, unlike damages, it never seems to take a pecuniary form. The literature and practice have always designated this kind of reparation as satisfaction." (*Op. cit.*, p. 25.)

[259] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 236-237 and footnote 14.

[260] According to Jiménez de Aréchaga:

"In some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice (*Janes* claim (1926) [UNRIAA, vol. IV, p. 89]; *Putnam* claim (1927) [*ibid.*, p. 151]; *Massey* claim (1927) [*ibid.*, p. 155]; *Kennedy* case (1927) [*ibid.*, p. 194]). This, however, does not go beyond the ordinary concept of civil liability, or imply criminal liability.

"But punitive or exemplary damages, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, are incompatible with the basic idea underlying the duty of reparation. . . ." (*Loc. cit.*, p. 571.)

[261] According to Bluntschli:

"*Violation of the law* of a foreign State is more serious than failure to fulfil commitments entered into with that State; it may be likened to offences under criminal law. But, since there is no criminal jurisdiction under international law, each State must inevitably be allowed to determine the conditions under which it will declare that it is satisfied. International law today is at the same stage as criminal law was under the Frankish kings; the injured citizen himself determined the atonement for the guilty party if the latter wished to escape the vengeance of the victim's family." (*Op. cit.*, p. 265, commentary to article 464.)

[262] See the opinion of Anzilotti, quoted in footnote 254 above.

[263] According to Eagleton:

". . . There seems to be no theoretical objection, granted ascertainable rules of law and judicial enforcement, to the imposition of penalties by international law. Mr. Hyde speaks of the 'value of exemplary reparation as a deterrent of conduct otherwise to be anticipated';* and, unsatisfactory as may be such procedure at present, international law is badly in need of such sanctions. It can no longer be argued that the sovereign State is above the law; and there seems to be no reason why it should not be penalized for its misconduct, under proper rules and restrictions." (*Op. cit.*, pp. 190-191.)

*C. C. Hyde, *International Law chiefly as Interpreted and Applied in the United States* (Boston, 1922), vol. I, pp. 515-516.

[264] H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des cours . . ., 1937-IV* (Paris, 1938), vol. 62:

". . . a violation of international law may be such that it needs, in the interest of justice, an expression of disapproval that goes beyond material reparation. To place limits on liability within the State to *restitutio in integrum* would be to abolish the criminal law and a major part of the law of torts. To abolish these aspects of liability as between States would be to adopt, on the grounds of sovereignty, a principle that is repugnant to justice and carries with it an encouragement to wrongfulness. . . ." (P. 350.)

[265] According to Personnaz:

"First of all, since it is responsibility that supplements civil liability, the penal sanction will be viewed in the same way as the reparation, the difference being that it is a material, or even intentional, element. The indemnity will include not only an element of reparation, evaluated in terms of the injury sustained by the injured State—or private individual—but in addition a penal factor. Accordingly, in the case of pecuniary compensation, part of it will be reparation for the material or moral injury actually sustained by the State, and part of it will be a penalty for the particularly serious breach of international law that has necessitated it.

"Hence it is necessary to examine what, in a given case, has been the extent of the injury, and this will determine the corresponding part that consists of reparation. The remainder of the indemnity will represent the part that is the penal sanction, which will be the difference between the total indemnity and the reparation for the actual injury." (*Op. cit.*, pp. 317-318.)

[266] According to García Amador:

". . . other measures of satisfaction are also accompanied by wide publicity so that they will accomplish what is in fact their twofold

Morelli.[267] It was denied recently—together with the autonomy of the remedy—by Dominicé, who believes satisfaction to be a form of reparation indistinguishable from *restitutio in integrum* and pecuniary compensation, because the juridical wrong, as an object of satisfaction, would be inseparable, in his opinion (if the Special Rapporteur has understood him correctly), from the other consequences of an internationally wrongful act.[268]

109. Related to the idea of its afflictive or punitive nature is the idea that satisfaction should be proportioned to the seriousness of the offence or to the degree of fault of the responsible State. This point is made by Bluntschli,[269] Anzilotti,[270] Personnaz,[271] Sereni[272] and Przetacznik.[273] But objections are raised by Reitzer, according to whom

> ... Leaving aside the question of whether it is very judicious to transpose the notion of psychological guilt into the field of international law, the problem of the seriousness of the fault is too elusive and it leaves a wide margin for every interpretation.[274]

110. A further question that is raised in the literature is whether the injured State has a choice with regard to the form satisfaction should take.[275] This raises the further question of what limitations should be placed on such a choice in order to prevent abuse.[276] A number of authors stress that practice shows that powerful States tend to make requests not compatible with the dignity of the wrongdoing State or with the principle of equality.[277]

B. Satisfaction in international jurisprudence

111. The study of international jurisprudence concerning satisfaction should, in the Special Rapporteur's view, focus on the cases in which this remedy has been taken into consideration, in one or more of its various forms, as a specific remedy for the moral, political and/or juridical wrong suffered by the offended State. One should thus leave aside, for the reasons already explained (para. 17 above), any cases in which satisfaction was considered as a matter of pecuniary compensation (in favour of individuals or in favour of the State itself) for ordinary physical or moral damages. As noted, the term

purpose—that of "satisfying" the honour and dignity of one State and that of "punishing" the act imputed to the other State. This second purpose reflects the last of the characteristics of satisfaction which will be emphasized here—viz., its essentially punitive nature." (Document A/CN.4/134 and Add.1, para. 76.)

[267] Morelli, *op. cit.*, p. 358.

[268] According to Dominicé:

"... The first conclusion that emerges from this study is that there is in international law no form of reparation, within the strict meaning of the term, that would amount to satisfaction and would, along with *restitutio in integrum* and payment of damages, take its place among the various forms of the obligation to make reparation. This obligation, viewed as bilateral—and that is reparation *stricto sensu*—has modalities solely of a material character.

"... We believe that the real reason is that a State's moral injury is not identifiable; it merges with the wrongful act and is elusive, unlike a moral injury sustained by an individual, which is clear to see in certain circumstances and may, one way or another, be the subject of compensation in money." (*Loc. cit.*, p. 118.)

[269] According to Bluntschli:

"The nature and the extent of the compensation, satisfaction or punishment are determined in accordance with the nature and the seriousness of the offence. The greater the crime, the more important the consequences. There is some proportion between the penalty and the guilt. Exaggerated claims constitute a violation of the law." (*Op. cit.*, p. 268, art. 469.)

[270] According to Anzilotti:

"The choice of one or more forms of satisfaction depends on the will of the parties, which will naturally take account of the nature and the seriousness of the act; there are no fixed rules on the subject. It is simply useful to note that, in determining the kind of satisfaction, the parties cannot fail to take account of moral elements, such as the sympathy or antipathy displayed by the population to the authors of the offence, the behaviour of the press, the precedents, the propaganda made in the country, and so on. Here, negligence or wilful intent are not elements of the unlawful act; it is the extrinsic circumstances determining the political seriousness of the act, and they cannot fail to be taken into consideration if the satisfaction is to be in keeping with the intent. ..." (*Corso*, p. 426.)

[271] According to Personnaz:

"... The manifestly injurious or serious nature of the unlawful act would warrant aggravated responsibility and this would lead to higher compensation or special measures of satisfaction. ..." (*Op. cit.*, p. 302.)

[272] According to Sereni:

"Negligence or wilful intent, even though they are not constituent elements of the unlawful act, are taken into consideration for the purpose of determining any obligation regarding satisfaction and the type of satisfaction due. ..." (*Op. cit.*, p. 1554.)

[273] According to Przetacznik:

"Satisfaction has certain features of its own. In view of the very nature of moral and political injury, the content of which is variable and imprecise, satisfaction is evaluated in terms of the unlawful act attributable to the State and even the circumstances determining the degree of seriousness of such an act. ..." (*Loc. cit.*, p. 944.)

[274] Reitzer, *op. cit.*, pp. 117-118.

[275] Reitzer, *op. cit.*, p. 134 and footnote 61.

[276] According to Graefrath:

"Indeed, satisfaction has been often used by the European Powers as a pretext for intervention. Tammes, therefore, spoke of 'a mediaeval procedure which is becoming more and more obsolete' and 'devaluation of the whole concept of "satisfaction" as being a unilateral act on the part of imperialist Powers for the humiliation of the weak'.*

"The misuse of satisfaction for suppression and humiliation of whole peoples is typical for the period of imperialism. The anachronistic forms of marks of tribute towards flags and State emblems appearing in the manuals scarcely correspond to the present style of international relations. We can agree with Tammes when he writes that claims of satisfaction 'often have looked like feigned hysteria ... and were calculated only to ensure enduring humiliation'.*" (*Loc. cit.*, p. 85.)

Personnaz (*op. cit.*, p. 289) and García Amador (document A/CN.4/134 and Add.1, para. 75) also speak about the abuse of satisfaction.

*A. J. P. Tammes, "Means of redress in the general international law of peace", *Essays on the Development of the International Legal Order* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1980), pp. 7-8.

[277] Bluntschli writes:

"A State whose honour and dignity have been insulted cannot demand anything incompatible with the dignity and the independence of the State from which it demands satisfaction." (Art. 470.)

This article is accompanied by the following commentary:

"... The greater the spread of a sense of honour in the civilized world the greater the need for consideration and tact in applying the above rule. Prudence demands it when a powerful State is involved. Exaggerated claims are easier to make against weak States. However, no State can undergo humiliation without its existence being jeopardized, for the State is the personification of a people's rights and its honour. International law, intended as it is to protect the existence and the safety of States, cannot tolerate such an affront. If a State no longer deserves to be treated as an honourable person, it is better to refuse immediately to recognize its existence." (*Op. cit.*, pp. 268-269.)

Similar requirements are included in paragraph 1 of article 27 of the revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, submitted by F. V. García Amador in his sixth report (see footnote 357 below). Przetacznik is of the same opinion (*loc. cit.*, pp. 672-673).

"satisfaction" is used in these cases in its merely etymological sense. As such, it is a synonym of reparation in a broad sense or of reparation by equivalent. It does not indicate the specific remedy dealt with here.

112. If one confines the study to cases in which satisfaction has been considered in its specified function, the relevant international jurisprudence (as distinguished from diplomatic practice) appears to be not very abundant. It is nevertheless substantial and more significant than it may appear at first sight.

113. Lack of competence seems to have been the main if not the exclusive reason for a negative decision on satisfaction (in the form of punitive damages) in the *Miliani*,[278] *Stevenson*,[279] "*Carthage*" and "*Manouba*" cases[280] and in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*.[281] In the "*Carthage*" and "*Manouba*" cases, however, satisfaction was awarded, as indicated in the excerpt from the decision cited in footnote 280, in the form of the tribunal's declaration of the wrongfulness of the offending State's action.

114. More complex is the well known "*Lusitania*" case, in which the umpire, Edwin B. Parker, was mainly concerned with confining his task to the award of material and moral damages on a purely compensatory basis. To that effect he stated that

> . . . The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought. . . .[282]

At the same time, far from denying the role of satisfaction as an afflictive remedy, he admitted that such a role was in the nature of satisfaction. This is the meaning that the Special Rapporteur believes should be attributed to the umpire's statement that:

> . . . as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.[283]

Of course, he qualifies the imposing of penalties as a "political" rather than a "legal" matter. However, it seems justified to presume that he used those two terms —perhaps not too precisely—in order to distinguish the direct relations between States, on the one hand, and his role as arbitrator, on the other hand. By saying that imposing penalties upon States was a matter of a political nature, he probably meant that it was a matter for States to settle at ordinary diplomatic level. By denying the legal nature of such a function, he probably meant that it was not a matter for arbitration ("therefore not a subject within the jurisdiction of this Commission"). It is on the basis of such a distinction that he concluded that the imposition of penalties (*scilicet*: satisfaction in the form of punitive damages) would have exceeded the terms of reference of the United States-German Mixed Claims Commission. The Special Rapporteur believes that Parker's point is probably not without significance for the conclusions to be drawn from the comparative analysis of jurisprudential and diplomatic practice.[284]

115. Among the cases in which one or more forms of satisfaction were awarded, the most famous instance is that of the "*I'm Alone*" (a Canadian vessel owned by United States nationals sunk by the United States Coast Guard).[285] The Commissioners decided not to award any compensation for the loss of the vessel, but stated that

> The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect

---

[278] In this case, which was before the Italian-Venezuelan Mixed Claims Commission, the umpire stated:

> ". . . It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so. . . ." (UNRIAA, vol. X, p. 591.)

[279] The umpire of the British-Venezuelan Mixed Claims Commission expressed the following opinion:

> "To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent.
>
> "Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly punitive in their character—not remedial, not compensatory.
>
> "It is one of the cherished attributes of sovereignty which it will not usually or readily yield to arbitrament or award. Herein is found a reason, if not the reason, why such matters are not usually, if ever, submitted to arbitration." (UNRIAA, vol. IX, p. 506.)

[280] In the "*Manouba*" case (see footnote 26 above), the arbitral tribunal declared:

> ". . .
>
> "Whereas the capture could not be legitimized, either, by the regularity, relative or absolute, of these latter phases viewed separately.
>
> "On the application to condemn the Royal Italian Government to pay damages:
>
> "1. the sum of *one franc* for the affront to the French flag;
>
> "2. the sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe ordinary international law and reciprocally binding conventions for Italy and for France.
>
> "And on the application to condemn the Government of the French Republic to pay the sum of one hundred thousand francs as a sanction and as reparation for the material and moral injury resulting from the breach of international law, notably the right of a belligerent to verify the status of individuals suspected of being enemy soldiers, found on board neutral trading vessels.
>
> "Whereas, in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction;
>
> "that such sanction is made heavier, where necessary, by the payment of damages for material losses;
>
> ". . .
>
> "that . . . generally speaking, the introduction of another pecuniary sanction seems to be superfluous and to go beyond the purpose of international jurisdiction;
>
> "Whereas, in the light of the foregoing, the circumstances of the case cannot substantiate such additional sanction; that, without further consideration, there are, accordingly, no grounds for meeting the above-mentioned demands".
>
> ". . ." (UNRIAA, vol. XI, p. 475.)

In the "*Carthage*" case (see footnote 26 above) an almost identical decision was made by the same tribunal (UNRIAA, vol. XI, pp. 460-461).

[281] The decision of the arbitral tribunal on the claim by Portugal for a special indemnity as punitive damages is quoted in footnote 42 above.

[282] UNRIAA, vol. VII, p. 39.

[283] *Ibid.*, p. 43.

[284] See footnote 346 below.

[285] Decisions of 30 June 1933 and 5 January 1935 (Canada v. United States of America) (UNRIAA, vol. III, pp. 1609 *et seq.*).

of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.[286]

Satisfaction was granted here in the dual form of excuses and pecuniary damages. Another instance is the *Moke* case, in which the United States-Mexican Mixed Claims Commission awarded punitive damages for the purpose of condemning the use of force against private parties in order to induce them to grant loans. The form chosen was the granting of an indemnity calculated to condemn the unlawful practice in question.[287] A further case is the *Arends* case, in which Venezuela was sentenced to pay a small sum in the presence of a presumed loss of small proportions. Satisfaction in this case is explicitly indicated by the umpire of the Netherlands-Venezuelan Mixed Claims Commission as consisting in the expression of regrets by the payment of $100.[288] In addition to the "*I'm Alone*" and *Arends* cases, satisfaction in the form of regrets was awarded in the *Kellett* case. This was the case of a United States Vice-Consul harassed by Siamese soldiers. The arbitral commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government . . .".[289]

116. Further instances of pecuniary satisfaction may be found in the *Brower* and *Lighthouses* cases. The *Brower* case[290] concerned a United States national who had bought six small islands of the Fiji archipelago. For not having recognized Brower's rights when it acquired sovereignty over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The Great Britain-United States Arbitral Tribunal, referring to a report of the British Colonial Secretary according to which

> "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them."

decided as follows:

> In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.
>
> Now therefore: The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.[291]

In the *Lighthouses* case,[292] the Permanent Court of Arbitration, in its decision on one of the claims of France against Greece, stated:

> The Tribunal considers the basis for this claim sufficiently proven, so that only the amount of the damage sustained by the Company needs to be established. In view of the inconsistency of the French claim, which fixed the amount of the damage at 10,000 francs Poincaré and then declared that the amount could not be set in figures, the Tribunal, while recognizing the validity of the claim, can only award a token indemnity of 1 franc.[293]

117. As noted above (para. 107), another form of satisfaction is the formal recognition of the wrongfulness of the wrongdoing State's conduct. Important examples are the already cited "*Carthage*" and "*Manouba*" cases. In the "*Manouba*" award, the arbitral tribunal considered that:

> . . . in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction.[294]

Identical language was used in the "*Carthage*" case. The term "sanction" should obviously be read as an equivalent of "satisfaction", especially of those aspects of satisfaction which appear to have a punitive nature. Even more significant, in the same sense, is the judgment of the ICJ in the *Corfu Channel* case (Merits). Addressing the question

> Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction?[295]

the Court stated

> . . . that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.[296]

118. In conclusion, two kinds of decisions seem to be relevant from the point of view of the admissibility of satisfaction in one or more of its forms:

(*a*) Those in which satisfaction was refused by an arbitral tribunal mainly, if not exclusively, for lack of competence (paras. 113 and 114 above);

(*b*) Those in which satisfaction was awarded in one or more of its forms (*supra*, paras. 115, 116 and 117).

C. Satisfaction in diplomatic practice

119. Compared with jurisprudence, diplomatic practice offers more abundant material in the area of satisfaction.

---

[286] *Ibid.*, p. 1618.

[287] Decision of 16 August 1871 (Moore, vol. IV, p. 3411). The Commission stated:

> "The forced loans were illegal; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property; but we wish to condemn the practice of forcing loans by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient. . . . we can not too strongly condemn this arbitrary, illegal, and unequal way of supplying the wants of the military. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them. . . ." (*Ibid.*)

[288] UNRIAA, vol. X, pp. 729-730. In particular, the umpire, F. Plumley, stated that:

> "The damages consequent upon the detention of this vessel are necessarily small, but it is the belief of the umpire that the respondent Government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay.
>
> "In the opinion of the umpire this sum may be expressed in the sum of $100 in gold coin of the United States of America, or its equivalent in silver, at the current rate of exchange at the time of payment, and judgment may be entered for that amount." (*Ibid.*, p. 730.)

[289] Decision of 20 September 1897 (United States of America v. Siam) (Moore, vol. II, pp. 1862 *et seq.*, at p. 1864).

[290] Decision of 14 November 1923 (UNRIAA, vol. VI, pp. 109 *et seq.*).

[291] *Ibid.*, p. 112.

[292] See footnote 156 above.

[293] UNRIAA, vol. XII, p. 216.

[294] See footnote 280 above.

[295] *I.C.J. Reports 1949*, p. 12.

[296] *Ibid.*, p. 36. On the other hand, the court, by 14 votes to 2, considered that the acts committed by the British Navy on 22 October 1946 did not violate Albanian sovereignty.

For the purposes of analysis it seems useful to divide the study of this material into two periods: one from about 1850 to the Second World War; the second from 1945 to the present time.

1. Diplomatic practice before the Second World War

120. In the period preceding the Second World War, claims for satisfaction were not always made exclusively for the purpose of obtaining reparation for a moral wrong. In a number of instances, claims for satisfaction were put forward with the additional purpose of exercising political constraint against a weaker State and possibly obtaining advantages for the more powerful State. In the practice following the Second World War, claims for satisfaction seem instead not to present such "iniquitous" aspects. In addition to the cases submitted to arbitration and dealt with in the preceding section, there have often been cases in which more than one form of satisfaction has been claimed and eventually obtained.

121. The diplomatic practice prior to the Second World War includes in the first place cases of satisfaction following the violation of symbols of the State, such as the national flag.[297] A form of satisfaction which is typical of these cases consists in a ceremony during which the offending State salutes the flag of the offended State. Examples are the Magee case,[298] the *Petit Vaisseau* case[299] and the case that arose from the insult to the French flag in Berlin in 1920.[300]

122. Insults, ill-treatment or attacks against heads of State or Government or against diplomatic or consular representatives abroad frequently led to claims for satisfaction on the part of the offended State. Following the insult to the Italian Consul in Casablanca by a Moroccan employee in June 1865, the Italian Consul General in Tangiers informed his Foreign Minister that he had asked the Moroccan Government for a *luminosa soddisfazione*, which seems to have been obtained.[301] Italy also made claim for satisfaction when the Italian chargé d'affaires in Caracas was physically ill-treated by an officer. The responsible officer was immediately arrested, sentenced to three years' imprisonment and downgraded. Regrets were expressed by the President of the Republic of Venezuela and by the Minister for Foreign Affairs, and a ceremony in honour of the Italian Legation was organized.[302] A similar event occurred in 1896 when the Italian Consul General in Sofia was forcibly taken to a police station by two officers.[303] In 1887, following the ill-treatment of the Italian consular agent in Hodeida, Turkey, by the deputy head of the Customs of that city, the Italian Government first threatened a naval shelling and then instead agreed that the Governor of Hodeida pay an official visit to the consulate in the city in order to present apologies.[304] In 1893, after having been attacked by Brazilian soldiers while returning from a visit to an Italian warship, the Italian Vice-Consul in Rio requested and obtained satisfaction in the form of a declaration deploring the events, the punishment of the responsible

---

[297] In some cases it was considered that the national flag had been insulted even though no material injury to it had actually been caused. For example, in 1864 an Italian sailor was pursued aboard his ship moored in a Tunisian port and, after being ill-treated by a local official, was arrested. Following the event, the Italian Consul General in Tunis demanded satisfaction for the insult to the Italian flag (*Prassi italiana*, 1st series, vol. II, No. 1012). A similar example is that of an incident which took place in Alexandria in 1865 between sailors of the Italian Navy in uniform and the Egyptian police (*ibid.*, No. 1013).

[298] "When, on April 24, 1874, John Magee, the British Vice-Consul at San José, Guatemala, was arrested and flogged by order of the commandant of the port of San José, and his life spared only on condition of a payment of money, the Guatemalan Government acted promptly—as soon as it was informed of the affair—to assure the arrest and punishment of the assailants. A garrison was sent to San José by the Government to effect the arrest of the persons involved, and precautions were taken to prevent their escape.

"The outrage gave rise to an active correspondence between the British Chargé d'Affaires and the Government of Guatemala, and on May 1, 1874, the Minister of Foreign Relations of Guatemala and the British Chargé d'Affaires signed a protocol of conference containing (1) a reiteration of promises to prosecute the guilty parties, which had already been ordered, and the British Chargé d'Affaires 'declared himself satisfied with this action on the part of the Government'; (2) an agreement by the Guatemalan Government to order a salute of twenty-one guns to the British flag 'as a proof of the deep pain with which it has seen the outrage'; and (3) a request for 'an indemnity for the outrage done to Vice Consul Magee of Guatemala by Commandant Gonzalez'." (Whiteman, *Damages*, vol. I, p. 64.)

[299] In 1863, customs officers in Rio de Janeiro, acting on their own initiative, hauled down the flag of the Italian ship *Petit Vaisseau*, which was under seizure. By way of reparation, the harbour-master publicly honoured the Italian flag and denounced the action of those responsible, who were severely admonished (*Prassi italiana*, 1st series, vol. II, No. 1010). An incident that took place in 1888 was provoked by a rather unmannerly occurrence concerning a letter of congratulations sent by the King of Italy to the Sultan of Zanzibar on the occasion of his accession to the throne; after lengthy negotiations, the Sultan presented written apologies and ordered that the Italian flag be saluted (*ibid.*, 2nd series, vol. III, No. 2564).

[300] "On July 14, 1920, the French flag, displayed on the French embassy in Berlin, was torn down by a mob. By way of reparation, Germany advertised large rewards for the apprehension of the individual guilty of tearing down the flag, and punished him according to law. In addition, apologies were formally made at the embassy, the police officials responsible were discharged, and the flag was restored with military ceremonies by a detachment of 150 soldiers. The French were dissatisfied because the troops did not appear in parade dress, and because they sang 'Deutschland über alles' as they marched away; and amends were made for this, with the explanation that it was financially impossible to afford parade dress." (Eagleton, *op. cit.*, pp. 186-187.)

[301] The satisfaction claimed by the injured State and promised by the wrongdoer involved the Moroccan employee's arrest as well as his apologies in front of all those who had witnessed the episode (*Prassi italiana*, 1st series, vol. II, No. 1014).

[302] The Italian chargé d'affaires, however, was not satisfied. He asked for the individual responsible to be publicly discharged and for other forms of satisfaction. Not having obtained this, he interrupted all official relations with the host Government. The seriousness of the situation prompted a request for advice from the legal advisers to the Foreign Ministry. That office maintained that "under the principle of international law and in diplomatic practice, the usual reparation in cases such as the present one consists of punishment of the guilty person, excuses presented by the Government to which the diplomatic agent is accredited, and guarantees for the future". The responsible official having subsequently been punished and the Government of Venezuela having publicly apologized, the suspension of diplomatic relations was discontinued (*Prassi italiana*, 1st series, vol. II, No. 1017).

[303] As soon as he was released, the Consul demanded the presentation of apologies and the punishment of the officers. Following a note from the Bulgarian Minister for Foreign Affairs expressing regrets and giving assurances that the responsible agents would be punished (which the Consul did not consider to be sufficient), the Bulgarian Prime Minister presented formal apologies and provided for the immediate punishment of the policemen (*Prassi italiana*, 2nd series, vol. III, No. 2563).

[304] *Prassi italiana*, 2nd series, vol. III, No. 2559.

individuals and an indemnity for the death of an Italian sailor killed during the incident.[305] Following the killing in 1919 of Sergeant Mannheim, a French soldier on guard at the French Embassy in Berlin, France obtained from Germany a sum of 1 million francs as satisfaction, in addition to 100,000 francs for the family of the victim.[306] In 1924, R. W. Imbrie, Vice-Consul of the United States of America in Tehran, was killed by the crowd for having tried to take photographs of a religious ceremony. The Government of Persia presented its apologies to the United States and paid a sum $US 170,000 as compensation. Failure to punish the policemen who had not defended the victim seems to have been due to the fact that they were not identified.[307]

123. As in the case of offences against State representatives, violation of the premises of embassies or consulates (as well as of the homes of members of foreign diplomatic missions) has also resulted in claims for satisfaction. For example, when, in 1851, the Spanish Consulate in New Orleans was attacked by demonstrators, the United States Secretary of State, Daniel Webster, recognized that Spain was entitled to the payment of a special indemnity.[308] Following the violation by two Turkish officials of the residence of the Italian Consul in Tripoli in 1883, the Italian demand for apologies and for punishment of the guilty parties was complied with by the Ottoman Empire.[309] In 1888, following a failed attempt by two Egyptian policemen to violate the Italian Consulate at Alexandria, Italy requested and obtained the punishment of the guilty parties and a solemn, public apology from the Governor of Alexandria.[310] A similar episode occurred in 1892 between Italy and the Ottoman Empire.[311]

124. Among the episodes preceding the Second World War, two cases appear to present a particular relevance. One was occasioned by the Boxer uprising in China in 1900. That event caused, *inter alia*, the death of the German Ambassador to China, the looting of several foreign legations, the killing of the chancellor of the Japanese legation and of other foreign citizens, as well as the wounding of other foreign nationals and the profanation of foreign cemeteries. The joint note sent to the Chinese Government by the States concerned included extremely vexatious requests, such as the negotiation of new and more favourable commercial agreements.[312] The second case concerned the killing, in 1923, near Janina, of General Tellini, an Italian officer commissioned by the

[305] *Ibid.*, No. 2576.

[306] P. Fauchille, *Traité de droit international public* (Paris, 1922), vol. I, part 1, p. 528.

[307] Whiteman, *Damages*, vol. I, pp. 732-733.

[308] Moore, *Digest*, vol. VI, pp. 811 *et seq.*, at p. 812.

[309] *Prassi italiana*, 1st series, vol. II, No. 1018.

[310] *Ibid.*, 2nd series, vol. III, No. 2558.

[311] *Ibid.*, No. 2561.

[312] According to the joint note presented to the Chinese Government on 22 December 1900:

"China having recognized her responsibility, expressed her regrets, and manifested her desire to see an end put to the situation created by the disturbances referred to, the powers have decided to accede to her request on the irrevocable conditions enumerated below, which they deem indispensable to expiate the crimes committed and to prevent their recurrence:

"I

"(A) Dispatch to Berlin of an extraordinary mission, headed by an Imperial Prince, to express the regrets of His Majesty the Emperor of China and of the Chinese Government, for the murder of His Excellency, the late Baron Ketteler, the German Minister;

"(B) Erection on the place where the murder was committed of a commemorative monument suitable to the rank of the deceased, bearing an inscription in the Latin, German, and Chinese languages, expressing the regrets of the Emperor of China for the murder.

"II.

"(A) The severest punishment in proportion to their crimes for the persons designated in the imperial decree of 25 September, 1900, and for those whom the representatives of the powers shall subsequently designate.

"(B) Suspension of all official examinations for five years in all the towns where foreigners have been massacred or subjected to cruel treatment.

"III.

"Honourable reparation shall be made by the Chinese Government to the Japanese Government for the murder of Mr. Sugiyama, chancellor of the Japanese legation.

"IV.

"An expiatory monument shall be erected by the Imperial Chinese Government in each of the foreign or international cemeteries which have been desecrated, and in which the graves have been destroyed.

"V.

"Maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, as well as of material used exclusively for the manufacture of arms and ammunition.

"VI.

"Equitable indemnities for governments, societies, companies and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

"VII.

"Right for each power to maintain a permanent guard for its legation and to put the legation in a defensible condition. Chinese shall not have the right to reside in this quarter.

"The Taku and other forts which might impede free communication between Peking and the sea shall be razed. [This is apparently VIII.]

"IX.

"Right of military occupation of certain points, to be determined by an understanding among the powers, for keeping open communication between the capital and the sea.

"X.

"(A) The Chinese Government shall cause to be published during two years in all subprefectures an imperial decree embodying—

"Perpetual prohibition, under pain of death, of membership in anti-foreign society.

"Enumeration of the punishments which shall have been inflicted on the guilty, together with the suspension of all official examinations in the towns where foreigners have been murdered or have been subjected to cruel treatment.

"(B) An imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh anti-foreign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honours.

"XI.

"The Chinese Government will undertake to negotiate the amendments to the treaties of commerce and navigation considered useful by the powers and upon other subjects connected with commercial relations, with the object of facilitating them.

"XII.

"The Chinese Government shall undertake to reform the office of foreign affairs and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate." (Moore, *Digest*, vol. V, pp. 515-516; reproduced in Eagleton, *op. cit.*, pp. 185-186.)

Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania. Greece, held responsible for the murder, received particularly onerous requests from the Conference of Ambassadors. These included the payment of 50 million lire to the Italian Government.[313] In both these cases the injured States appear to have taken not little advantage, in dealing with the matter and claiming severe measures of satisfaction, of their military, political and/or economic superiority.[314]

125. Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were private citizens of a foreign State. In 1883, as a result of the ill-treatment of an Italian worker by a Serbian police officer and the subsequent Italian protests, the Serbian Minister for Foreign Affairs expressed regrets and assured the injured State that the responsible officer had been discharged.[315] A well known case concerns the lynching in 1891 of eleven Italians who had been imprisoned following the murder of the chief of police of New Orleans and three of whom had already been acquitted. The United States deplored the occurrence and awarded Italy a sum of 125,000 lire, to be distributed by the Italian Government to the families of the victims.[316] In the case regarding the murder in 1904 of the Reverend Labaree, a United States missionary, the Persian Government paid a sum of $30,000 and punished the Kurds who were responsible for the murder.[317] In the case concerning the killing of a Frenchman near Tangiers in 1906, the French Government considered the local authorities responsible in the first place (and the Government of Morocco in the second place) for having allowed the Tangiers region to fall into complete anarchy. After examining the circumstances of the murder, the French Government formulated a long list of requests aimed at obtaining satisfaction.[318] In 1912, three American teachers in China were attacked by a group of Chinese; one of them, B. R. Hicks, was killed and the other two, A. N. Sheldon and P. Hofmann, were seriously injured. The United States Ambassador in Peking requested and obtained $50,000 from the Chinese Government as punitive damages.[319] Severe measures were obtained in 1922 by the United States from the Chinese Government following the murder of C. Coltman, a United States merchant, by Chinese soldiers.[320]

126. Two more cases seem to be of importance in the period under review. The first concerns a military action carried out in Bulgarian territory by Greece in 1925. The Council of the League of Nations, after finding Greece responsible, decided that Greece should pay an indemnity exceeding the value of the material damage

[313] The Conference of Ambassadors set the following measures of redress as due from Greece:

"(1) Apologies shall be presented by the highest Greek military authority to the diplomatic representatives at Athens of the three Allied Powers, whose delegates are members of the Delimitation Commission;

"(2) A funeral service in honour of the victims shall be celebrated in the Catholic Cathedral at Athens in the presence of all members of the Greek Government;

"(3) Vessels belonging to the fleets of the three Allied Powers, the Italian naval division leading, will arrive in the roadstead of Phaleron after eight o'clock in the morning of the funeral services;

"After the vessels of the three Powers have anchored in the roadstead of Phaleron the Greek fleet will salute the Italian, British and French flags, with a salute of twenty-one guns for each flag;

"The Salute will be returned gun by gun by the Allied vessels immediately after the funeral services, during which the flags of the Greek fleet and of the three Allied Powers will be flown at half-mast;

"(4) Military honours will be rendered by a Greek unit carrying its colours when the bodies of the victims are embarked at Prevesa;

"(5) The Greek Government will give an undertaking to ensure the discovery and exemplary punishment of the guilty parties at the earliest possible moment;

"(6) A special commission consisting of delegates of France, Great Britain, Italy and Japan, and presided over by the Japanese delegate, will supervise the preliminary investigation and enquiry undertaken by the Greek Government; this work must be carried out not later than September 27, 1923;

"The Commission appointed by the Conference of Ambassadors will have full powers to take part in the execution of these measures and to require the Greek authorities to take all requisite steps for the preliminary investigation, examination of the accused, and enquiry.

"The Greek Government will guarantee the safety of the commission in Greek territory. It will afford it all facilities in carrying out its work and will defray the expenditures thereby incurred.

"The Conference of Ambassadors is forthwith inviting the Albanian Government to take all necessary measures. . . .

"(7) The Greek Government will undertake to pay to the Italian Government in respect to the murder of its delegate, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at The Hague, acting by summary procedure. . . ."

Eagleton added:

"For the payment of this indemnity, the Greek Government was required to deposit 50,000,000 Italian lire as security. On the basis of a preliminary report, not decisive in character, and without waiting for a final report, the Conference of Ambassadors 'decides that as a penalty under this head [neglect in pursuing criminals], the Greek Government shall pay to the Italian Government a sum of 50,000,000 Italian lire'." (Eagleton, *op. cit.*, pp. 187-188.)

[314] According to Graefrath:

"The classic example of how, under the mask of satisfaction, colonial suppression and humiliation were practised, was the mode of satisfaction that was enforced on China after the Boxer Rebellion. Another example of excessive satisfaction claims, whose implementation was imposed by force, was the Italian demands to Greece on the occasion of the murder of General Tellini in 1923." (*Loc. cit.*, p. 85.)

[315] *Prassi italiana*, 1st series, vol. II, No. 1020.

[316] *Ibid.*, 2nd series, vol. III, No. 2571.

[317] Whiteman, *Damages*, vol. I, pp. 725 *et seq.*

[318] Kiss, *Répertoire*, vol. III, No. 982.

[319] G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. V (1943), p. 725.

[320] "On January 2, 1923, vigorous representations were made to the Chinese Government by the American diplomatic officers, who demanded: (1) an apology for the affront to the American Government and the utter disregard of the rights and persons of American citizens in China; (2) an apology from the military governor to the American Consul; (3) the summary dismissal from the Chinese Army of certain officers, including the third officer who was present at the guard station, and proper punishment of those guilty of the unjustifiable killing of Coltman; (4) damages for the family of Coltman; (5) removal of the prohibition on transportation of currency by American merchants, as authorized by treaty; and (6) acknowledgment of the right to present claims for damages on account of the prohibition.

"On February 11, 1923, the Chinese Ministry of Foreign Affairs replied (1) that the military governor of Chahar would apologize to the American Minister; (2) that the Chinese Government would examine the affair thoroughly and would punish the officers involved according to law as a warning for the future; (3) that the Government would pay an indemnity to the family of Coltman out of pity and regard; (4) that it would give permission for American merchants to carry specie out of the district for their own use; and (5) that the Chinese Government was not responsible for losses of American merchants on account of the prohibition." (Whiteman, *Damages*, vol. I, pp. 702-703.)

suffered by Bulgaria, in order to provide reparation for the moral wrong suffered as well.[321] The second—the *Panay* incident between Japan and the United States—is a case in which all the forms of satisfaction were cumulatively resorted to in conjunction with reparation by equivalent. In a note dated 14 December 1937, concerning the sinking of that American gunboat and three other United States vessels by Japanese aircraft in the course of hostilities in China, Japan expressed her profound regret for the incident, presented sincere apologies, promised indemnification for all losses, and undertook "to deal appropriately" with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future.[322]

2. Diplomatic practice from 1945 to the present day

127. More recent diplomatic practice includes, to begin with, a number of cases in which apologies were made or regrets expressed.[323] In March 1949, a sailor in the United States Navy who was on leave in Havana climbed on to the statue of José Martí, a hero of Cuban independence. He did so with the encouragement of his comrades. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets.[324] Apologies were also presented by France to the USSR in 1961 following that country's protest at the attack carried out against a Soviet aircraft carrying President Breznev by French fighter planes over the international waters of the Mediterranean.[325] Apologies and expressions of regret also followed demonstrations in front of the French Embassy in Belgrade in 1961[326] and the fires in the libraries of the United States Information Service in Cairo in 1964[327] and in Karachi in 1965.[328] Similar actions were taken following the incidents that took place during a visit of President Georges Pompidou of France to the United States in 1970,[329] the searching of the luggage of President Soleiman Frangie of Lebanon at New York airport in 1974[330] and a great number of similar episodes.[331] Finally, apologies, together with a promise of compensation, were presented by the Cuban Government following the sinking of a Bahamian ship in 1980 by a Cuban aircraft.[332]

128. Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely, forms of publicity—concerning in particular the request for apologies or the offer thereof—seem to have increased in importance and frequency. Following the looting of the French Embassy in Saigon by Vietnamese students in 1964, the Government of Viet Nam issued a communiqué to the local press presenting apologies and suggesting that the damage suffered by persons and property be assessed in order to allow the payment of compensation.[333] When, in 1967, attempts were made to blow up the Yugoslav Embassy in Washington, D.C., and the Yugoslav Consulates in New York, Chicago and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement.[334] The Chinese Government requested public excuses from the Indonesian Government for the looting in 1966 of the Chinese Consulates at Jakarta, Macassar and Medan during anticommunist riots.[335] The same Government requested and obtained public excuses following incidents at Ulan Bator railway station, where Chinese diplomats and nationals were ill-treated by the local police.[336]

129. It should be stressed that the resonance effect of public apologies can be achieved in the kind of cases considered in the preceding paragraph not only by involving the press or other mass media. It can be pursued even more effectively by the choice of the level of the wrongdoing State's organization from which the apologies emanate. For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister and the Foreign Minister of Japan presented apologies to the United States Ambassador and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies.[337]

130. The disavowal (*désaveu*) of the action of its agent by the wrongdoer State, the setting up of a commission of inquiry and the punishment of the responsible individuals are frequently requested and granted in post-war diplomatic practice.

131. A case of *désaveu*[338] involved Bolivia and the United States. Following the publication in the American magazine *Time* in March 1959 of an article attributing to the spokesman of the United States Embassy in La Paz remarks which were considered to be offensive to Bolivia, the United States Department of State immediately corrected those statements.[339]

132. Two cases concerning the punishment of responsible individuals are well known. The first concerns the killing in 1948, in Palestine, of Count Bernadotte while

---

[321] League of Nations, *Official Journal*, 7th Year, No. 2 (February 1926), pp. 172 *et seq.*

[322] L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), p. 354, note 2.

[323] Apologies or expressions of regret are also present in cases in which States have not acknowledged their responsibility. For example, in the case of the accident of 27 July 1955 in which an Israeli airliner was shot down by Bulgarian military aircraft, Bulgaria expressed its regrets for what had happened but denied that it had violated the right to freedom of air navigation (Whiteman, *Digest*, vol. 8, pp. 781 *et seq.*).

[324] Bissonnette, *op. cit.*, pp. 67 and 88.

[325] "Chronique", RGDIP, vol. 65 (1961), pp. 603 *et seq.*

[326] *Ibid.*, p. 610.

[327] *Ibid.*, vol. 69 (1965), pp. 130-131.

[328] *Ibid.*, vol. 70 (1966), pp. 165-166.

[329] *Ibid.*, vol. 75 (1971), pp. 177 *et seq.*, at p. 181.

[330] *Ibid.*, vol. 79 (1975), pp. 810-811. It was, it seems, a matter of an inspection by "sniffer dogs".

[331] See Przetacznik, *loc. cit.*, pp. 951 *et seq.*

[332] "Chronique", RGDIP, vol. 84 (1980), pp. 1078-1079.

[333] *Ibid.*, vol. 68 (1964), p. 944.

[334] *Ibid.*, vol. 71 (1967), p. 775.

[335] *Ibid.*, vol. 70 (1966), pp. 1013 *et seq.*

[336] *Ibid.*, vol. 71 (1967), pp. 1067-1068.

[337] *Ibid.*, vol. 68 (1964), p. 736.

[338] For cases of *désaveu* during the period from 1850 to 1939, see Bissonnette, *op. cit.*, pp. 104 *et seq.*

[339] Whiteman, *Digest*, vol. 5, pp. 169-170.

he was acting in the service of the United Nations. The United Nations requested from Israel the punishment of the responsible individuals, the presentation of apologies and the payment of an indemnity.[340] The second case concerns the kidnapping in Argentina and the deportation to Israel of Adolf Eichmann, charged with crimes against humanity. Although the Argentine Government's requests were not met by Israel, the nature of such requests was not insignificant from the point of view of the practice of satisfaction in international relations.[341] Punishment of the guilty individuals was requested in the cases concerning the bombing of the United States Information Service library in Athens.[342] In the case of the killing of two United States officers in Tehran, the responsible parties were executed.[343]

133. The diplomatic practice of recent years includes at least two cases that are worthy of mention: the "*Rainbow Warrior*" and the "*Stark*" cases.

134. As is widely known, the *Rainbow Warrior* was sunk in Auckland harbour in 1985 by agents of the French security services who had used false Swiss passports to enter New Zealand; and a Netherlands citizen aboard the ship was killed. New Zealand demanded that France present a formal apology and pay $US 10 million—a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the Secretary-General of the United Nations, who decided that France should present formal apologies and pay a sum of $US 7 million to New Zealand; in addition, the Secretary-General decided that the two French agents should be handed over to France and later be restricted to the island of Hao for at least three years.[344]

135. Following the damaging of the *Stark* by an Iraqi missile in 1987, the President of Iraq immediately wrote to the President of the United States explaining the attack as an accident and expressing his "heartfelt condolences" for the death of the United States sailors who had been killed, and adding that "sorrow and regrets are not enough".[345]

[340] *Ibid.*, vol. 8, pp. 742-743. An indemnity was also claimed by the United Nations for the murder of Colonel Sérot (*ibid.*, p. 744).

[341] ". . . The Argentine Government, in presenting to Israel its most explicit protest against the act committed in the face of one of the fundamental rights of the Argentine State, hopes that Israel will make the only appropriate reparation for this act, namely, by returning Eichmann within the current week and punishing the persons guilty of violating our national territory . . ." (Whiteman, *Digest*, vol. 5, p. 210).

[342] *Ibid.*, vol. 8, p. 816.

[343] "Chronique", RGDIP, vol. 80 (1976), p. 257.

[344] Ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX, pp. 197 *et seq.*). See also G. Apollis, "Le règlement de l'affaire du '*Rainbow Warrior*'", RGDIP, vol. 91 (1987), pp. 9 *et seq.*

[345] In 1989, Iraq agreed to pay the United States a sum of $US 27.3 million to compensate the families of the 37 sailors killed on board the *Stark*. In so far as the indemnity for the damage to ship and crew are concerned, negotiations were continuing at that time. (*The New York Times*, 28 March 1989, p. A5.)

D. Satisfaction (and punitive damages) as a consequence of an internationally wrongful act and its relationship with other forms of reparation

136. The analysis of the literature, jurisprudence and —especially—diplomatic practice indicates with certainty the existence of various forms of satisfaction as a mode of reparation in international law. It confirms, in particular, the position of the prevailing doctrine, according to which the remedy for the moral, political or juridical wrong suffered by the injured State is satisfaction, namely a form of reparation which tends to be of an afflictive nature—distinct from compensatory forms of reparation such as *restitutio* and pecuniary compensation. Of course, the distinction between compensatory and afflictive or punitive forms of reparation, notably between pecuniary compensation and the various forms of satisfaction, is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in inter-individual relations, a role that cannot be deemed to be purely compensatory. Though its role is certainly not a punitive one, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts. The predominantly afflictive and not compensatory role of satisfaction is nevertheless widely recognized and indisputably emphasized by long-standing diplomatic practice.[346]

[346] Dominicé, as already noted (para. 108 above), maintains an opposite view; his brilliant essay concludes as follows: "In fact, satisfaction is not a form of reparation—it is reparation that is one of the forms of satisfaction" (*loc. cit.*, p. 121). The clear tendency of this author to absorb, if not dissolve, the various forms of satisfaction into reparation in a broad sense—a tendency which is emphasized by the use of the term satisfaction as a mere synonym of reparation—is presumably due to a different evaluation of the practice of States (notably of diplomatic practice). This leads him to underestimate the specific, autonomous function of international satisfaction in a narrow sense. That very practice, which the Special Rapporteur has perhaps analysed more thoroughly, leads instead to an opposite conclusion, which might be of considerable importance as a matter of both codification and progressive development in the field. From the viewpoint of progressive development, in particular, the various forms of satisfaction appear to be the most suitable to meet the necessity of adjusting the consequences of delicts to the degree of fault and of tackling the problem of the special, even more severe, consequences that should be attached to international crimes. The Special Rapporteur's evaluation of the diplomatic practice (as compared in particular with jurisprudence) finds some comfort—in addition to his own reading of the umpire's dictum in the "*Lusitania*" case (see para. 114 above)—in the following thoughts put forward by Reitzer in his often cited work:

> "The conclusion from the foregoing analysis is not difficult to draw: there is necessarily a divergence between diplomatic practice, on the one hand, and arbitration and judicial jurisprudence, on the other. In other words, the legal rules governing the extent of the reparation differ, depending on whether only two States are involved or whether a third impartial and disinterested body enters the scene. There is nothing surprising in this proposition. All jurists are aware that a basic difference in the rules of *procedure* almost invariably entails a difference in the *material* rules of law. The fact that this cardinal distinction is ignored and that an attempt has been made *to extend arbitration rules to situations in which two States stand in opposition to each other* is, in our opinion, the chief mistake of the present doctrine and the source of a large part of the misunderstandings and ambiguities in this whole matter. In other words, the root of these ambiguities lay in the frequent assertion that the rules on material injury that are drawn—rightly or wrongly—from arbitration jurisprudence are part of *customary international law*. The proper line of demarcation lies *not between injury caused to a State's citizens and other injuries, but between diplomatic practice and international jurisprudence*." (*Op. cit.*, pp. 131-132.)

137. This functional distinction between satisfaction, on the one hand, and *restitutio* and pecuniary compensation, on the other, does not exclude the possibility that two of those forms, or all three, may come into play together in order to ensure a combined, complete reparation of the material as well as the moral/political/juridical injury. It has, in fact, been observed that, both in jurisprudence and in diplomatic practice, satisfaction is frequently accompanied by pecuniary compensation.

138. The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the "*Rainbow Warrior*" case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the value of the material loss (see para. 134 above). Other examples include the case concerning the lynching of 11 Italians in New Orleans (see para. 125 above) and the Labaree case (*ibid.*). In such instances one may doubt, at first sight, whether they involved satisfaction *stricto sensu*. The element of satisfaction is, however, equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the pecuniary compensation exceeded to a greater or lesser degree the extent of the material loss. And there are instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

139. As clearly revealed by jurisprudence and diplomatic practice (and indicated by doctrine), satisfaction takes on forms which are all typical of and, in a sense, specific to international relations. These are, in particular: apologies, with the implicit admission of responsibility and the disapproval of and regret for what has occurred; punishment of the responsible individuals; a statement of the unlawfulness of the act by an international body, either political or judicial; assurances or safeguards against repetition of the wrongful act; payment of a sum of money not in proportion to the size of the material loss. This latter form of satisfaction is obviously equivalent, in the opinion of the Special Rapporteur, to the payment to the offended State of what a part of the doctrine, using a well known common-law concept, refers to as "punitive damages".

140. Satisfaction in the form of punitive damages, or in any other form of an afflictive nature, may be by its form or circumstances incompatible in given cases with the principle of equality among States. Such has been the case of measures claimed as satisfaction—especially prior to the Second World War—by offended States which took advantage of the situation to make excessive or humiliating demands upon weaker States, in contempt of their dignity and sovereignty. Examples include the case of the Boxer uprising and the case of the Tellini murder (see para. 124 above). It should be added, however, that there are cases in which decidedly afflictive forms of satisfaction have been granted to injured States by powerful offending States; instances are the *Panay* case (see para. 126 above) and the "*Rainbow Warrior*" case (see para. 134 above).

141. The afflictive nature of satisfaction might appear at first sight—and does in fact appear to some contemporary writers—as not compatible either with the composition or with the structure of a "society of States". It may notably be contended:

(*a*) that punishment or penalty does not "become" persons other than human beings, and notably not the majesty of sovereign States; and

(*b*) that the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon—if ever—in the "society of States".

142. Although arguments such as these are not without force, they do not seem to the Special Rapporteur to constitute valid reasons for not accepting satisfaction among the forms of reparation. There seem to be, on the contrary, good reasons positively to emphasize the role of satisfaction.

143. In the first place, the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offences makes even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of the said institutions. To confine the consequences of any international delict (let alone an international crime) to restitution in kind and pecuniary compensation would mean to overlook the necessity of providing some specific remedy—having a preventive as well as a punitive function—for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage.[347] To overlook such a function would in turn encourage States—especially the richest among them—inopportunely and dangerously to assume that any injury they may cause to one or more other States can easily be made good by merely pecuniary compensation. One must conclude that, far from being incompatible with the lack of institutionalization of the "society of States", an afflictive or relatively more afflictive/punitive form of reparation like satisfaction in its various forms would help to reduce the gap represented by the absence of adequate institutions. The inspiration of the passage from Sir Hersch Lauterpacht's article quoted above,[348] though not identical, is surely similar.

144. The punitive or afflictive nature of satisfaction is not in contrast with the sovereign equality of the States involved. Whatever its form, the satisfaction claimed by the injured State never consists, as shown by the abundant practice analysed, in any action or measure taken directly by the injured State itself against the offender. At a later stage, the question may, of course, arise of a sanction to be inflicted upon the offending State by a direct conduct of the injured State—and obviously it is reprisals that come to mind. This will be the stage at which, demands for reparation and/or satisfaction having been put forward unsuccessfully, the situation will move from the substantive or immediate consequences

[347] The reference here is to the material damage suffered by the injured State as inclusive of any patrimonial, personal and/or moral damage suffered by (inflicted upon) its nationals.

[348] See footnote 264 above.

of the wrongful act to those consequences which are represented by the reaction of the injured State to non-compliance by the offending State with its so-called "secondary" obligation to make reparation. Prior to that more crucial, critical stage, satisfaction does not involve any direct measures of the kind. Although the demand for satisfaction will normally come—unless felicitously preceded by the offending State's own initiative—from the injured State, the satisfaction to be given consists of actions to be taken by the offender itself. There is no need to fear, therefore, that satisfaction will entail the notion of a sanction applied by one State against another, and thus constitute a serious encroachment upon the offending State's sovereign equality.[349] In the measure, surely relative, in which one can speak of a sanction, it is not so much a question of a sanction inflicted upon the offending State. It is rather a matter of atonement, of a "self-inflicted" sanction, intended to cancel, by deeds of the offender itself, the moral, political and/or juridical injury suffered by the offended State. The opinion of the eminent jurist Morelli is enlightening in this respect:

> Satisfaction is in some ways analogous to a penalty, which also fulfils a function of atonement. Again, satisfaction, like a penalty, is afflictive in character in that it pursues an aim in such a way that the subject responsible undergoes harm. The difference is that, while a penalty is harm inflicted by another subject, in satisfaction the harm consists of a particular kind of conduct by the subject who is responsible—conduct which constitutes, as in other forms of reparation, the content of the subject's obligation.[350]

145. While neither of the possible objections to satisfaction seems thus to hold, there is, on the contrary, good cause to believe that such a remedy performs a positive function in the relations among States. In addition to the reasons emerging from the preceding discussion, it must be stressed that it is precisely by resorting to one or more of the various forms of satisfaction (as qualitatively distinct from purely compensatory remedies) that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. The Special Rapporteur refers in particular to the degree of fault in a broad sense, namely to the various conceivable *nuances* of *dolus* and *culpa* which, even in an internationally wrongful act, are bound, after all, to become relevant at some point. Indeed, while aware that the Commission has rightly or wrongly chosen not to mention fault among the conditions of international responsibility, the Special Rapporteur finds it difficult to believe that fault in any degree could not be deemed to be—*de lege lata* or *ferenda*—of some relevance in the determination of the consequences of an internationally wrongful act. The question of the impact of fault is to be addressed in chapter V. It will be shown there that it is especially in cases where claims to satisfaction were successfully put forward that fault was of relevance (see paras. 183 *et seq.* below). And it is also probable that it will be precisely in such cases, namely in the case of delicts of particular gravity (not to mention crimes for the time being), that a refusal of the offender to provide adequate satisfaction may justify resort to more severe measures on the part of the injured State.

146. To the extent that the above conclusions are acceptable, part 2 of the draft articles on State responsibility should, in the opinion of the Special Rapporteur, not fail to include a provision contemplating satisfaction as a distinct, specific form of reparation. He actually believes such a provision to be indispensable as a matter of strict codification as well as progressive development of the law of international responsibility. Such a provision will therefore be submitted in chapter VI.

147. On the other hand, a positive norm on satisfaction should be accompanied by an indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by an offending State. As noted, the diplomatic practice of satisfaction shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose excessive or humiliating forms of satisfaction on weaker offenders. An express provision against such abuses would be an indispensable complement of a positive rule.

[349] The confusion between the two stages is of course inevitable whenever one disregards the distinction—for the Special Rapporteur indispensable—between the immediate (or substantive) and the mediate (or instrumental) consequences of an internationally wrongful act.

[350] Morelli, *op. cit.*, p. 358.

CHAPTER IV

Guarantees of non-repetition of the wrongful act

148. The study of practice and the literature shows that the consequences of an internationally wrongful act also include safeguards against its repetition. This remedy, however, is generally dealt with only marginally and within the framework of other consequences, notably of satisfaction.[351] Guarantees against repetition are also seen in other forms of reparation, including "punitive damages" and pecuniary compensation. Personnaz, for example, sees such a preventive function in indemnifi-

[351] Bissonnette, for example, maintains that safeguards against repetition of a wrongful act

> ". . . differ also from *restitutio in integrum* by the absence of intent to restore the situation disrupted by the wrongful act.

cation;[352] García Amador, for his part, stresses the preventive function of "punitive damages".[353]

149. Even though most authors consider safeguards against repetition to be a form of satisfaction, it is undeniable that such safeguards include aspects, often insufficiently clarified, that distinguish them from other forms of satisfaction. In the first place, the safeguards in question are not among the consequences of any wrongful act. They manifest themselves only with respect to wrongful acts which appear more likely to be repeated. It is of course also true that all measures—whether afflictive or compensatory—are themselves more or less directly useful in avoiding the repetition of a wrongful act. For example, there is no doubt that

> ... the best way for the State to prevent a repetition of wrongful acts against its nationals and, therefore, to protect them, is to demand that the guilty be punished by the judicial apparatus of the country on whose territory the wrongful act has been committed.[354]

A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient. For example, following demonstrations against the United States Embassy in Moscow in February 1965 (less than three months after those of November 1964), the President of the United States affirmed that

> ... The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection.[355]

In other words, the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily.

150. The main issues arising in connection with the practice and theory of guarantees of non-repetition are: (*a*) the source of the offending State's obligation to provide such guarantees; (*b*) the question whether an explicit request by the offended State is necessary; (*c*) the question whether the choice of the specific guarantees to be provided belongs to the offending or to the offended State; and (*d*) the question whether the offending State may refuse to provide given safeguards. The study of previous attempts at codification offers a few interesting indications.

151. Article 13 of the draft convention on international responsibility of States for injuries on their territory to the person or property of foreigners, submitted by L. Strisower during the preparatory meetings for the Lausanne session of the Institute of International Law, in 1927, read as follows:

Article 13

> The responsibility of the State for injuries caused to foreigners includes ... a satisfaction to be given to the State which has been injured in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise, as well as the necessary guarantees against a repetition of the offending act.[356]

On the other hand, the revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, submitted by F. V. García Amador in his sixth report, provides in article 27 (significantly entitled "Measures to prevent the repetition of the injurious act"), paragraph 2, as follows:

> 2. ... the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to

---

"Again, although a demand for security for the future differs from a demand for punishment of the guilty because it contains no punitive element, it is nevertheless similar because it seeks to prevent the repetition of wrongful acts. For these reasons, it must be considered as one of the forms of satisfaction." (*Op. cit.*, p. 121.)

Graefrath observes that:

"Reaffirmation of the obligation breached, in order to safeguard the violated right against further new violations, is the real sense of a formal apology, of the prosecution and punishment of culprits, or the enactment of corresponding legal or administrative measures to prevent such violations in future. The State dissociates itself from the violation either because the act was unintentional or because it, in any case, will take care in future that such a violation would not be repeated. It affirms guarantees for the future observance of the obligation. In this sense, satisfaction by all means has practical importance. ...

"In all cases where continuation or repetition of a violation may be feared and particularly if violations of obligations are concerned which are arising from *jus cogens* norms, the claim for satisfaction is directed to measures to be taken that would forestall continuation or repetition of the wrongful conduct that would prevent such a disturbance of peaceful international co-operation in future. ..." (*Loc. cit.*, p. 87.)

According to Brownlie, the "objects" of satisfaction are three and are often cumulative. These are

"... apologies or other acknowledgment of wrongdoing by means of a salute to the flag or payment of an indemnity; the punishment of the individuals concerned; and the taking of measures to prevent a recurrence of the harm". (*Op. cit.*, p. 208.)

See also Przetacznik, *loc. cit.*, pp. 966-967; and F. V. García Amador, *Principios de derecho internacional que rigen la responsabilidad: Análisis crítico de la concepción tradicional* (Madrid, 1963), pp. 447-453.

[352] According to Personnaz:

"... the effect of pecuniary indemnification may be to encourage States to take the necessary measures in future to avoid a return to such a situation. ... The implicit intention of such indemnification, which may or may not be compensatory, may include the idea that, by means of such penalties, the delinquent government may be induced to improve its administration of justice and give the claimant the assurance that such breaches and injustice in regard to its citizens will be avoided in the future." (*Op. cit.*, p. 325.)

[353] García Amador, document A/CN.4/134 and Add.1, para. 145.

[354] Bissonnette, *op. cit.*, p. 72.

[355] Reproduced in ILM, vol. IV (1965), p. 698. Italy, too, following the lynching of Italian citizens in the United States in the period from 1890 to 1895, did not consider the payment of an indemnity by the Government of that country to be sufficient and requested that the laws of the United States be modified in order to avoid the repetition of such episodes.

[356] See footnote 252 above.

demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.[357]

The role assigned to safeguards against repetition by the previous Special Rapporteur, Mr. Willem Riphagen, appears to be still different. Article 4 of part 2 of the draft articles on State responsibility, which he submitted in his second report, provides in subparagraph 3:

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.[358]

Article 6 of part 2 of those draft articles, submitted by Mr. Riphagen in his sixth report, which provides that:

1. The injured State may require the State which has committed an internationally wrongful act to:

...

(*d*) provide appropriate guarantees against repetition of the act.[359]

seems to add some emphasis to the provision. Omitting as it does any reference to satisfaction, the latter formulation seems to assign a more distinct role to safeguards against repetition. The expression "appropriate guarantees", however, has prompted a great deal of discussion. Unaccompanied as it was by any specification, it has been viewed as a possible source of abuse on the part of the injured State.[360]

152. Previous codification drafts seem thus to show:

(*a*) a certain tendency to give guarantees an autonomous position in relation to other remedies, including satisfaction itself;

(*b*) the existence of an offending State's obligation, under circumstances to be determined, to provide guarantees against repetition subject to a demand from the injured State;

(*c*) that the choice of guarantees rests in principle with the injured State;

(*d*) no indications concerning either the kind of guarantees to be offered or the limits in the choice thereof.

153. While confirming the conclusions drawn from the study of the above-mentioned drafts, State practice appears to be more complex and nuanced. In particular, as the offended State's right to demand safeguards against repetition has never been questioned, one would seem to have to conclude that safeguards are generally considered to be among the consequences of an internationally wrongful act. The same practice suggests that the corresponding obligation of the offending State must be fulfilled only on the injured State's demand.

154. With regard to the kinds of guarantees that may be requested, international practice is not univocal. In most cases the injured State demands either

(*a*) safeguards against the repetition of the wrongful act without any specification; or

(*b*) where the wrongful act affects its nationals, that a better protection of the persons and property of the latter be ensured.

155. Examples of hypothesis (*a*) include: the Dogger Bank incident between the United Kingdom and Russia in 1904, in which the United Kingdom requested, among other things, "security against the recurrence of such intolerable incidents";[361] the four cases in 1880 concerning the "visitation and search of American merchant vessels by armed cruisers of Spain on the high seas off the eastern coast of Cuba", following which the United States declared that it expected from Spain "a prompt and ready apology for their occurrence, a distinct assurance against their repetition";[362] the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta; the Chinese Deputy Minister for Foreign Affairs requested, among other measures, a guarantee that such incidents would not be repeated in the future;[363] and the attack on an Israeli civil aircraft carried out in Zurich on 18 February 1969 by four members of the Popular Front for the Liberation of Palestine, following which the Swiss Government delivered formal notes of protest to the Governments of Jordan, Syria and Lebanon condemning the attack and urging the three Governments to take steps "to prevent any new violations of Swiss territory".[364]

156. Examples of hypothesis (*b*) are: the exchange of notes between the United States and Spain concerning American missionaries and, in particular, the Doane case in 1886, in which Mr. E. T. Doane, an American missionary in the Philippines, who had protested against the seizure by the Spanish authorities of certain lands belonging to the mission, was arrested and deported to Manila; following the protest by the United States Government, "the Spanish Government endeavoured in a measure to repair the wrong it had done by restoring Mr. Doane to the scene of his labours and by repeating its assurances with reference to the protection of the missionaries and their property";[365] the Wilson case, concerning the murder in 1894 of an American citizen in Nicaragua, in which the United States demanded, *inter alia*, that "the Government of Nicaragua . . . adopt such measures as to leave no doubt as to its purpose and ability to protect the lives and interests of citizens of the United States dwelling in the reservation, and to punish crimes committed against them";[366] the Vracaritch case, concerning the arrest in Munich on 2 November 1961 of

[357] Paragraph 1 of article 27 reads as follows:

"1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of "satisfaction" to the State of nationality, which would be offensive to the honour and dignity of the respondent State." (Document A/CN.4/134 and Add.1, addendum.)

[358] *Yearbook ... 1981*, vol. II (Part One), pp. 100-101, document A/CN.4/342 and Add.1-4, para. 164.

[359] *Yearbook ... 1985*, vol. II (Part One), p. 8, document A/CN.4/389.

[360] See especially Mr. Calero Rodriguez's statement at the thirty-seventh session of the Commission, *Yearbook ... 1985*, vol. I, p. 100, 1892nd meeting, para. 34.

[361] Martens, *Nouveau Recueil*, 2nd series, vol. XXXIII, p. 642.

[362] Moore, *Digest*, vol. II, pp. 903 *et seq.*, at pp. 903 and 907.

[363] "Chronique", RGDIP, vol. 70 (1966), p. 1013.

[364] R. A. Falk, "The Beirut raid and the international law of retaliation", AJIL, vol. 63 (1969), p. 419.

[365] Moore, *Digest*, vol. VI, pp. 345-346.

[366] *Ibid.*, pp. 745-746.

Lazo Vracaritch, a former captain in the Yugoslav resistance forces, charged with the "cowardly assassination of German soldiers during the occupation of Yugoslavia in 1941"; the Minister of Justice of the Federal Republic of Germany, in a statement issued to the press on 8 November, declared, *inter alia*, that "the arrest of the Yugoslav citizen Lazo Vracaritch is a regrettable, isolated case and the competent authorities have taken the necessary measures to ensure that such a case does not occur again";[367] the exchange of notes between the United States and the Soviet Union following the violation of the personal immunity of American military attachés by the Soviet authorities (29 September 1964) and their expulsion (14 December 1964), in which the United States demanded a formal assurance from the Soviet Government that no further violations of diplomatic immunity would take place;[368] the incident between China and the United Kingdom in which, following an attack against the British Consulate in Shanghai on 16 May 1967, the British Government demanded guarantees for the security of its diplomats and of other British subjects in China.[369]

157. In both the hypotheses considered, the offending State would seem to be placed under an *obligation of result*. In the face of the injured State's demand for guarantees, the choice of the measures most apt to achieve the aim of preventing repetition remained, it seems, with the offending State.

158. On other occasions—generally less recent—the injured State has asked that the offending State adopt specific measures or act in certain ways considered to be apt to avoid repetition. In such instances the offending State would seem to find itself under an *obligation of conduct*. Three possibilities seem to emerge here:

(*a*) In one set of cases the request for guarantees takes the form of a demand for formal assurances from the offending State that it will in future respect given rights of the offended State or that it will recognize the existence of a given situation in favour of the offended State. Examples include: the 1893 controversy between France and Siam in which France demanded that Siam recognize its territorial claims on the left bank of the Mekong;[370] the 1901 case of the Ottoman post offices, in which the Western Powers demanded that Turkey make reparation and present apologies for the violation of the mail on 5 May 1901 and recognize officially and unconditionally the foreign postal services that were then in operation in Constantinople and in various towns of the Ottoman Empire; Turkey apologized for the events of 5 May and gave a formal assurance that the British, Austrian and French postal services would thenceforth operate freely in Turkey;[371] the "Constitución" case, in 1907,[372] in which Uruguay requested that the Government of Argentina condemn the *Huracán* incident and make a declaration to the effect that it had had no intention of offending the dignity of the República Oriental or of ignoring the jurisdiction which it had, as a neighbouring and bordering country, over the Rio de la Plata;[373] the case of the "*Arménie*", a French packet-boat illegally detained in 1894 by the Turkish authorities, in which, following French protests, Turkey granted an indemnity of 18,000 francs to the Compagnie Paquet, the owners of the ship, and promised that in future the treaty provisions guaranteeing the inviolability of the person and of the domicile of French nationals in the Orient would be better respected.[374]

(*b*) On other occasions the injured State has asked the offending State to give specific instructions to its agents. Examples include: the case of the *Aliança*, a United States mail steamship fired on by a Spanish gunboat off the coast of Cuba in 1895, in which the United States affirmed that it "will expect prompt disavowal of the unauthorized act and due expression of regret on the part of Spain, and it must insist that immediate and positive orders be given to Spanish naval commanders not to interfere with legitimate American commerce passing through that channel, and prohibiting all acts wantonly imperilling life and property lawfully under the flag of the United States";[375] the case of the *Herzog* and the *Bundesrath*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer War, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war";[376] the Jova case, concerning the pillage of the estate of an American citizen by Spanish troops in 1896, in which the United States indicated that "The circumstances narrated seem, therefore, to call for the most searching inquiry and rigorous punishment of the offenders, with reparation to the injured party, as well as stringent orders to prevent the recurrence of such acts of theft and spoliation".[377]

(*c*) In a third set of instances the injured State asked the offending State to adopt a certain conduct considered to be apt to prevent the creation of the conditions which had allowed the wrongful act to take place. The most interesting examples are: the above-mentioned Boxer case, in which a number of the measures demanded from China were clearly intended for the specific purpose of preventing future occurrences of the same kind (para. 124 above); the case of the killing of 11 French sailors and the wounding of five others in Sakai, Japan, in 1868, on orders given by the Mikado's Government, by retainers of the Daimio of Tosa, whose troops were occupying the town. On that occasion France demanded that the troops of this Daimio should not be permitted to pass through or be stationed in the ports opened to

[367] "Chronique", RGDIP, vol. 66 (1962), pp. 376-377.

[368] *Ibid.*, vol. 69 (1965), pp. 156-157.

[369] *Ibid.*, vol. 71 (1967), p. 1064.

[370] Martens, *Nouveau Recueil*, 2nd series, vol. XX, pp. 160 *et seq.*

[371] "Chronique", RGDIP, vol. 8 (1901), pp. 777 *et seq.*, in particular pp. 788 and 792.

[372] A Uruguayan steamship which had been wrecked opposite the Argentinian island of Martín García in the Uruguay River was assisted by another Uruguayan ship, the *Huracán*. The authorities of Martín García thereupon captured the *Huracán* and took the crews of both ships prisoner.

[373] "Chronique", RGDIP, vol. 15 (1908), p. 318.

[374] *Ibid.*, vol. 2 (1895), pp. 623-624.

[375] Moore, *Digest*, vol. II, pp. 908-909.

[376] Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456 *et seq.*, at p. 486.

[377] Moore, *Digest*, vol. VI, p. 910.

foreigners.[378] Specific guarantees against repetition were also indicated by the arbitral tribunal in the *Trail Smelter* case.

In deciding on question No. 3, contained in article III of the Convention of 15 April 1935 between the United States of America and Canada[379] and reading as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

that tribunal mentioned specifically a series of measures (at first provisional and later definitive) apt to "prevent future significant fumigations in the United States".[380]

159. On a number of occasions the request for guarantees went so far as to include the adoption or abrogation by the offending State of specific legislative provisions. Examples include: the Boxer case, already mentioned;[381] the correspondence exchanged in 1838 between Great Britain and Persia, in which Great Britain set forth its requests concerning the protection of British subjects, among which was the request that a firman be issued for that purpose;[382] the Mathéof case, which led to the adoption by the British Parliament of the Diplomatic Privileges Act (Act of Anne) of 21 April 1709;[383] the case between France and Belgium following an attempt on the life of Emperor Napoleon III carried out in 1854 by a French citizen who took refuge in Belgium and whose extradition was refused as his crime was considered by Belgium to be a political one, for which he was not extraditable under Belgian law; in order to avoid such occurrences in the future, the Belgian Parliament adopted the law of 22 March 1856;[384] the 1886 Cutting case between the United States and Mexico following the prosecution and conviction in Mexico of an American national for having published in the United States an article considered to be defamatory of a Mexican citizen; as that prosecution was in conformity with the Mexican legislation then in effect, the United States, with a view to preventing a repetition of such cases, demanded that the article in question of the Mexican Penal Code be modified, which was subsequently done;[385] the lynching of Italian nationals in Erwin, Mississippi, in 1901, in which Italy asked the United States to modify the law which did not recognize the jurisdiction of federal courts in certain cases, thus in practice preventing the punishment of the authors of crimes against foreigners;[386] the "*Alabama*" case, in which the United States protests had led Great Britain to modify the 1819 Act by the Act of 9 August 1870, which made it a statutory offence to build in its territory any ship intended for a belligerent; authorized the detention of any suspect ship; and required any ship that had infringed British neutrality to hand over any prizes of war which it had brought into a British port.[387]

160. In the case of abrogation, the request for guarantees is absorbed into the request for reparation (*restitutio in integrum*) which, therefore, acquires the additional function of protecting the offended State against possible future wrongful acts of the same kind. In the case of emission of a legislative act, the request—according to some authors[388]—has an essentially preventive function, which is typical of guarantees of non-repetition.

161. It must be noted, however, that more recent practice does not record explicit demands to modify or issue legislation. Similar requests are however made by international bodies. For example, it is frequent that *ad hoc* international bodies request States responsible for violations of human rights to adapt their legislation in order to prevent the repetition of violations. These requests include those by the Human Rights Committee in its decisions on individual complaints. In the *Torres Ramírez* case, for instance, the Committee, after ascertaining that Uruguayan law was not in conformity with the International Covenant on Civil and Political Rights,

---

[378] Whiteman, *Damages*, vol. I, pp. 722-723. See also *Archives diplomatiques, 1869* (Paris), 9th year, vol. 2 (April-June 1869), pp. 601 *et seq.* A specific safeguard was also claimed by France because of the serious prejudice suffered by French citizens in Mexico in the early days of that country's independence and of the Mexican Government's disregard of its protests. France presented its conditions in the form of an ultimatum in 1838, demanding *inter alia*:

". . .

"2. an undertaking by the Mexican Government not to place difficulties in the way of regular and punctual payment of recognized debts which it owes to French citizens;

". . .

"4. a specific and solemn undertaking by the Mexican Government, under conditions of reciprocity;

". . .

"(*b*) not to impose on those subjects, in any case, any kind of war contribution or forcible loan, for any purpose whatsoever.

". . ."

(Lapradelle-Politis, vol. I, pp. 545 *et seq.*, at p. 547.)

[379] League of Nations, *Treaty Series*, vol. CLXII, p. 75.

[380] UNRIAA, vol. III, pp. 1934 *et seq.*

[381] See condition X of the joint note presented to the Chinese Government on 22 December 1900 (footnote 312 above).

[382] BFSP, 1838-1839, vol. XXVII, p. 93.

[383] J. Dumas, "La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", *Recueil des cours . . ., 1931-II*, vol. 36, gives the following account:

". . . Thus, in the reign of Queen Anne, Ambassador Mathéof, who represented Russia at the Court of St. James, could be arrested by his creditors on the public highway because English law did not protect aliens from imprisonment for debts. After being manhandled, he was placed under guard by an officer of the law. Despite the excuses he received from the government and the proceedings against his assailants, Mathéof left England in great annoyance, without presenting his letters of recall, and did not accept the farewell gift from the Queen. It was admitted that the fault of those who had arrested him was a result of lacunae in the law itself and, in 1707, an Act of Parliament was adopted to supplement the law in force and to prevent a recurrence of a physical attack at the expense of a foreign ambassador. . . ." (P. 188.)

[384] According to this law, the murder or attempted murder of the head of a foreign Government or of a member of his family was not deemed to be a political crime (*ibid.*, p. 189).

[385] Article 186 of the criminal code of Mexico, under which the condemnation had been pronounced, provided for the prosecution and punishment of crimes committed by foreigners abroad against Mexican citizens (*ibid.*, pp. 189-190).

[386] Moore, *Digest*, vol. VI, pp. 848-849.

[387] N. Politis, *La justice internationale* (Paris, 1924), p. 41. The following statement in the United States case in this arbitration is particularly significant: ". . . a belligerent has the right . . . to ask to have the powers conferred upon the neutral by law increased if found insufficient [to assure the preservation of its neutrality]" (Moore, vol. I, p. 578).

[388] See Bissonnette, *op. cit.*, pp. 124-125.

stated that

> The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.[389]

162. A difficult question is whether and in what circumstances the offending State may reasonably refuse guarantees of non-repetition. It seems open to question, for example, whether and to what extent the offending State could invoke the existence of "juridical obstacles of municipal law". To be sure, such obstacles would be, from the point of view of international law, "factual obstacles" and not "strictly legal obstacles".[390] However, the claims of Italy in the Erwin case (see para. 159 above) and the successful claim of the United States in the "*Alabama*" case[391] are significant in this respect. A similar issue is whether an offending State may lawfully refuse to provide safeguards that are allegedly too onerous in nature. It was noted in dealing with satisfaction that the forms of this remedy should be commensurate to the gravity of the offence. Although State practice does not contain explicit statements to that effect, the same principle should perhaps apply with regard to safeguards against repetition.

163. The analysis of doctrine and practice seems to justify the conclusion that guarantees against repetition constitute a form of satisfaction performing a relatively distinct and autonomous remedial function. It would therefore seem justified to include in the article of part 2 of the draft that deals with satisfaction an explicit mention of assurances and guarantees against repetition. This remedy would obviously be subject to the limiting clause applying to any form of satisfaction.

[389] Decision of 23 July 1980, para. 19 (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126); other examples include the *Lanza* case, decision of 3 April 1980, para. 17 (*ibid.*, p. 119), and the *Dermit Barbato* case, decision of 21 October 1982, para. 11 (*ibid., Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133). A complete analysis of the practice of the Human Rights Committee and a study of the jurisprudence of the European Commission and Court of Human Rights have not been possible for lack of time.

[390] See the preliminary report of the Special Rapporteur, document A/CN.4/416 and Add.1 (footnote 1 above), para. 98 *in fine*.

[391] See footnote 387 above.

CHAPTER V

The forms and degrees of reparation and the impact of fault: tentative remarks

A. Introduction

164. An issue that the Commission will have to face in the course of the elaboration of part 2 of the draft articles on State responsibility is the question of fault as a factor in the qualitative and quantitative determination of reparation or any form thereof. The Special Rapporteur refers of course to fault in the broadest sense, inclusive of wilful intent (*dolus*) or negligence in its various degrees (*culpa lata, levis, levissima*). This is not rendered any easier by the fact that an explicit treatment of the question of fault seems to have been set aside so far by the Commission. An express treatment of fault is to be found neither in the articles in part 1 of the draft that deal with the definition of an internationally wrongful act, which were adopted on first reading,[392] nor in the draft articles of part 2 submitted by the previous Special Rapporteur, Mr. Riphagen, which were discussed by the Commission at the thirty-seventh session and referred to the Drafting Committee.[393] An important exception seems to be, of course, the implied reference to fault contained in article 31 of part 1 of the draft, according to which, if a State could prove successfully that no fault was attributable to it, no wrongful act or liability could

[392] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[393] *Yearbook ... 1985*, vol. II (Part Two), p. 22, paras. 117-163.

be imputed.[394] Some references to fault were made in Mr. Ago's reports and proposals[395] and in some comments by Governments.[396] Occasional references to fault were also made by members of the Commission during the debates on other topics. One should add, of course, the references to the problem of fault contained in Mr. Riphagen's seventh report.[397]

165. Although, in a comment recalled above, it seems to be assumed that the Commission has, in part 1 of the draft articles, "excluded" fault from the constitutive elements of an internationally wrongful act, the Special Rapporteur is inclined to believe that such was not really the case. According to his understanding, particularly in view of the presence of article 31 and of the commentary thereto,[398] the Commission seemed rather to believe that fault was a condition *sine qua non* of wrongfulness and responsibility.

166. But whether or not that is the correct interpretation of the Commission's position, and whether or not there are cases in which responsibility is attributed regardless of the absence of any degree of fault, there is no doubt, in the Special Rapporteur's opinion, about the relevance of fault with regard to the specific determination of the consequences of an internationally wrongful act. It is one thing to say that the presence of fault is not essential for an act to cross the threshold separating the lawful from the unlawful; it is another thing to say that the legal consequences of an act which has passed that threshold are the same whether or not any fault (*dolus* included) is present in any degree. Whatever position the Commission took in part 1 of the draft articles, the Special Rapporteur believes that it could not take any further significant steps into part 2 without exploring the impact of fault on the forms and degree of reparation,[399] particularly if one considers that part 2 is to cover not just the consequences of delicts (not all of which, anyway, could reasonably be placed on the same level of wrongfulness and degree of responsibility) but also the consequences of crimes.

B. The problem of attribution of a fault to a State

167. Originally, fault was considered to be a "natural" element of tort in the relations between sovereigns as it was, and partly still is, considered to be a "natural" element of a civil tort or of a criminal offence within a national legal system. The Roman notion of *culpa* was extended by Gentilis and Grotius to the actions and omissions of sovereigns and States. Difficulties emerged rather late, notably in the works of Anzilotti and Kelsen. It is not just by chance that the difficulties came about when the subject was considered by these two authors, who have perhaps had the most to say about the relationship between international law and municipal law. The reasoning by which Anzilotti and Kelsen were led to present international responsibility as an objective responsibility based upon mere causation and independent from any wilful intent (*dolus*) or negligence (*culpa*) is strikingly significant of the connection with the problem of the relationship between international law and municipal law.

168. Considering that fault is an attitude of an individual human being, the problem was, according to Anzilotti, whether the attribution of international responsibility to a State for an action or omission infringing an international legal obligation was conditional upon the fault (*dolus* or *culpa*) of the individual organ whose action or omission was involved. Considering further, according to the same author, that, in so far as the internal law of a State so provided, the will or action of an individual could be considered as the will or action of a State, two hypotheses, A and B, could arise. In hypothesis A, the individual agent's act (or omission) was in violation of both international law and the relevant

---

[394] Article 31 reads as follows:

"*Article 31.* Force majeure *and fortuitous event*

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

"2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility."

For the commentary to this article, see *Yearbook . . . 1979*, vol. II (Part Two), pp. 122 *et seq.*

[395] Indeed, the only document of the Commission in which "fault" is explicitly and rather extensively treated is the study prepared by the Secretariat entitled "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine" (*Yearbook . . . 1978*, vol. II (Part One), p. 61, document A/CN.4/315). In that document, section 1 (*a*) of chapter III, "Doctrine", is devoted to "Introductory considerations to the problem: the 'fault theory' and the 'objective theory'" (paras. 489-511).

[396] See in particular the general remarks by Austria on chapters I, II and III of part 1 of the draft articles (*Yearbook . . . 1980*, vol. II (Part One), pp. 88 *et seq.*, document A/CN.4/328 and Add.1-4) that are devoted to the issue of "fault" (paras. 14-18). "Surprise" is expressed therein for the absence of any explanation, on the part of the Special Rapporteur or of the Commission, of the exclusion of fault and for the striking contrast between that exclusion and the premises set forth by the Sub-Committee on State Responsibility, presided over by Mr. Ago, in whose report "fault" had been referred to as the "subjective element" of a wrongful act within the framework of the question: "Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault" (*Yearbook . . . 1963*, vol. II, p. 228, document A/CN.4/152, para. 6). The Austrian comment on this issue concluded as follows:

"18. One thing, however, needs to be stated clearly: even if one adheres to the view of the Special Rapporteur which the Commission endorsed—'that the topic of the international responsibility of States was one of those in which progressive development could be particularly important', such progressive development would still require a convincing reasoning in each instance to become acceptable. Passing over a problem in silence cannot be counted as such."

[397] *Yearbook . . . 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

[398] See footnote 394 above.

[399] It should not be overlooked that wrongfulness of the act (together with responsibility itself) is not really distinguishable, in the last resort, from the legal consequences of the act. The characterization of an act as unlawful is but one side of the coin, the other side of which consists precisely of the consequences, in terms of responsibility and forms and degrees of reparation, attached to the act by the law. In the measure in which fault is relevant for the purpose of the forms and degrees of reparation, it would thus also be relevant for the purpose of the characterization of the act. The distinction between part 1 and part 2, surely indispensable for the purpose of codification of the relevant provisions, does not affect the essential unity of the legal phenomenon involved.

national law; in hypothesis B, the agent's conduct was in violation of international law but not in violation of municipal law.[400] In the case of A, the very condemnation of such an act by the agent under national law excluded the possibility that that same law could attribute the agent's act to the State. In the words of Anzilotti:

> . . . Hence, the logical effect of the fault of the agent acting contrary to the law should be that acts performed by him cannot be regarded as acts of the State . . .[401]

It followed that if international law nevertheless considered the State responsible, it did so, according to Anzilotti, on an objective basis. The author's explanation was that the State's liability was based (rather than on any fault of the agent or of the State) on a kind of guarantee to which any State would be held for any injury caused by its organization. In case B, the agent's conduct having been held in conformity with national law (namely, within the limits of the agent's competence and in compliance with existing legislation), no fault could be attributed to the agent notwithstanding the fact that his conduct was contrary to international law:

> . . . [the agents] were required to observe the laws of their State, and they behaved as they had to. Fault should therefore lie with the authors of the law which permitted or ordered . . . acts contrary to the State's international duties; and perhaps also with the authors of the State's Constitution itself, which vested some agents with powers incompatible with the fulfilment of those duties. But it would be difficult to determine fault—indeed, often impossible and almost always extraneous to the facts, which, in a given case, entail the State's international responsibility: a defect can occur in the laws regardless of great vigilance or foresight. In addition, since doubts cannot be entertained about . . . the State's responsibility, whatever the defect in its legislation or its organization and whatever the root cause, establishing or ruling out fault would in short have no effect on the responsibility. In this case, one could speak of *culpa qui inest in re ipsa*, of fault based on the fact that there is no internal organization to ensure fulfilment of the State's international duties in all instances, in other words, fault which in reality is not fault. But these are abstractions that have nothing to do with the facts. Here too, we have to admit that responsibility has *a purely objective basis**; the State is answerable for the injurious act *for the reason that the act stems** from its activity.[402]

So, if the State was internationally responsible it was not, according to Anzilotti, in consideration of any fault (of its own or of the agent's). International responsibility would have had again a purely objective basis. Hans Kelsen had a similar position.[403]

169. Ago reached a different conclusion by rejecting Anzilotti's and Kelsen's notion that the attribution of the agent's act or omission was a matter left to national law.[404] According to Ago, it was erroneous to believe that international law depended, so to speak, on national law for the attribution to the State of the agent's conduct. He agreed with Anzilotti and Kelsen that such an attribution could only be the work of legal rules in the sense that only by legal rules could the conduct of one or more individuals be "imputed" to the State—a point on which the Special Rapporteur disagrees (see paras. 170-172 below). But Ago took a different position with regard to the source of the legal rules effecting the allegedly legal operation. The rules in question, according to Ago (as according to others), could only be the rules of the same legal system within which the State was an international person, namely international law itself.[405] It naturally followed that if a State agent acted as such, the attribution to the State of his conduct, and of any element of his conduct such as *dolus* or *culpa*, would not find any obstacle in the fact that the same conduct was not "imputable" to the agent or to the State under municipal law. Ago also shared the view, common to widely accepted theories of juridical persons of municipal law, according to which the organ and the State (as *personne morale*) were one and the same entity.[406] It followed that when international law qualified the agent's conduct by considering it (through "imputation") as a conduct of the State, it did so on the basis of its own rules, not by virtue of national rules which from its viewpoint had a merely factual value.[407] The agent's conduct in violation of an international legal obligation was thus an internationally wrongful act if international law so provided, even though that conduct was a perfectly correct one from the point of view of municipal law. Consequently, international law could consider such a conduct as affected by *dolus* or *culpa* regardless of whether that conduct was considered not so affected but perfectly lawful, or even due, under municipal law. Ago thus rejected any theories according to which the responsibility of States in international law would be bound to be

---

[400] Hypothesis B would materialize where the agent's action or omission was merely lawful (not prohibited) or when it was obligatory under municipal law. The result indicated in the latter part of the paragraph would be the same, the only difference being that if the agent's action or omission was obligatory his fault would have been even less attributable to the State than in the case of a merely lawful, permissible conduct.

[401] D. Anzilotti, "La responsabilité internationale . . .", RGDIP, vol. XIII (1906), p. 289.

[402] *Ibid.*, p. 290.

[403] Kelsen, it will be recalled, spoke in terms of international sanction and in terms of *zentrale Zurechnung* and *periphere Zurechnung*. *Zentrale Zurechnung* was the attribution ("imputation") of the agent's conduct to the State on the part of the *national law* of the State. *Periphere Zurechnung* was the attribution ("imputation") of the consequent sanction (what the Commission calls the legal consequences or the duty of reparation) to the State, which was the task of international law. Kelsen reached thus the same conclusion as Anzilotti with regard to fault. As in no case would the national legal order attribute ("impute") fault to the State (*zentrale Zurechnung*), international law attributed liability on a purely objective, causal basis. (H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII (1932), pp. 481 *et seq.*)

[404] R. Ago, "La colpa nell'illecito internazionale", *Scritti giuridici in onore di Santi Romano* (Padua, CEDAM, 1940), vol. III; reprinted in R. Ago, *Scritti sulla responsabilità internazionale degli Stati* (Naples, Jovene, 1978), vol. I, pp. 271 *et seq.*

[405] In his study "La colpa nell'illecito . . ." (*loc. cit.*, p. 290), Ago quoted T. Perassi, *Lezioni di diritto internazionale*, part I (Roma, 1937):

> ". . . when a declaration of will or an action comes into consideration for the effects attributed to it by a legal system *it is for such a legal system to determine**, by rules of its own, the conditions under which that will or action is attributable to a given person. *Imputation of a will or an action to a person** and determination of the *effects** it produces for the person to whom it is imputable, are *legal operations** which logically depend upon (one and) the same legal system." (P. 94; trans. by the Special Rapporteur.)

A very similar position is taken by Morelli, *op. cit.*, pp. 185 *et seq.* and 342 *et seq.* For the reasons explained below (paras. 170 *et seq.*), the Special Rapporteur believes that the only imputation effected by legal rules is the imputation of the legal consequences of the conduct. The origin of the legally relevant conduct and the attribution of such conduct to a person is normally, and at least with regard to factual entities, a question of fact.

[406] A point which, in the Special Rapporteur's view, contradicts the necessity of a legal imputation of the organ's conduct to the State (see footnote 405 above and paras. 170-172 below).

[407] Ago, "La colpa nell'illecito . . .", *loc. cit.*, p. 290.

"totally or in a major part a purely objective responsibility".[408] He concluded instead that the question of fault could only be decided on the basis of the international rules whose violation was at issue.

170. In the opinion of the Special Rapporteur, Anzilotti's and Kelsen's position, according to which fault was practically not attributable to States as international persons, is untenable. Great merit goes therefore to Ago for having, by his masterly critique of "attribution" under national law, removed an obstacle to the admission of a role of fault in the area of international responsibility. At the same time, Ago's criticism of the then current objective theory seems to fall short of a thorough clarification of the issue of attribution. In particular, the Special Rapporteur is not convinced by the theory according to which attribution of an act to a State as an international person (any degree of fault included) would be a legal operation of international law distinct from the attribution to the State of the legal consequences of the act. It would of course be presumptuous to attempt to deal adequately with such a problem in the present context.[409] Considering, however, the importance of the issue, the Special Rapporteur feels unable to avoid expressing at least his doubts. It seems to him essential, in particular, to verify the premiss which Ago left untouched in his study published in 1940[410] and the non-disposal of which is the cause, in the Special Rapporteur's view, of the incompleteness of the revision. Indeed, the main difficulty with Anzilotti's and Kelsen's theory resided in the analogy generally assumed to exist between States as international persons, on the one hand, and juridical persons of national law, on the other.[411] This analogy led both authors to try to fit the attribution to a State of the conduct of its organs into the same pattern to which most lawyers rightly or wrongly resort in order to explain the attribution to a juridical person of the conduct of its organs. But the analogy, generally taken for granted, is highly questionable.

171. According to the analogy, just as the conduct of agents was "imputed", for purposes of national law, to a juridical person through the action of the rules of the entity's by-laws or statutes governing the structure and competence of its organs,[412] the conduct of the organs of a State as an international person would have been "imputed" to the State, for the purposes of international legal relations, on the basis of the rules of the national legal order defining that State's organs and their competence.[413] Combined with the general notion of national law according to which the State as *personne morale* "can do no wrong"—particularly no intentional or negligent wrongful acts[414]—the analogy led to the conclusion that the infringement by a State of an international obligation could only bring about a responsibility based on the merely objective causal link between the infringement and its injurious consequences. Any wilful intent or *culpa* remained with the agent or agents of whose conduct the infringement of the obligation had consisted.

172. This analogy does not seem to be justified.[415] States as international persons are, to be sure, collective entities, resembling as such the *substratum* of juridical persons. Nevertheless, they do not possess, from the viewpoint of international law, any of the most essential features characterizing juridical persons from the viewpoint of the law of a national society. The juridical persons of national law are legal instruments within the legal order of a society the primary members—and legal subjects—of which are individual human beings; and they exist and operate not as "given" entities but as *legal* instrumentalities of *legal* relations among individuals.[416] In this sense, juridical persons are "secondary" persons as compared to physical persons.[417] On the contrary, sovereign States as international persons are the primary persons within a unique, *sui generis* legal system which presupposes States just as national law presupposes human beings.[418] The fallacy of the analogy is demon-

---

[408] *Ibid.*, pp. 292-293.

[409] The Special Rapporteur dealt with it long ago within the framework of a general theory of the State as an international person (*Staat im Sinne des Völkerrechts*) in *Gli enti soggetti dell'ordinamento internazionale* (Milan, Giuffrè, 1951), pp. 128 *et seq.* and 335 *et seq.*, especially pp. 343-346 and 360-371. He returned to the problem in 1971 in "Stati e altri enti (Soggettività internazionale)", *Novissimo digesto italiano* (Turin), vol. XVIII (1971), pp. 150 *et seq.*, paras. 27-30; and in "L'Etat dans le sens du droit des gens et la notion du droit international", *Österr. Z. öff. Recht*, vol. 26 (1975-1976), pp. 311-331, especially pp. 324 *et seq.*

[410] See footnote 404 above.

[411] Very widely assumed, the analogy extends to the subdivisions of a unitary or federal state within a national system—in particular to such territorial subdivisions as provinces, cities, cantons, *Länder*, regions, or member states of a federation. Even where they are not personified under national law, these entities are indeed very similar to juridical persons from the viewpoint of the relationship of their respective legal orders with the national legal order within which they operate as legal subdivisions of the State.

[412] See the study by the Special Rapporteur, *Gli enti soggetti . . .*, pp. 121 *et seq.* and 335 *et seq.*

[413] This would have been precisely, in Kelsen's terminology, the *zentrale Zurechnung* (see footnote 403 above).

[414] Wilful intent or negligence remaining a feature of the agent's conduct (and the State as *personne morale* being only subject eventually to an indirect, purely civil liability).

[415] It is thoroughly contested by the Special Rapporteur in his study *Gli enti soggetti . . .*, especially pp. 16-39 and 373-410. (This work is discussed by J. Kunz in AJIL, vol. 47 (1953), pp. 512-513, and in *Österr. Z. öff. Recht*, vol. VI (1953), pp. 105 *et seq.*) The Special Rapporteur summarized his critique of the analogy in "The concept of international law and the theory of international organization", *Collected Courses . . . 1972-III*, pp. 646-653, and in *The United Nations Declaration on Friendly Relations and the System of International Law* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979), pp. 216-223. His critical position with regard to this analogy (and the factual concept of the State as an international person) is shared by L. Ferrari Bravo, *Diritto internazionale e diritto interno nella stipulazione dei trattati* (Pompei, Morano, 1964), pp. 154 *et seq.* and *passim*; M. L. Forlati Picchio, *La sanzione nel diritto internazionale* (Padua, CEDAM, 1974), p. 322; G. Battaglini, "Il riconoscimento internazionale dei principi generali del diritto", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Milan, Giuffrè, 1987), vol. I, p. 103, and in the other works of the same author referred to in footnote 424 below; and F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (Milan, Giuffrè, 1983), p. 117.

[416] See the Special Rapporteur's study *La persona giuridica come soggetto strumentale* (Milan, Giuffrè, 1952) (reprint of chapter I, revised, of *Gli enti soggetti . . .*).

[417] *Ibid.*, pp. 61-63; and *Gli enti soggetti . . .*, pp. 95-98.

[418] States could become legal instruments of inter-individual *legal* relations only within a highly problematic (and at present not perceptible) public law of mankind. Within such a framework they would indeed be legal subdivisions: legal subdivisions of a "world legal order" and, of course, of a "world State". See the studies by the Special Rapporteur, "The concept of international law . . .", *loc. cit.*, pp. 651-653, and *The United Nations Declaration . . .*, pp. 221-223.

strated by a host of data, two of which need to be stressed here. The first is that, unlike public and private juridical persons, set up by the law even when their creation is prompted by the initiative of private parties, States come into being, as international persons, on the merely factual basis of their existence as independent political units. So, while *personnes morales* are legal entities created by the law and penetrated thereby, States are just a product of historical events. In no way are they penetrated by the "law of nations" in the sense in which juridical persons are so penetrated (and "conditioned" from within) by national law.[419] The second datum—and the one that matters directly in the present context—is that, unlike juridical persons and subdivisions, organized by their national law and only able to act within that law through their legitimate organs—the latter validly operating only within the sphere of their respective *legal* competence —States as international persons are not organized by international law.[420] The organization of a State for the purposes of its international legal relations is, from the viewpoint of international law, a merely *factual* structure of which national law itself, from the viewpoint of international law, is just another factual element.[421]

173. Once the *idolum* represented by the fallacious "legal corporate body" model is set aside, one should be in a better position to perceive the true nature of the attribution of acts to a State as an international person. Attribution does not really seem to be an operation carried out by legal rules, notably by national or international law—or not in the same sense, surely, in which the qualification of an act as wrongful and the "imputation" of responsibility are legal operations. The attribution of an act to a State for the purposes of any legal consequence is, more realistically, an operation carried out by the interpreter of the law—foreign ministry lawyer or international judge—in order to determine that the fact constituting a violation of an international obligation emanates in fact from a given State for the legal purposes of determination of wrongfulness and imputation of responsibility. Although it is after all a fiction to speak of acts of juridical persons, the concept of a *legal* attribution to such persons of the acts of their organs has at least a legal foundation. Its foundation resides in the above-noted relevance of the legal organization of juridical persons for the national legal system within which they exist.

174. The relevance of the legal organization of a juridical person is indeed so decisive that the circumstance that an individual has acted under the dual legal condition that he was a statutory agent of the *personne morale* and operated within his statutory competence is necessary and sufficient for the relevant national law (of which the juridical person's statutes are an integral part) to consider the act in question as attributable to the *personne morale*. Such is not the case, however, of a wrongful act of a State under international law and for the purposes thereof. First, international law being normally not active with regard to the creation and organization of the State,[422] the rules of internal law providing for the title and the competence of the State's organs are not complements of international law in the sense in which the statutes of *personnes morales* are legal complements of national law (see para. 172 above). From that viewpoint the national rules in question are merely indicative of the factual organization of the State.[423] Secondly, the attribution to the State of the act of an organ is conditional neither upon the organ's legitimacy nor upon its competence under national law. This is confirmed by articles 1 to 15 of part 1 of the draft articles (see para. 176 above). Rather than a matter of legal attribution of acts to the State by international law, one should speak, therefore, of a factual relationship between the act and the State's organization, namely of a factual attachment of the act to the State as an international person, the existence of such relationship to be determined by the interpreter.[424]

175. If in the case of juridical persons of national law a legal attribution or imputation of will or acts is a practical terminological expedient, in the case of States as international persons a legal attribution seems actually to be an error and a redundancy. It is an error because—as explained—it has no real legal basis from the viewpoint of international law. It is a redundancy because it presents as a distinct legal phenomenon an operation which is but a duplication of determination of wrongfulness and imputation of responsibility. The best that can be said in favour of the notion of attribution of acts to States as a *legal* operation is that it is just another way of saying that it is a *logical* operation carried out by the interpreter for the purpose of a possible imputation of legal responsibility.

176. This does not mean, of course, that attribution could be effected arbitrarily. The foreign ministry legal adviser or the arbitrator called to make the finding must surely resort to criteria, standards and principles, includ-

[419] It is not by chance that States, while they consider themselves institutions from the viewpoint of the society over which they rule, prefer to be called, for international purposes (not necessarily in a military sense), "powers". In that sense States are independent and not just "autonomous". Autonomy is a feature of subdivisions, namely of essentially dependent entities such as those referred to in footnote 411 above.

[420] Although the second datum may appear to be just a consequence of the first, both are just two of the innumerable consequences of the fundamental one: namely, that international law is not, and does not seem to be close to becoming, an inter-individual public law of mankind. (*The United Nations Declaration . . .*, pp. 221-223.)

[421] On marginal or "apparent" exceptions, see "Stati e altri enti . . .", *loc. cit.*, p. 166, para. 42, footnote 1; and *The United Nations Declaration . . .*, pp. 218-219.

[422] *Gli enti soggetti . . .*, pp. 320 *et seq.*

[423] On this point the Special Rapporteur's position is the same as that of Ago; and the view is widely shared, since the time of Triepel and Anzilotti, especially in the German and Italian schools of international law.

[424] *Gli enti soggetti . . .*, pp. 343-349; "L'Etat dans le sens du droit des gens . . .", *loc. cit.*, pp. 313-314 and 327. A clear comparison between the doctrine of legal imputation (*rechtliche Zurechnung*) and the position of the Special Rapporteur can be found in I. Feustel, *Die Kompetenz-Kompetenz zum Abschluss völkerrechtlicher Verträge in der italienischen Lehre* (Berlin, Duncker & Humblot, 1977), pp. 74-82. The Special Rapporteur's view seems to be shared by Ferrari Bravo, *Diritto internazionale . . .*, pp. 154 *et seq.*, 178 and 216; and by Battaglini, "Amministrazione e sovranità nell'ex-Territorio libero di Trieste", *Studi in onore di Manlio Udina* (Milan, Giuffrè, 1975), vol. I, p. 128 (particularly with respect to the attribution of the psychological attitude of the organ); and "Convenzione europea, misure d'emergenza e controllo del giudice", *Giurisprudenza costituzionale* (Milan), 1982, part I, p. 423.

ing, in addition to common sense, national and international rules. He must also take account, however, of factual elements, some of which prevail over legal provisions, as is clearly indicated by articles 1 to 15 of part 1 of the draft. In principle, those articles (for example, articles 5, 6 and 7) indicate, as a criterion for attribution, the internal law of the State, which is surely not a part of international law.[425] In the same set of articles, however, there are provisions that refer unambiguously to absolutely non-normative elements. According to article 8, an act that would not be attributable to a State under the latter's internal law may be attributable to that State under international law if it was committed by persons acting in fact on behalf of the State. And under article 10, to evoke just one more example, an act equally non-attributable to a State under the internal law of that State can be attributed to it under international law if the act was committed by an organ acting in the exercise of governmental authority but outside its competence under national law or in contravention of its instructions. In such cases, surely, there is not even a national law attribution. The provisions of national law under which the act would not be attributable are set aside if any non-organ acted *in fact* as an organ or if a non-competent organ acted *in fact* as if it were competent. As regards international law, it could, of course, be assumed that a legal imputation to the State is effected by the very rules set forth in articles 1 to 15 of part 1 of the draft articles or by any rules of general international law of which those draft articles were to represent a codification. It seems evident, however, that these rules do not really affect the State's structure, namely the legitimation of the State's organs or their competence. They merely accept or "register", so to speak, the existing factual structure. More than legal rules, they only represent factual standards or criteria to be followed in determining the factual connecting link of the acting individuals—and of their acts and attitudes—with the factual organization of the State as an international person.[426] The "operation" that international law really carries out with regard to the conduct in question is the imputation to a State (the same State or one or more other States) of the *legal consequences* of the conduct. International law, in other words, has only to decide whether the act is of legal relevance, for whom and with what consequences. The only imputation operated by international law is thus what Kelsen called *periphere Zurechnung*. The act (the conduct) "belongs" to a given State as a matter of fact. Whether or not it has occurred and which person has done it are indeed questions which the interpreter (government legal adviser, arbitrator or court) resolves as *quaestio facti*, namely as a condition for the solution of the *quaestio iuris* represented by the determination of the legal consequences and the "imputation" thereof (*periphere Zurechnung*).[427]

177. The discarding of the analogy with the juridical persons of national law—or at least the redimensioning of the current analogy—would permit the elimination *in radice* of any difficulties which have arisen in the past and may still be raised with regard to the admissibility of attribution of fault to a State. The factual nature of the person excludes the possibility that the question of the attribution of wilful intent or negligence to a State as an international person could be one of legal "imputation" of the fault either by national law (Anzilotti and Kelsen) or by international law (Perassi, Ago, Morelli and others).

[425] See footnote 423 above.

[426] One should of course not overlook a certain similarity between the rules contained in the cited articles 1 to 15 of part 1 of the draft and the rules set forth in article 7 of the 1969 Vienna Convention on the Law of Treaties, notwithstanding the difference represented by the fact that the latter rules do at least seem to indicate certain organs as "competent". The difficulty of the problem makes the Special Rapporteur reluctant to express an opinion even on the said difference. He would venture tentatively to say, nevertheless, that the impact of article 7 of the 1969 Vienna Convention on the attitude of international law (conventional and general) with regard to the organization of States (an impact which in his view remains still to be adequately determined) is not necessarily such as to modify significantly the situation set forth here (and in his study "L'Etat dans le sens du droit des gens ..."), namely that there is an essentially factual connection between the State and the acts of its organs. The problem is briefly touched upon (with regard to article 7 of the 1969 Vienna Convention) by Ferrari Bravo, "Alcune riflessioni sui rapporti fra diritto costituzionale e diritto internazionale in tema di stipulazione di trattati", *International Law at the Time of its Codification ..., op. cit.*, pp. 273 *et seq.*; and by L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *Collected Courses ... 1984-VI*, vol. 189, pp. 34-35.

[427] A very stimulating (and in many ways intriguing) treatment of problems of "imputation", or problems related thereto, is to be found in the course given in 1984 at the Hague Academy by Condorelli (see footnote 426 above *in fine*). Subject to a more accurate study of the essay, the Special Rapporteur has the impression that, while in certain respects the *interventionisme* of international law in the organization of States is perhaps overestimated, "imputation" of the act—viewed also by Condorelli, it seems, as a (legal) operation of international law—appears in more than one case to be understood so broadly as to become hardly distinguishable, at least for the Special Rapporteur, from what he rightly or wrongly deems to be, on the basis of a rejection of the juridical person analogy, the only real "imputation" that the law of nations effects to a State as an international person, namely the attribution of the *legal consequences* of the act. The Special Rapporteur fails to see, in particular, in what sense the extension of State responsibility to certain facts or acts could or should imply, in addition to liability, the attribution to the State of acts or facts which have not been committed by individuals occupying any position, even a factual one, within the State's organization. He refers, for example, to the case of State responsibility envisaged by article 139, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea. Does that provision imply the elevation of the acting individuals (as in other cases evoked by Condorelli) to the (legal?) quality or capacity of organs of the State? The Special Rapporteur finds that difficult to believe; and he has the impression that the difficulty derives mainly from the fact that he conceives differently from Condorelli what the latter calls "*la norme*" or "*le classique*", which should be, together with the so-called "*droit de s'auto-organiser*" of States and other "*notions élémentaires*" used by the said author, the starting-point of any discussion of "*nouvelles tendances*". But it is the whole problem of the State in the sense of international law which is involved here and particularly the juridical person analogy. The Special Rapporteur finds similar difficulties with the equally interesting course given at The Hague Academy the same year by P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des Etats", *Collected Courses ... 1984-V*, vol. 188, pp. 9 *et seq.* "Imputation" seems to the Special Rapporteur to be used too indifferently —and even more frequently—in that study to indicate either the attribution of the act or the imputation of responsibility or both; and while the juridical person analogy (which for the Special Rapporteur is very questionable) is evoked continuously, one finds in the study the intriguing thought that

> "... On the one hand, the State, which has remained a juridical person, becomes virtually disembodied by the objectivation of the wrongful act; on the other, mechanical imputation means that all the injurious consequences of wrongful activities carried out within its jurisdiction are attributed to that disembodied juridical person!" (*Ibid.*, p. 85.)

The analogy becomes here, to say the least, very problematic indeed.

The choice between national law and international law discussed by the cited authorities is a moot question altogether. It is a moot question because the so-called *zentrale Zurechnung* of an act to a State is not an operation effected by the legal rules themselves but merely a logical operation carried out by the parties or by a judge on the basis of the positive and negative data indicating whether that conduct is or is not a conduct of that State's organization in a broad sense. There is thus no place, in the process of attribution, for a legal sifting of given elements of the conduct or for any one or more of such elements to be "left out", so to speak, of the attribution. The so-called "subjective" or "psychological" element of conduct—whether fault, error or bad faith—is just as attributable to the State as any other one of the conduct's objective elements, no rule of national or international law being susceptible of altering the consequent factual finding. So, the infringement by a State of one of its international obligations can be committed with or without fault; and if there is fault it can be committed either with wilful intent or with any degree of negligence (*culpa lata*, *levis*, *levissima*). The question whether wilful intent or any degree of *culpa* is present in a given instance is a question of fact, just as the very existence of an act of a State is a question of fact.

178. In maintaining that attribution of fault to the State is essentially a question of fact, as is the determination of the presence of fault in the conduct of an individual (for the purposes of the law of tort within a national system), the Special Rapporteur is very far from intimating that it is not a much more difficult operation. Apart from the greater difficulty of the basic legal problem of finding out in which cases the so-called "subjective element" is relevant (see paras. 179 *et seq.* below) and with what consequences (paras. 183 *et seq.*), the very factual determination of whether or not a wilful intent or any degree of negligence of a State exists is surely far more arduous than the corresponding problem of private law. If the international person is in a sense as factual as a physical person, it is at least as tremendously complex as the *substratum* of such a colossal *personne morale* as the State as a person of national law. It is actually more complex than that, precisely because (as indicated also by the cited articles 1 to 15 of part 1 of the draft) the organization of the State reaches beyond the boundaries of the "legal" organization provided for by national law. The consequence of complexity (combined with factuality) is that an act of a State as an international person is mostly if not always composed of a plurality of acts and attitudes emanating from different organs situated frequently at different levels in the hierarchy of the State's organization.[428] Now, just as the external or objective conduct of one or more low-ranking officers may or may not *per se* materialize in fact a conduct of the State as an international person, the so-called psychological attitudes (possibly different) of such officers may or may not constitute in fact a fault of the State as an international person. Considering therefore the far greater difficulty which any determination of intention or motivation presents as compared with the determination of the so-called "objective" conduct, attribution of any degree of fault may frequently be more problematic than attribution of "objective" conduct. And the fact that one cannot rely exclusively and directly upon legal rules (as would be the case with the juridical person of national law) probably explains in part the doubts which have afflicted and still afflict the issue of fault in the area of international responsibility.

179. Whatever may be the difficulties of factual attribution, the question whether fault is relevant, and in what sense and in what measure, is of course a question of law —a question clearly to be decided on the basis of the content of the international rule in violation of which the wrongful act has been committed. It will thus depend on that rule whether or not fault or any degree thereof is a condition of responsibility (see paras. 165-166 above).

180. Another matter, however, is the relevance of fault with respect to the legal consequences of an internationally wrongful act. In that respect, it seems both logical and rational, as recognized by a number of authorities, that the presence or absence of fault, and, if there is fault, the degree of wilful intent or negligence, play some role in the determination of the degree of responsibility and therefore of the forms and degrees of the reparation due. The main authorities in that sense are Oppenheim and Ago.

181. According to Oppenheim:

> . . . A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for delinquencies which arise merely from culpable negligence.[429]

The Special Rapporteur submits that, *a fortiori*, a "great difference" will exist between an act in the absence of any fault and an act which is accompanied by fault (a wilful act).

182. According to Ago:

> . . . the problem of the various gradations and nuances of fault in internationally wrongful acts seems to be of importance chiefly in regard to another question, on which it undoubtedly has a notable impact, namely, the nature and the extent of the reparation to be made by the State responsible. . . .[430]

C. The impact of fault on the forms and degrees of reparation

1. Fault and pecuniary compensation

183. The study of jurisprudence shows that the impact on pecuniary compensation of the so-called "subjective" element of an internationally wrongful act is rather infrequently taken explicitly into consideration by judges. *Prima facie*, the quantum of reparation by equivalent due

[428] This is what the Special Rapporteur would describe as "the material (social, so to speak) complexity of an act of a person of the law of nations, as opposed to the 'unicity' of an act of an individual;" ("L'Etat dans le sens du droit des gens . . .", *loc. cit.*, p. 315). The point is discussed in that study (pp. 315 *et seq.*).

[429] Oppenheim, *op. cit.*, p. 354.

[430] Ago, "La colpa nell'illecito . . .", *loc. cit.*, p. 302. Similar positions are taken by, *inter alia*: Giuliano, Scovazzi and Treves, *op. cit.*, p. 581; Brownlie, *op. cit.*, p. 46; and B. Simma, "Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law", *Österr. Z. öff. Recht*, vol. 20 (1970), pp. 11-12.

by the offending State seems to be determined solely on the basis of the nature and extent of the damage caused, the absence, presence or degree of fault being for that purpose not relevant.[431] There are, however, a few cases where an opposite tendency is manifest; and it remains to be seen:

(i) whether the documentation which the Special Rapporteur has managed to collect is really complete; and

(ii) whether the lack of express mention of the so-called "subjective" element may conceal more or less frequently an implied—and at times perhaps inadvertent—consideration of the element in question by the arbitrator.

184. As regards the cases in which an express mention of the matter has been made, three seem to be very significant:

(*a*) The "*Alabama*" case, in which the British Commissioner expressed the following opinion:

> . . . the reparation claimed should never exceed the amount of the loss which can be clearly shown to have been actually caused by the alleged injury; and . . . it should bear some reasonable proportion, not only to the loss consequent on the act or omission, but to the gravity of the act or omission itself. A slight default may have in some way contributed to a very great injury; but it is by no means true that, in such a case, the greatness of the loss is to be regarded as furnishing the just measure of reparation, without regard to *the venial character of the default**. . . .[432]

(*b*) The *Fabiani* case, in which a degree of explicit consideration of the seriousness of *culpa* is also evident in the decision. As Subilia explains:

> [Fabiani] had suffered repeated denials of justice by the Venezuelan authorities, which had more particularly obstructed the execution of an arbitral award rendered in his favour in Marseilles on 15 December 1880. According to the French Government, the damage exceeded mere loss of use of the sum arbitrated, for Fabiani was later declared bankrupt for default in paying sums lower than those which the arbitral award should have enabled him to recover. This bankrupty had caused Fabiani considerable material and moral injury, for which reparation was also demanded.[433]

According to the arbitrator,

> . . . [the injured party] would have made a profit if the unlawful act had not occurred, and the proof is subject to less stringent conditions *in the event of gross fault or wilful intent**; the judge retains full discretion.[434]

(*c*) The *Dix* case, in which Commissioner Bainbridge, speaking on behalf of the United States-Venezuelan Mixed Claims Commission, said that

> . . . International as well as municipal law denies compensation for remote consequences, in the *absence** of evidence of *deliberate intention to injure**. . . .[435]

185. Despite these cases, the doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called "intentional element" should in no way affect the computation of compensation. And if the purpose of monetary reparation is, as the Special Rapporteur has tried to show, to place the injured party in the situation which would have obtained if the wrongful act had not been committed—namely to provide a sum of money compensating the injured party for *all* the damages caused by the wrongful act but *only* for such damages; in other words, if the amount of reparation by equivalent in a narrow sense depends exclusively on the nature and dimension of the injury caused—it is difficult to see what relationship it could have to the presence or absence of any degree of fault on the part of the offending State.

186. The Special Rapporteur is inclined to think, however, that this interpretation might not be as correct as it may appear to be on the basis of *prime facie* logic, the more so if one considers that the various forms of reparation do not operate *in concreto* as separately from one another as their distinction in principle would suggest. It has already been noted in particular that:

(i) The compensatory and the afflictive functions are in a sense always present in any one of the forms of reparation, the distinction being essentially, however well marked at a given stage, one of degree (see para. 136 above);

(ii) The punitive function, deemed to be most typical of satisfaction (and guarantees of non-repetition), may find in some cases an invisible ersatz, so to speak, in the award, or in the more or less spontaneous grant, of a higher amount of pecuniary compensation (see para. 138 above). Some remarks by Salvioli, for example, seem to suggest that the matter would require a deeper and more extended study.[436]

2. Fault and satisfaction (and guarantees of non-repetition)

187. Whatever the impact of fault may be on the amount of pecuniary compensation, it seems manifest that the element in question has played an important role with respect to the forms and degrees of satisfaction in

---

[431] This opinion is expressed by, for example, Personnaz, *op. cit.*, p. 106, and, more recently, Gray, who affirms:

". . . Strictly, if the aim of the award is to compensate the loss of the injured alien then the fault of the respondent State should be irrelevant. . . ." (*Op. cit.*, p. 24.)

[432] "Counter-case presented on the part of the Government of Her Britannic Majesty to the Tribunal of Arbitration" (s.l.n.d.) (Archives de l'Etat de Genève), p. 131.

[433] Subilia, *op. cit.*, pp. 59-60, footnote 141.

[434] Martens, *Nouveau Recueil*, 2nd series, vol. XXVII, p. 699.

[435] UNRIAA, vol. IX, p. 121.

[436] Salvioli writes:

". . . In my opinion, the point concerning the *subjective conduct of the guilty party** is not necessarily bound up with the extent of the further consequences of the wrongful act, which, as we have already seen, come under the principle of 'normality' and 'predictability', and so on. . . . In the case of *wilful intent**, the aim of the author was, let us suppose, to cause damage *y*, but in order to accuse the guilty party of further damage y^1 it has to be shown that such damage was normal, that it was predictable; that does not necessarily stem from the fact of the original purpose, which was perhaps to inflict only damage *y*."

But further on he says:

"Nevertheless, I consider that, on the basis of a quite different consideration, it is possible to justify the tendency to be *more demanding towards the author of an act of wilful intent** than towards someone who has acted *through fault**, and *even in regard to the determination of further damage* for which reparation is to be made. The attribution of . . . extrinsic injury to someone who has acted with *wilful intent** is a special form of sanction, a measure of punishment in view of the greater seriousness of harm to the international legal system, when the harm has been committed with *wilful intent**. . . ." (*Op. cit.*, pp. 269-270.)

the repeatedly stressed technical sense. Once more, the authority of Oppenheim can be invoked.[437]

188. Considering the dimensions which the present report has assumed, the Special Rapporteur suggests that the members of the Commission themselves take a good look at the practice referred to in the relevant sections (paras. 106 *et seq.*), and particularly, but not exclusively, at the abundant diplomatic practice (paras. 119 *et seq.*).[438] In both jurisprudence and diplomatic practice the Special Rapporteur has the impression that the so-called "subjective" element represented by fault in a minor or major degree has played a significant role with regard to both:

(i) the coming into play of satisfaction in lieu of, or as a significant complement to, pecuniary compensation; and

(ii) the quality and number of the forms of satisfaction claimed and in most cases obtained.

While the first of the above data emerges from all the cases without exception, the second emerges in a fairly high number of instances.

189. In the less recent practice, particularly significant are, in the Special Rapporteur's view, the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*, the *Moke* and *Arends* cases, the Boxer revolt and the Tellini case, all of which have been referred to above.[439] Other cases that are probably significant, subject to further study, are those of the violation of the Bulgarian frontier by Greece in 1925 (see para. 126 above), the *Panay* incident of 1937 between Japan and the United States (*ibid.*) and most of the post-1945 diplomatic practice cases briefly reviewed above (paras. 127-135). In both sets of cases some degree of fault was presumably admitted by the offending State, in consideration either of the fact that the injury had been inflicted on foreign nationals or agents by public (police or military) officials, or by the fact that the objects of injury were persons or premises with regard to which the injured State was entitled to a special protection.

190. Of course, the question may well arise in a number of the said cases whether and to what extent the fault on the part of an "acting" or "omitting" low-ranking State agent was in fact a fault of the offending State, or whether the latter's responsibility was predicated on a merely objective basis ("State risk"). A deeper and more extended analysis of jurisprudence would, however, be necessary in order to answer such a question.[440] Subject, however, to the results of further study (and in the light of comments from the members of the Commission), the Special Rapporteur would be inclined to believe that a State cannot be considered to be exempt from fault when it does not provide the members of its organization—particularly the members of the police and the armed forces—with adequate instructions concerning the positive and negative duties incumbent upon them with regard to the treatment of foreign nationals and agents.

---

[437] According to Oppenheim:

"... *international tribunals** have in numerous cases awarded damages which must, upon analysis, be regarded as *penal**. Such punitive damages have been awarded, in particular, for the failure of States to apprehend or effectively to punish persons guilty of criminal acts against aliens. The practice of States and tribunals shows other instances of reparation, indistinguishable from punishment, in the form of pecuniary redress *unrelated to the damage** actually inflicted." (*Op. cit.*, p. 355.)

Read in conjunction with paragraph 178 above, this dictum represents an explicit recognition of the impact of the presence and degree of wilful intent or *culpa* upon satisfaction, particularly in the form of "punitive damages".

[438] On the particular relevance that fault assumed in cases where reparation took the form of satisfaction, see, for example, the interesting remarks by R. Luzzatto, "Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. LI (1968), p. 63. Incidentally, Luzzatto's reference (*ibid.*, p. 58, footnote 13) to the manual of R. Quadri, *Diritto internazionale pubblico*, 4th ed. (Palermo, Priulla, 1963), and to the study of the Special Rapporteur, *Gli enti soggetti* . . ., in connection with the problem of "imputation" should be corrected; Quadri's position on imputation—as on other matters—had become quite different in 1963 from what it had been until 1949, when the first edition of his manual appeared. The position of the Special Rapporteur with respect to that of Quadri is specified in "Stati e altri enti . . .", *loc. cit.*, pp. 141 *et seq.*, para. 11 and footnote 8, paras. 27-28 and footnotes, and para. 30 and footnotes; and in "L'Etat dans le sens du droit des gens . . .", *loc. cit.*, pp. 297 *et seq.*, 325-326, 345 and 358 (footnotes 305 and 306).

[439] The Special Rapporteur refers in particular to those motivations of satisfactory remedies which emphasize, together with a punitive or afflictive function which is also present in numerous other instances, the intentional nature of the offence. In the *Responsibility of Germany* case, the tribunal spoke of "a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation" (see footnote 42 above). In the *Moke* case, punitive damages were awarded for the purpose of condemning the unlawful use of force (see the extract from the decision cited in footnote 287 above). In the *Arends* case, the umpire said: "the respondent Government is willing to recognize its responsibility for the untoward act of its officers" (see footnote 288 above). Although in the Tellini case the fascist Italian Government's demands were no doubt arrogantly out of proportion, those which were formulated by the Conference of Ambassadors were presented in terms which seemed to imply a significant degree of negligence on the part of Greece.

[440] G. Palmisano is currently preparing a study of this problem, "Colpa dell'organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi", which is to appear in *Comunicazioni e Studi* (Milan), vol. XIX (1991).

CHAPTER VI

Draft articles on reparation by equivalent, satisfaction and guarantees of non-repetition

191. The following are the draft articles proposed by the Special Rapporteur:

Article 8. Reparation by equivalent

1 (ALTERNATIVE A). The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

1 (ALTERNATIVE B). If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of Article 7, the injured State has the right to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

2. Pecuniary compensation under the present article shall cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

3. Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.

4. For the purposes of the present article, damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.

Article 9. Interest

1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(*a*) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(*b*) shall run until the day of effective payment.

2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result.

Article 10. Satisfaction and guarantees of non-repetition

1. In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which has committed the wrongful act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

2. The choice of the form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence and degree of wilful intent or negligence of the State which has committed the wrongful act.

3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

4. In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction.

WORKS CITED

AGO, R.

"La colpa nell'illecito internazionale", *Scritti giuridici in onore di Santi Romano*, vol. III. Padua, CEDAM, 1940. (Reprinted in *Scritti sulla responsabilità internazionale degli Stati*, vol. I. Naples, Jovene, 1978)

"Le délit international", *Recueil des cours de l'Académie de droit international de La Haye, 1939-II*. Paris, Sirey, 1947. Vol. 68. (Reprinted in *Scritti sulla responsabilità internazionale degli Stati*, vol. I. Naples, Jovene, 1978)

"Second report on State responsibility", *Yearbook of the International Law Commission, 1970*, vol. II, document A/CN.4/233.

ANZILOTTI, D.

"La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", *Revue générale de droit international public* (Paris), vol. XIII, 1906. (Reprinted in S.I.O.I., *Opere di Dionisio Anzilotti*, vol. II, *Scritti di diritto internazionale pubblico*, vol. I. Padua, CEDAM, 1956)

"Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di danaro", *Rivista di diritto internazionale* (Rome), vol. VII, 1913.

Corso di diritto internazionale, vol. I, *Introduzione: teorie generali*. 4th ed. Padua, CEDAM, 1955.

Cours de droit international. French trans. by G. Gidel of *Corso di diritto internazionale*, 3rd ed. Paris, 1929.

APOLLIS, G.
"Le règlement de l'affaire du '*Rainbow Warrior*' ", *Revue générale de droit international public* (Paris), vol. 91, 1987.

ARANGIO-RUIZ, G.
Gli enti soggetti dell'ordinamento internazionale. Milan, Giuffrè, 1951.
La persona giuridica come soggetto strumentale. Milan, Giuffrè, 1952.
"Stati e altri enti (Soggettività internazionale)", *Novissimo digesto italiano* (Turin), vol. XVIII, 1971.
"The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations" with an appendix on "The concept of international law and the theory of international organisation". *Collected Courses of The Hague Academy of International Law, 1972-III.* Leyden, Sijthoff, 1974. Vol. 137.
"L'Etat dans le sens du droit des gens et la notion du droit international", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 26, 1975-1976.
The United Nations Declaration on Friendly Relations and the System of International Law. Alphen aan den Rijn, Sijthoff & Noordhoff, 1979.

BATTAGLINI, G.
"Amministrazione e sovranità nell'ex-Territorio libero di Trieste (In margine a una attuale controversia)", *Studi in onore di Manlio Udina*, vol. I. Milan, Giuffrè, 1975.
"Convenzione europea, misure d'emergenza e controllo del giudice", *Giurisprudenza costituzionale* (Milan), 1982, part I.
"Il riconoscimento internazionale dei principi generali del diritto", *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I. Milan, Giuffrè, 1987.

BISSONNETTE, P. A.
La satisfaction comme mode de réparation en droit international. Annemasse, Imprimerie Grandchamp, 1952. (Thesis, University of Geneva)

BLUNTSCHLI, J. C.
Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt. 3rd ed. Nördlingen, 1878.
French translation by C. Lardy: *Le droit international codifié.* 5th rev. ed. Paris, 1895.

BOLLECKER-STERN, B.
Le préjudice dans la théorie de la responsabilité internationale. Paris, Pedone, 1973.

BROWNLIE, I.
System of the Law of Nations: State Responsibility. Part I. Oxford, Clarendon Press, 1983.

ČEPELKA, Č.
Les conséquences juridiques du délit en droit international contemporain. Prague, Karlova University, 1965.

CHENG, B.
General Principles of Law as Applied by International Courts and Tribunals. London, Stevens, 1953.

COMBACAU, J.
"La responsabilité internationale", *in* H. Thierry and others, *Droit international public.* 4th ed. Paris, Montchrestien, 1984.

CONDORELLI, L.
"L'imputation à l'Etat d'un fait internationalement illicite; solutions classiques et nouvelles tendances", *Collected Courses of The Hague Academy of International Law, 1984-VI.* Dordrecht, Nijhoff, 1988. Vol. 189.

DOMINICÉ, C.
"La satisfaction en droit des gens", *Mélanges Georges Perrin.* Lausanne, Payot, 1984.

DUMAS, J.
"La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers", *Recueil des cours de l'Académie de droit international de La Haye, 1931-II.* Paris, 1932. Vol. 36.

DUPUY, P.-M.
"Le fait générateur de la responsabilité internationale des Etats", *Collected Courses of The Hague Academy of International Law, 1984-V.* Dordrecht, Nijhoff, 1986. Vol. 188.

EAGLETON, C.
The Responsibility of States in International Law. New York, 1928.

FALK, R. A.
"The Beirut raid and the international law of retaliation", *American Journal of International Law* (Washington, D.C.), vol. 63, 1969.

FAUCHILLE, P.
Traité de droit international public (8th ed. of *Manuel de droit international public* by H. Bonfils). Vol. I, part 1. Paris, 1922.

FERRARI BRAVO, L.
Diritto internazionale e diritto interno nella stipulazione dei trattati. Pompei, Morano, 1964.
"Alcune riflessioni sui rapporti fra diritto costituzionale e diritto internazionale in tema di stipulazione di trattati", *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, vol. I. Milan, Giuffrè, 1987.

FEUSTEL, I.
Die Kompetenz-Kompetenz zum Abschluss völkerrechtlicher Verträge in der italienischen Lehre. Berlin, Duncker & Humblot, 1977.

FORLATI PICCHIO, M. L.
La sanzione nel diritto internazionale. Padua, CEDAM, 1974.

GARCÍA AMADOR, F. V.
"Sixth report on State responsibility", *Yearbook of the International Law Commission, 1961*, vol. II, document A/CN.4/134 and Add.1.
Principios de derecho internacional que rigen la responsabilidad: Análisis crítico de la concepción tradicional. Madrid, Escuela de funcionarios internacionales, 1963.

GIULIANO, M.
Diritto internazionale, vol. I, *La società internazionale e il diritto.* 2nd ed. with T. Scovazzi and T. Treves. Milan, Giuffrè, 1983.

GRAEFRATH, B.
"Responsibility and damages caused: relationship between responsibility and damages", *Collected Courses of The Hague Academy of International Law, 1984-II.* The Hague, Nijhoff, 1985. Vol. 185.

GRAY, C. D.
Judicial Remedies in International Law. Oxford, Clarendon Press, 1987.

GUGGENHEIM, P.
Traité de droit international public. Vol. II. Geneva, Georg, 1954.

HACKWORTH, G. H.
Digest of International Law. Vol. V. Washington, D.C., 1943.

HAURIOU, A.
"Les dommages indirects dans les arbitrages internationaux", *Revue générale de droit international public* (Paris), vol. 31, 1924.

JIMÉNEZ DE ARÉCHAGA, E.
"International responsibility", *in* M. Sørensen, ed., *Manual of Public International Law.* London, Macmillan, 1968.

KELSEN, H.
"Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, 1932.

KISS, A.-C.
Répertoire de la pratique française en matière de droit international public. Vol. III. Paris, 1965.

LAPRADELLE, A. DE *and* N. POLITIS
Recueil des arbitrages internationaux. Vol. I (1798-1855), Paris, 1905; Vol. II (1856-1872), Paris, 1923; Vol. III (1872-1875), Paris, 1954.

LATTANZI, F.
Garanzie dei diritti dell'uomo nel diritto internazionale generale. Milan, Giuffrè, 1983.

LAUTERPACHT, H.
"Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international de La Haye, 1937-IV.* Paris, 1938. Vol. 62.

LEAGUE OF NATIONS
Conference for the Codification of International Law. Bases of discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for damage caused in their territory to the persons or property of foreigners (C.75.M.69.1929.V).
Idem, Supplement to volume III (C.75(*a*)M.69(*a*).1929.V).

LUZZATTO, R.
"Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. LI, 1968.

MARTENS, G. F. DE
Nouveau Recueil général de Traités et autres actes relatifs aux rapports de droit international, 2nd series: Vol. XX (1890-1894), Göttingen, 1896; Vol. XXVII (1874-1896), Leipzig, 1902; Vol. XXIX (1885-1902), Leipzig, 1903; Vol. XXX (1879-1902), Leipzig, 1903; Vol. XXXIII (1886-1905), Leipzig, 1906.

MOORE, J. B.
History and Digest of the International Arbitrations to which the United States has been a Party. Vols. I, II, IV and V. Washington, D.C., 1898.
A Digest of International Law. Vols. II, V and VI. Washington, D.C., 1906.

MORELLI, G.
Nozioni di diritto internazionale. 7th ed. Padua, CEDAM, 1967.

NAGY, K.
"The problem of reparation in international law", *in* E. Bokor-Szegö, ed., *Questions of International Law: Hungarian Perspectives*, vol. 3. Budapest, Akadémiai Kiadó, 1986.

OPPENHEIM, L.
International Law: A Treatise, vol. I, *Peace*. 8th ed., H. Lauterpacht, ed. London, Longmans, Green, 1955.

PALMISANO, G.
"Colpa dell'organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi", *Communicazioni e studi* (Milan), vol. XIX (to be published in 1991).

PERASSI, T.
Lezioni di diritto internazionale. Part I. Rome, 1937.

PERSONNAZ, J.
La réparation du préjudice en droit international public. Paris, 1939.

POLITIS, N.
La justice internationale. Paris, 1924.

PRZETACZNIK, F.
"La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", *Revue générale de droit international public* (Paris), vol. 78, 1974.

QUADRI, R.
Diritto internazionale pubblico. 1st ed. Palermo, Priulla, 1949.
Diritto internazionale pubblico. 4th ed. Palermo, Priulla, 1963.

RALSTON, J. H.
Venezuelan Arbitrations of 1903. Washington, D.C., 1904.

REITZER, L.
La réparation comme conséquence de l'acte illicite en droit international. Paris, 1938.

REUTER, P.
"Le dommage comme condition de la responsabilité internationale", *Estudios de derecho internacional: homenaje al Profésor Miaja de la Muela*, vol. II. Madrid, Tecnos, 1979.

RIPERT, G.
"Les règles du droit civil applicables aux rapports internationaux", *Recueil des cours de l'Académie de droit international de La Haye, 1933-II*. Paris, 1934. Vol. 44.

ROUSSEAU, C.
Droit international public, vol. V, *Les rapports conflictuels*. Paris, Sirey, 1983.

ROTH, A.
Schadenersatz für Verletzungen Privater bei völkerrechtlichen Delikten. Berlin, 1934.

SALMON, J. J. A.
"Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international, 1964* (Paris), vol. X.

SALVIOLI, G.
"La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours de l'Académie de droit international de La Haye, 1929-III*. Paris, 1930. Vol. 28.

SCHOEN, P.
"Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau), vol. 10, supp. 2, 1917.

SCHWARZENBERGER, G.
International law, vol. I, *International Law as Applied by International Courts and Tribunals*. 3rd ed. London, Stevens, 1957.

SERENI, A. P.
Diritto internazionale, vol. III, *Relazioni internazionali*. Milan, Giuffrè, 1962.

SIMMA, B.
"Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 20, 1970.

SOCIETÀ ITALIANA PER L'ORGANIZZAZIONE INTERNAZIONALE (S.I.O.I.)
La prassi italiana di diritto internazionale: 1st series (1861-1887), vol. II. Dobbs Ferry, N.Y., Oceana Publications, 1970; 2nd series (1887-1918), vol. III. Dobbs Ferry, N.Y., Oceana Publications, 1979.

STRISOWER, L.
Rapport sur "La responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne ou aux biens des étrangers", *Annuaire de l'Institut de droit international, 1927* (Brussels), vol. 33, part I.

STRUPP, K.
"Das völkerrechtliche Delikt", *in* F. Stier-Somlo, ed., *Handbuch des Völkerrechts*, vol. III, 1st part. Stuttgart, 1920.

SUBILIA, J.-L.
L'allocation d'intérêts dans la jurisprudence internationale. Lausanne, Imprimerie Vaudoise, 1972. (Thesis, University of Lausanne)

UNITED NATIONS
Reports of International Arbitral Awards: vol. I, Sales No. 1948.V.2; vol. II, Sales No. 1949.V.1; vol. III, Sales No. 1949.V.2; vol. IV, Sales No. 1951.V.1; vol. V, Sales No. 1952.V.3; vol. VI, Sales No. 1955.V.3; vol. VII, Sales No. 1956.V.5; vol. IX, Sales No. E/F.59.V.5; vol. X, Sales No. E/F.60.V.4; vol. XI, Sales No. E/F.61.V.4; vol. XII, Sales No. E/F.63.V.3; vol. XIX, Sales No. E/F.90.V.7.

VERDROSS, A.
Völkerrecht. 5th ed. Vienna, Springer, 1964.

VERZIJL, J. H. W.
International Law in Historical Perspective, part VI, *Juridical Facts as Sources of International Rights and Obligations*. Leyden, Sijthoff, 1975.

VISSCHER, C. DE
"La responsabilité des Etats", *Bibliotheca Visseriana*, vol. II. Leyden, 1924.

WENGLER, W.
Völkerrecht. Vol. I. Berlin, Springer, 1964.

WHITEMAN, M. M.
Damages in International Law. Vol. I. Washington, D.C., 1937.
Digest of International Law. Vol. 5, Washington, D.C., 1965; vol. 8, Washington, D.C., 1967.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 3]

DOCUMENT A/CN.4/422 and Add.1*

Second report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur

[*Original: English*]
[*11 and 24 April 1989*]

CONTENTS

NOTE

Instruments relating to jurisdictional immunities of States and their property cited in the present report

Multilateral conventions

	Source
International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926)—hereinafter referred to as the "1926 Brussels Convention"	League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.
and	
Additional Protocol (Brussels, 24 May 1934)	*Ibid.*, p. 214.
European Convention on State Immunity and Additional Protocol (Basel, 16 May 1972)—hereinafter referred to as the "1972 European Convention"	Council of Europe, European Treaty Series, No. 74 (Strasbourg, 1972).

*Incorporating documents A/CN.4/422/Corr.1 and A/CN.4/422/Add.1/Corr.1.

National legislation

The texts listed below, with the exception of the Australian Act, are reproduced in a volume of the United Nations Legislative Series: *Materials on Jurisdictional Immunities of States and Their Property* (Sales No. E/F.81.V.10), part I.

	Source
AUSTRALIA	
Foreign States Immunities Act 1985	Australia, *Acts of the Parliament of the Commonwealth of Australia passed during the year 1985* (Canberra, 1986), vol. 2, p. 2696.
CANADA	
State Immunity Act, 1982	*The Canada Gazette, Part III* (Ottawa), vol. 6, No. 15, 22 June 1982.
PAKISTAN	
State Immunity Ordinance, 1981	*The Gazette of Pakistan* (Islamabad), 11 March 1981.
SINGAPORE	
State Immunity Act, 1979	United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 28 *et seq.*
SOUTH AFRICA	
Foreign States Immunities Act, 1981	Republic of South Africa, *Government Gazette* (Cape Town), vol. 196, No. 7849, 28 October 1981.
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	
State Immunity Act 1978	United Kingdom, *The Public General Acts, 1978*, part 1, chap. 33, p. 715.
UNITED STATES OF AMERICA	
Foreign Sovereign Immunities Act of 1976	*United States Code, 1982 Edition*, vol. 12, title 28, chap. 97.

Introduction

1. This second report of the Special Rapporteur deals, as did the previous one, with the entire set of draft articles on jurisdictional immunities of States and their property adopted on first reading by the International Law Commission at its thirty-eighth session, in 1986,[1] after long consideration. In his preliminary report,[2] submitted to the Commission at its fortieth session, in 1988, the Special Rapporteur analysed the comments submitted in response to the Commission's request by the Governments of 24 States[3] and proposed certain amendments to the draft articles in the light of those comments. The present report is additional to the preliminary report, and the two reports should be read together for the purpose of the second reading of the draft articles.[4]

[1] For the text, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

[2] *Yearbook . . . 1988*, vol. II (Part One), p. 96, document A/CN.4/415.

[3] These comments, which were received before 24 March 1988, together with those submitted after that date by the Governments of five other States, are reproduced in *Yearbook . . . 1988*, vol. II (Part One), p. 45, document A/CN.4/410 and Add.1-5.

[4] The following reports of the previous Special Rapporteur may also be mentioned in this connection: second report: *Yearbook . . . 1980*, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; fifth report: *Yearbook . . . 1983*, vol. II (Part One), p. 25, document A/CN.4/363 and Add.1; sixth report: *Yearbook . . . 1984*, vol. II (Part One), p. 5, document A/CN.4/376 and Add.1 and 2.

I. General comments

2. A closer examination of the comments of Governments shows a clear split of views on the present status of the rule of State immunity in international law.[5] In the light of the two main points of view, the Special Rapporteur will discuss the rule of State immunity in this report and will propose an appropriate approach towards a possible codification of the topic. As a matter of fact, the previous Special Rapporteur, Mr. Sucharitkul, examined

[5] See document A/CN.4/415 (footnote 2 above), paras. 8-10.

State practice concerning the rule of State immunity in detail in his second report and concluded that, in the general practice of States as evidence of customary law, there was no doubt that the principle of State immunity had been firmly established as a norm of customary international law.[6] At that early stage, this conclusion was confirmed as a justification for the Commission to commence work on the topic, and since then the Commission has been making efforts to clarify the extent of the application of the principle of State immunity to the various activities of foreign States.

3. Though the draft articles, which were provisionally adopted in 1986 on first reading, must be tested by reference to accepted principles of international law and emerging State practice, the Commission has already identified the basic concept of the draft—namely, that a State enjoys immunity from the jurisdiction of the court of another State with certain limitations/exceptions.[7] In his preliminary report, the Special Rapporteur tried not to reopen discussion on the theoretical basis of the rule of State immunity. That was why he did not deal in detail with judicial practice and domestic legislation or with international agreements However, after the presentation of the preliminary report, towards the end of the fortieth session, some members of the Commission expressed their preference for hearing about the recent development of the general practice of State immunity in more detail. Although the former Special Rapporteur had already dealt with that in some of his reports in an excellent manner, this is an entirely legitimate request, in particular on the part of those members who have joined the Commission relatively recently. The Special Rapporteur is pleased to respond to it by including in the present report a summary of the recent development of general State practice, without examining in detail the theoretical basis of the rule of State immunity. However, it would be pertinent to stress that what is needed at this stage of second reading is to endeavour to elaborate a new multilateral agreement that would make it possible to reconcile conflicting sovereign interests arising out of the application or non-application of State immunity, rather than mere confirmation of the more fundamental principle of sovereignty in this specific area.

4. One point of view that appeared in the comments of Governments is that a State is absolutely immune from the jurisdiction of a foreign court in practically all circumstances, unless it has expressly consented to submit to such jurisdiction. According to this position, absolute immunity is a norm of general international law and, consequently, States which do not abide by it violate international law. Several States, such as Bulgaria, China, the German Democratic Republic, the Soviet Union and Venezuela, have apparently supported this doctrine,[8] which rests in part on the fact that for some time in the past it was the rule predominantly applied by the courts of several States. However, the doctrine of absolute immunity has gradually given way to a doctrine of restricted immunity, and therefore it now appears that there is no existing rule of customary international law which automatically requires a State to grant jurisdictional immunity to other States in general terms.[9] This process, in which domestic courts have adopted a restrictive view of immunity, will be examined briefly below.

5. The doctrine of absolute immunity appears to have been entrenched in the judicial practice of the nineteenth century. The following selective State practice can be suggested. In France, the Cour de cassation, in the *Gouvernement espagnol* v. *Casaux* case (1849),[10] affirmed the doctrine of absolute immunity in respect of private law acts, by applying the general principle that a Government might not be subjected to the jurisdiction of a foreign State with respect to commitments which it might have entered into.[11] At the beginning of this century, the German courts also began to embrace the doctrine of absolute immunity. For example, in the *Hellfeld* v. *den Fiskus des russischen Reiches* case (1910),[12] the Prussian Court for Conflicts of Jurisdiction took the view that the distinction between the State as exercising its sovereignty and the State as appearing in its private law personality had not been generally recognized in international law. Again, in the *Polish Loans* case (1921)[13] the same court supported the rule of absolute immunity by holding that, according to international law, a foreign State, both in its public capacity and in transactions of a private law nature, was not subject to the jurisdiction of the courts of another country, except in cases of voluntary submission and in matters involving immovable property.[14] In the United Kingdom, the lower courts generally followed the absolute doctrine after 1880, at least with respect to arrest or attachment of foreign State-owned vessels,[15] though in *The "Cristina"* (1938)[16] some Lords in the highest court reserved their view as to whether the doctrine was applicable in international law.[17] In addition to this selective case law, it has often been said that the courts of many countries, including the United States of America, Australia, India and South Africa, adhered to the absolute immunity doctrine in the past.[18]

6. On the other hand, even at that early stage, especially in the 1920s and the 1930s, the courts of Belgium[19]

[6] Document A/CN.4/331 and Add.1 (footnote 4 above), para. 90.

[7] See document A/CN.4/415 (footnote 2 above), paras. 66 and 110.

[8] *Ibid.*, para. 11.

[9] But for the view held by some States that the principle of jurisdictional immunity of States is universally recognized in international law, see document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of, for example, Bulgaria (para. 3) and China (para. 1).

[10] Dalloz, *Recueil périodique et critique de jurisprudence, 1849* (Paris), part I, p. 9; Sirey, *Recueil général des lois et des arrêts, 1849* (Paris), part I, p. 93.

[11] See S. Sucharitkul, "Immunities of foreign States before national authorities", *Collected Courses of The Hague Academy of International Law, 1976-I* (Leyden, Sijthoff, 1977), vol. 149, pp. 140-141.

[12] *Zeitschrift für internationales Recht* (Leipzig), vol. XX (1910), p. 416; *The American Journal of International Law*, vol. 5 (1911), p. 490.

[13] *Annual Digest of Public International Law Cases, 1919-1922* (London, 1932), p. 116, case No. 78.

[14] See I. Sinclair, "The law of sovereign immunity. Recent developments", *Collected Courses . . ., 1980-II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, pp. 130-131.

[15] *Ibid.*, pp. 121-127.

[16] United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485.

[17] See Sucharitkul, *loc. cit.* (footnote 11 above), p. 162.

[18] See I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979), pp. 328-329, footnote 5.

[19] See Sucharitkul, *loc. cit.*, pp. 132-135.

and Italy[20] developed and applied the so-called restrictive theory, which denied immunity to foreign States in proceedings arising out of acts done in a non-sovereign capacity (acts *jure gestionis*). As early as 1879, a Belgian court denied immunity in proceedings arising out of a contract for the sale of guano, observing that there can no longer be any question of sovereignty when a foreign Government "takes actions and enters into contracts which, always and everywhere, have been considered to be commercial contracts, subject to the jurisdiction of commercial courts".[21] One scholar, after an extensive survey of State practice, published in 1933, concluded, with regard to the restricted immunity doctrine based on the distinction between acts *jure imperii* and acts *jure gestionis*, that the idea that this distinction was "peculiar to Belgium and Italy must be enlarged to include Switzerland, Egypt, Romania, France, Austria and Greece".[22] Since then, the distinction between acts *jure imperii* and acts *jure gestionis* has been developed and applied in a number of important civil law countries in Western Europe.[23]

7. As the practice of State trading has spread rapidly, particularly since 1945, the number of States rejecting the absolute theory has continued to grow up to this day. In the United States, the Supreme Court in the *Berizzi Brothers Co.* v. *SS "Pesaro"* case (1926)[24] upheld the immunity of a vessel owned and operated by the Italian Government and engaged in the carriage of passengers and cargo to the United States.[25] But in subsequent cases the Court took the position that the granting of State immunity was a matter of national policy as determined by the executive branch of the Government, and thereafter, in 1952, the Department of State announced that it espoused the restrictive theory in the so-called "Tate letter".[26] The present position in the United States is governed by the provisions of the *Foreign Sovereign Immunities Act of 1976*, which reflects the restricted immunity doctrine. The United Kingdom courts admitted the applicability of the restrictive theory in *The "Philippine Admiral"* (1975).[27] In this case the Judicial Committee of the Privy Council, breaking the tradition, held that a foreign State could not claim immunity from jurisdiction in an action *in rem* against a vessel owned by that State if the vessel was being used in commercial service by the Government of that State.[28] In this connection, reference to the opinion of two members of the English Court of Appeal, Lord Denning and Lord Justice Shaw, in *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977)[29] is not without significance; they held that the Bank was not entitled to immunity in an action *in personam*, since the letter of credit on which the plaintiff had sued the Bank was a commercial document. As Lord Denning remarked, in an *obiter dictum* in this case, their position indicates the adoption of the principle that a foreign State has no immunity when it enters into a commercial transaction with a trader in the United Kingdom.[30] Subsequent to this case, the United Kingdom enacted the *State Immunity Act 1978*, which represented the restricted immunity theory.

8. In the Federal Republic of Germany, the former position in favour of the absolute immunity doctrine was decisively rejected in the *Danish State Railways in Germany* case (1953)[31] by the District Court of Kiel, which held that "a State must be subject to the jurisdiction of foreign courts in respect of activities of a private and civil nature", such as the operation of bus services by a foreign State in Germany. This restrictive doctrine was also recognized in the decision of the Federal Constitutional Court in 1963 in the *X* v. *Empire of* . . . [Iran] case.[32] After a comprehensive survey of the judicial practice in other States, relevant treaties and the various codification efforts,[33] the Court supported the theory of restricted immunity as follows:

> As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.[34]

Such an approach on the issue of State immunity was followed by the courts of other countries, for example by the Austrian Supreme Court in *Dralle* v. *Republic of Czechoslovakia* (1950)[35] and *Holubek* v. *United States* (1961),[36] by the Court of Appeal of Brussels in *S. A. "Eau, gaz, électricité et applications"* v. *Office d'Aide*

---

[20] *Ibid.*, pp. 126-132.

[21] *Rau, Vanden Abeele et Cie.* v. *Duruty* case (*Pasicrisie belge, 1879* (Brussels), part 2, p. 175).

[22] E. W. Allen, *The Position of Foreign States before National Courts, Chiefly in Continental Europe* (New York, Macmillan, 1933), p. 301, cited in Sinclair, *loc. cit.* (footnote 14 above), p. 134.

[23] See H. Lauterpacht, "The problem of jurisdictional immunities of foreign States", *The British Year Book of International Law, 1951*, vol. 28, pp. 250-272.

[24] *United States Reports*, vol. 271 (1927), p. 562.

[25] See Sucharitkul, *loc. cit.* (footnote 11 above), p. 155; and G. M. Badr, *State Immunity: An Analytical and Prognostic View* (The Hague, Martinus Nijhoff, 1984), p. 36.

[26] Published in *The Department of State Bulletin* (Washington, D.C.), vol. 26 (1952), pp. 984-985. See Sinclair, *loc. cit.* (footnote 14 above), pp. 161-163.

[27] *Owners of the ship "Philippine Admiral"* v. *Wallem Shipping (Hong Kong) Ltd. and others* (*The All England Law Reports, 1976*, vol. I, p. 78).

[28] See Badr, *op. cit.* (footnote 25 above), pp. 48 and 79; and Sinclair, *loc. cit.* (footnote 14 above), pp. 154-155.

[29] *The All England Law Reports, 1977*, vol. I, p. 881.

[30] See R. Higgins, "Recent developments in the law of sovereign immunity in the United Kingdom", *American Journal of International Law* (Washington, D.C.), vol. 71 (1977), pp. 425-430. See also Badr, *op. cit.* (footnote 25 above), pp. 49-50; and Sinclair, *loc. cit.* (footnote 14 above), pp. 155-156.

[31] *Juristenzeitung* (Tübingen), vol. 9 (1954), p. 117; *International Law Reports, 1953* (London), vol. 20, 1957, p. 178.

[32] *Entscheidungen des Bundesverfassungsgerichtes* (Tübingen), vol. 16 (1964), p. 27; *International Law Reports* (London), vol. 45 (1972), p. 57; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 282.

[33] *International Law Reports*, vol. 45, pp. 63-73.

[34] *Ibid.*, p. 80.

[35] *Österreichische Juristen Zeitung* (Vienna), vol. 5 (1950), p. 341, case No. 356; *International Law Reports, 1950* (London), vol. 17 (1956), case No. 41, p. 155; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 183.

[36] *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; *International Law Reports* (London), vol. 40 (1970), p. 73; United Nations, *Materials on Jurisdictional Immunities* . . ., p. 203.

mutuelle (1956)[37] and by Netherlands courts in *Krol* v. *Bank Indonesia* (1958),[38] *N. V. Cabolent* v. *National Iranian Oil Company* (1968)[39] and *Parsons* v. *Republic of Malta* (1977).[40]

9. Furthermore, several domestic statutes similar to those adopted by the United Kingdom and the United States of America have recently been enacted by other countries, including Singapore (1979), Pakistan (1981), South Africa (1981), Canada (1982) and Australia (1985). These codification efforts clearly refused the general principle of the absolute immunity of a foreign State and adhered to the restrictive principle of State immunity. Attention has also been drawn to certain relevant treaty practice, particularly in the field of commercial activities by a foreign State and its agencies. The 1926 Brussels Convention and its Additional Protocol of 1934 preserved State jurisdictional immunity only for public vessels of a non-commercial nature. This principle was confirmed by the 1958 Convention on the Territorial Sea and the Contiguous Zone,[41] which treated public ships operated for commercial purposes in the same manner as private merchant ships, abandoning the distinction between public and private ships based only upon their ownership.[42]

10. In the light of the preceding brief sketch of State practice from the nineteenth century to the present period, it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law.[43] However, it might be argued that the doctrine of absolute immunity is still the norm on which States that have not consented to its modification could rely. But, as the previous Special Rapporteur suggested in his sixth report,[44] unless the advocates of the absolute doctrine provide "concrete evidence of a judicial decision allowing immunity in cases where it would have been denied in countries practising restricted immunity", the restrictive trends could not be denied simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle.[45] A crucial fact is that "the judicial practice of the States that had upheld absolute immunity has now radically changed"[46] and, therefore, there is no general consensus in favour of absolute immunity.

11. The Special Rapporteur will refer next to the rule of State immunity from the opposite point of view. The question is whether general international law now leaves a State free to deny immunity to other States as it sees fit. If the rule of State immunity is governed by international law, we can suppose that international law contains a norm limiting the freedom of States to deny immunity to other States. However, the problem of the scope of limitations on this freedom has not been resolved so as to permit any precise formulation which would meet general consensus. Indeed, advocates of the restrictive doctrine of State immunity have proposed that acts of a foreign State can be divided into two categories, acts *jure imperii* and acts *jure gestionis*, and that the foreign State is entitled to immunity only with respect to the first category. Unfortunately, in practice this distinction has posed difficulties in its application to various types of State activity.[47] This seems to be one of the reasons why adherents of the doctrine of absolute immunity are hesitant to accept the restrictive trend.[48]

12. With respect to that distinction, the Special Rapporteur will next turn his attention to the question of the so-called "purpose or nature" test. According to the restrictive theory, acts *jure imperii* are acts done by a State for a "public purpose", and it is only for such acts that immunity is or should be accorded. But the purpose criterion has been rejected in judicial practice and criticized by international lawyers because all acts performed by a State could be assumed to have some public purpose.[49] Therefore, some courts have considered the nature of the act of a foreign State determinative.[50] According to the nature test, the foreign State is not entitled to immunity if the act is of such nature that a private person could perform it. Yet the nature test also gives rise to difficulties. A foreign State being sued for breach of a contract with a private person should not be granted immunity; but, if one supposes that private persons in general do not maintain armed forces, it follows that a foreign State is entitled to immunity in a proceeding concerning a contract for the purchase of supplies for such forces.[51]

13. As to the difficulty in applying the "purpose or nature" test, one scholar, examining recent judicial

---

[37] *Pasicrisie belge* (Brussels), 1957, part II, p. 88; *International Law Reports, 1956* (London), vol. 23 (1960), p. 205.

[38] *Nederlandse Jurisprudentie* (Zwolle), No. 164 (1959); *International Law Reports, 1958-II* (London), vol. 26 (1963), p. 180.

[39] *Nederlandse Jurisprudentie* (Zwolle), No. 484 (1969); *International Law Reports* (London), vol. 47 (1974), p. 138; United Nations, *Materials on Jurisdictional Immunities . . .*, p. 344.

[40] See *Netherlands Yearbook of International Law*, vol. IX (1978), pp. 272-273.

[41] United Nations, *Treaty Series*, vol. 516, p. 205.

[42] See Brownlie, *op. cit.* (footnote 18 above), p. 329; see also the argumentation of the Federal Constitutional Court in *X* v. *Republic of the Philippines* (1977) (United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 310-311).

[43] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 214-217.

[44] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 46.

[45] Badr also refers to this "implicit general acquiescence in the restricted rule of immunity" as follows:

"A fact worthy of being pointed out is that there is no record of any protests or other diplomatic representations made over the years to any of the States applying the restrictive rule by those other States who have failed in their pleas before the courts of the former. Had there been a perception that under international law States were entitled to immunity from the jurisdiction of other States, those increasing 'violations' of such a rule of general international law would not have failed to elicit appropriate reactions from the 'injured' States." (*Op. cit.* (footnote 25 above), pp. 33-34.)

[46] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 47.

[47] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 210-214.

[48] According to C. Schreuer, *State Immunity: Some Recent Developments* (Cambridge, Grotius Publications, 1988):

"In fact, one of the main arguments of the proponents of absolute immunity has always been that it is impossible to draw the line between the two types of State activity. . . ." (P. 41.)

[49] See, for example, Brownlie, *op. cit.*, (footnote 18 above), pp. 330-332.

[50] See, for example, Sucharitkul, *loc. cit.* (footnote 11 above), p. 187.

[51] See, for example, Sinclair, *loc. cit.* (footnote 14 above), pp. 213-214; Brownlie, *op. cit.*, p. 331.

practice in a number of countries in a work published in 1988,[52] remarks that, while the more recent cases of "contracts for the purchase, transportation or financing of goods for public works" in a defendant foreign State are almost invariably regarded as commercial and non-immune cases, "borderline questions" still remain in cases of "State-run services in areas like transportation, telecommunication or education".[53] In the latter cases, he indicates, the judicial practice varies from country to country, or even from court to court in the same country. However, he goes on to say:

> A borderline area will always remain. But this grey zone can be narrowed if we employ the right criteria and if courts are prepared to look beyond national confines to try and find common international standards.[54]

It may also be noted that the same approach was suggested in 1979 by Ian Brownlie, according to whom the "least objectionable technique" is to clarify the exception from immunity of "a particular type of activity or subject-matter, for example government ships operated for commercial purposes", leaving aside any attempt to establish general criteria for distinguishing between acts *jure imperii* and acts *jure gestionis*.[55]

14. In sum, there is no single, generally accepted meaning either of acts *jure imperii* or of acts *jure gestionis*, though a number of scholars support the principle of restricted immunity. At the same time, however, now that we cannot neglect "a clear and unmistakable trend towards recognition of the principle that the jurisdictional immunity of States is not unlimited",[56] the Special Rapporteur understands that both acts *jure imperii* and acts *jure gestionis* need to be elaborated and defined in objective legal terms.

15. The formulation of article 6 of the draft will be considered from the above point of view. One possible formulation of a general rule of State immunity is as follows:[57]

"*Article 6. State immunity*

"In general, a foreign State shall be immune from the jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii*; it shall not be immune in the circumstances provided in the present articles."

This formulation does not entitle the foreign State to automatic residual immunity, because the foreign State must demonstrate that the conduct subject to litigation was performed in its *jure imperii* capacity, even if the conduct does not fall within one of the express exceptions. Yet such a formulation, which imposes on the foreign State the burden of proving its entitlement to immunity, has never been proposed and is not adopted in the present article 6.[58] The more usual approach in drafting is that, if none of the express exceptions applies, a foreign State is entitled to immunity from jurisdiction; the first alternative formulation of this approach begins with a general rule of immunity and then lists the exceptions to the immunity of a foreign State,[59] and the second alternative lists the exceptions and then provides a residual general rule of immunity.[60]

16. The first alternative formulation mentioned above was used in article 6, but there are two conflicting views as to the possible addition of the bracketed phrase, "and the relevant rules of general international law".[61] The deletion of the phrase might restrict the jurisdiction of some States whose courts are already applying the rule of restricted immunity.[62] It is actually conceivable that some cases covered by the domestic rule fall outside the cases of non-immunity provided for in the draft. In view of the recent developments supporting the doctrine of restricted immunity, the retention of the phrase would not be illogical, as it would allow for the future development of the law on this subject.

17. On the other hand, the retention of the phrase may result in increasing the number of exceptions to immunity by subjecting the provision to unilateral interpretation by a court of the forum State, which would lead to undue restrictions on acts *jure imperii*.[63] Should the deletion of the phrase be admitted for this or other reasons, the Special Rapporteur would propose the inclusion in the draft of the following new article 6 *bis* for the purpose of keeping a balance between the two different views referred to above:

"*Article 6* **bis**

"Notwithstanding the provision of article 6, any State Party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State Party, unless the

---

[52] Schreuer, *op. cit.* (footnote 48 above), pp. 17-31.

[53] *Ibid.*, pp. 18 and 26.

[54] *Ibid.*, p. 41.

[55] Brownlie, *op. cit.* (footnote 18 above), p. 331.

[56] Sinclair, *loc. cit.* (footnote 14 above), p. 196.

[57] An example of such a formula may be found in the ILA Montreal Draft Convention on State Immunity approved by ILA at its Sixtieth Conference (Montreal, 29 August-4 September 1982), article II of which reads:

> "*Article II. Immunity of a foreign State from adjudication*
>
> "In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii*. It shall not be immune in the circumstances provided in article III."

(Article III of the draft provides for several exceptions to jurisdictional immunity.) See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5 *et seq.*, resolution No. 6, "State immunity".

[58] Article 6 as adopted on first reading provides:

> "*Article 6. State immunity*
>
> "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles [and the relevant rules of general international law]." (See footnote 1 above.)

[59] See, for example, the United States Foreign Sovereign Immunities Act of 1976, sects. 1604 and 1605; the United Kingdom State Immunity Act 1978, sects. 1 (1) and 2-11; and the ILA Montreal Draft Convention on State Immunity (see footnote 57 above), arts. II and III.

[60] See, for example, the 1972 European Convention, arts. 1-15.

[61] See document A/CN.4/415 (footnote 2 above), paras. 59-65.

[62] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of, for example: Australia, paras. 14-15; Federal Republic of Germany, para. 6; Nordic countries, para. 3; Switzerland, para. 23.

[63] *Ibid.*, comments of: Bulgaria, para. 9; German Democratic Republic, para. 15; USSR, para. 9.

latter State raises objection within thirty days after the declaration was made. The court of the State which has made the declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either the State which has made the declaration or the State which has raised objection can withdraw its declaration or objection at any time."

18. It might be too early to predict whether the proposed new article 6 *bis* will be acceptable to a number of States, but the Special Rapporteur believes that it is consistent with the current general trend in State practice towards the restrictive rule of State immunity in international law; in cases falling outside the scope of articles 11 to 19, the draft does not prejudice the extent of jurisdictional immunity already recognized in States which have made the optional declaration under the proposed articles 6 *bis*. At any rate, this provision might be conducive to the formation of a precise rule of customary international law, which could be based upon regular and uniform judicial practice among States—something which thus far has not yet occurred. In this connection, the Special Rapporteur's view is that, if the proposed new article 6 *bis* on the optional declaration is adopted and if the bracketed phrase of article 6 is deleted, article 28 may have to be reconsidered.

Interpretative provisions (article 3)

19. The Special Rapporteur suggested in his preliminary report that paragraph 2 of article 3 be aligned on paragraph 3 of the new article 2 proposed in that report[64] in the light of the fact that several Governments did not agree to the purpose criterion included in the former paragraph because of its subjective or artificial nature. Paragraph 2 of article 3 had been a compromise formula proposed by the Drafting Committee at the thirty-fifth session.[65] The Commission, encountering strong objections to the adoption of the nature test in determining whether or not a contract is commercial, had had to seek a criterion which would also take into account the motive or the ultimate purpose that a foreign State was seeking to achieve by concluding the contract with a private party. That is how the paragraph came to be introduced into the draft. However, this double criterion, referring primarily to the nature of the contract but also to the relevant practice of a foreign State, could lead to uncertainties in application, since the practice of the State is not necessarily clear, and lean to the doctrine of absolute immunity. As far as the text is interpreted literally, the purpose test is to be used as a supplementary one in cases of doubt. But, according to the commentary to paragraph 2 of article 3, "if after the application of the 'nature' test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction".[66] As one Government commented, the purpose of the contract would almost always be determined on a one-sided basis.[67] Indeed, the double criterion was designed to provide an appropriate protection for developing countries' endeavours in their national economic development. Though the Special Rapporteur does not deny this necessity in formulating this article, he feels that a more balanced criterion could be ensured by the formula appearing in paragraph 3 of the proposed new article 2, according to which reference should be made primarily to the nature of the contract, while its purpose should also be taken into account to the extent that public purpose is clearly stipulated in an international agreement between the States concerned or a written contract between the foreign State and the private party.

[64] A/CN.4/415 (see footnote 2 above), para. 29.

[65] See *Yearbook ... 1983*, vol. I, p. 291, 1805th meeting, para. 68.

[66] *Yearbook ... 1983*, vol. II (Part Two), p. 35, para. (2) of the commentary.

[67] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of the United Kingdom, para. 9.

II. Comments on part III of the draft: [Limitations on] [exceptions to] State immunity

ARTICLE 13 (Personal injuries and damage to property)

20. As the previous Special Rapporteur indicated in his fifth report,[68] the relevant provisions in recent codifications provide for the denial of immunity for illegal acts of foreign States which cause death or personal injury or damage to or loss of property. Those enactments usually require a territorial jurisdiction as a limiting factor in the application of the torts exception; for example, in the United Kingdom the State Immunity Act 1978 provides, in section 5 (*b*), that a State is not immune as regards proceedings in respect of certain injury or damage "caused by an act or omission in the United Kingdom". On the other hand, there are two cumulative requirements in article 13 of the draft, which is very similar to article 11 of the 1972 European Convention: "... the author of the act or omission ... [must be] present in that territory at the time of the act or omission". Though in his preliminary report the Special Rapporteur suggested the deletion of the second territorial requirement,[69] this tort exception would not be applicable to tort committed abroad or other transfrontier injurious acts because of the first requirement of territorial connection: the

[68] Document A/CN.4/363 and Add.1 (see footnote 4 above), paras. 86-98.

[69] Document A/CN.4/415 (see footnote 2 above), para. 141.

relevant act or omission must occur "in whole or in part in the territory of the State of the forum".

21. As to the question of State responsibility, the illegality of the act or omission referred to in article 13 is not determined by the rules of international law. According to the commentary to this article, "This exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the *lex loci delicti commissi*".[70] In other words, the applicable law is in principle the law of the forum State. Next, the Special Rapporteur understands that the phrase "the act or omission which is alleged to be attributable to the State" is not governed by the general requirement of State responsibility. This point should also be clarified in the light of the comments of some Governments.

22. Furthermore, while article 13 covers literally physical injury to the person or damage to tangible property, it might be arguable that the scope of the article would be too wide to get the support of a significant number of States for its formulation. In fact, as far as the intent of the Commission reflected in the commentary is concerned, article 13 was designed to cover mainly accidents occurring routinely within the territory of the forum State. The present text of article 13, which was adopted by the Commission in 1984, is identical with that originally submitted by the previous Special Rapporteur in 1983; it had been replaced in the intervening time by a revised version which narrowed down its application to traffic accidents, for which insurance coverage could usually be sought.[71] In any event, the Commission should reconsider the scope of the article in the light of the fact that liability cases connected with criminal offences have thus far been very few in practice.

ARTICLE 15 (Patents, trade marks and intellectual or industrial property)

23. Some developing countries have raised objections to article 15 because it would have a detrimental effect on their economic growth and development. In general, they think that refraining from enacting legislation to protect industrial or intellectual property is consistent with their national interest, since free reproduction of any new technological advancement in their countries may be for the benefit of the society as a whole. However, article 15 does not in any way affect the competence of a State to select and implement its domestic policies within its territory. In fact, the article has placed two specific territorial restrictions on this proposed exception to State immunity. First of all, the alleged infringement must have occurred within the territory of the forum State, and second, the case must involve rights which are protected in the forum State. Therefore, under article 15 a domestic court could not be empowered to decide infringement occurring outside the territory of the forum State.

ARTICLE 18 (State-owned or State-operated ships engaged in commercial service)

24. The Special Rapporteur proposes that the expression "non-governmental" be deleted because if it is retained paragraphs 1 and 4 could be interpreted to mean that a ship owned by a State and used in commercial service enjoys immunity from the jurisdiction of another State; while all commercial ships in service under a State-trading system might invoke immunity, a commercial ship operating under the free-market system would be subject to local jurisdiction. Such an uneven legal consequence is quite unacceptable to a significant number of States. It was pointed out that, in countries having the State-trading system, a State is the owner of the ship but authorizes an entity separated from the State to use and operate that ship for commercial purposes. In such a case, unless the State could allow the separate operator (the "State enterprise" referred to in article 11 *bis* proposed by the Special Rapporteur in his preliminary report[72]) to answer a claim arising out of the operation of the ship, the State should always be answerable for any causes of action relating to the operation of that ship. This proposal would be consistent with the general trend emerging from such international conventions as the 1926 Brussels Convention, the 1958 Convention on the Territorial Sea and the Contiguous Zone[73] and the 1982 United Nations Convention on the Law of the Sea.[74] In the Brussels Convention, it was recognized that State-owned or State-operated ships and cargoes carried on them were subject to local jurisdiction in the same manner as ordinary private merchant ships, and that State immunity was claimable only in respect of State-owned ships which were used for public or non-commercial purposes. Such a distinction may also be found in the conventions on the law of the sea: the distinction between government ships operated for commercial purposes and those operated for non-commercial purposes.

25. Following the rationale and the wording of these international conventions, the expression "non-governmental" should be deleted in paragraphs 1 and 4 of article 18. With regard to paragraph 6, the Special Rapporteur considers that it should be redrafted because it could be misinterpreted to the effect that States may plead all measures of defence, prescription and limitation of liability only in proceedings relating to the operation of the relevant ships and cargoes. Finally, the Special Rapporteur doubts whether granting immunity to ships owned or operated by the developing countries is advantageous to them in the long run. If they are not answerable for claims in respect of the operation of ships and the cargoes on board those ships, private parties in the developed as well as other developing countries would hesitate to engage in commercial service with the ships owned or operated by such developing countries.

26. With regard to article 18, two Governments said that the introduction into the draft articles of the concept of segregated State property could facilitate the solution of problems relating to State-owned or State-operated ships in commercial service.[75] In view of those comments and the necessity for a new provision similar to the article 11 *bis* proposed by the Special Rapporteur in his pre-

[70] *Yearbook ... 1984*, vol. II (Part Two), p. 66, para. (2) of the commentary to article 14 (now article 13).

[71] *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 59.

[72] Document A/CN.4/415 (see footnote 2 above), para. 122.

[73] See footnote 41 above.

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

[75] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of: Byelorussian SSR, para. 13; USSR, para. 15.

liminary report,[76] he suggests that the following new paragraph 1 *bis* be included in article 18:

1 *bis*. If a State enterprise, whether agency or separate instrumentality of the State, operates a ship owned by the State and engaged in commercial service on behalf of the State and, by virtue of the applicable rules of private international law, differences relating to the operation of that ship fall within the jurisdiction of a court of another State, the former State is considered to have consented to the exercise of that jurisdiction in a proceeding relating to the operation of that ship, unless the State enterprise with a right of possessing and disposing of a segregated State property is capable of suing or being sued in that proceeding.

27. The Commission must duly identify the crucial differences between the two major politico-economic systems in the world today, especially in the light of their growing trade relations. However, socialist countries have a distinct advantage under the absolute theory. That is because their trade organizations are an essential part of the State and can easily qualify for immunity. As an attempt to curtail this opportunism, the Special Rapporteur had proposed article 11 *bis*. The same consideration would hold true for article 18.

28. Next, also as regards article 18, one Government suggested that the Commission consider the question of State-owned or State-operated aircraft engaged in commercial service.[77] This question is governed by treaties of international civil aviation law, which include the following:

(*a*) Convention relating to the Regulation of Aerial Navigation (Paris, 13 October 1919)[78] and several additional protocols;

(*b*) Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 12 October 1929);[79]

(*c*) Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (Rome, 29 May 1933);[80]

(*d*) Convention on International Civil Aviation (Chicago, 7 December 1944);[81]

(*e*) Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7 October 1952).[82]

29. In the 1944 Chicago Convention, a distinction is made between State aircraft and civil aircraft; the Convention applies to the latter. According to article 3 (*b*) of the Convention, State aircraft comprise "aircraft used in military, customs and police service". This implies that an aircraft is not to be considered a State aircraft merely by reason of its ownership or operation by the State. It is therefore justifiable to draw the conclusion that State immunity cannot be invoked in proceedings relating to State-owned or State-operated aircraft, except for aircraft used in military, customs and police service.[83] In other words, an aircraft owned or operated by a foreign State is assimilated to a privately owned and operated aircraft (civil aircraft) and is subject to the jurisdiction of the territorial State based on its territorial sovereignty (art. 1). Thus, the Chicago Convention is based on the assumption that a State cannot invoke its immunity in the case where an aircraft owned or operated by that State, being used in commercial service, makes use of the rights and privileges granted by that Convention.

30. The 1929 Warsaw Convention established certain uniform rules relating to the conditions of international carriage by air, including documents of carriage and the liability of the carrier. However, it does not provide for any reservation relating to State immunity. The following provisions should be noted:

Article 1

1. This Convention applies to all international carriage of persons, baggage or goods performed by aircraft for reward. . . .

. . .

Article 2

1. This Convention applies* to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.[84]

. . .

Furthermore, pursuant to the 1952 Rome Convention, civil actions concerning obligations or liability can be brought by private claimants in the case of collisions or other accidents of aircraft owned or operated by a State, at least within the framework of that international agree-

[76] See footnote 72 above.

[77] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Switzerland, para. 30.

[78] "1919 Paris Convention" (League of Nations, *Treaty Series*, vol. XI, p. 173).

[79] "1929 Warsaw Convention" (*ibid.*, vol. CXXXVII, p. 11).

[80] "1933 Rome Convention" (*ibid.*, vol. CXCII, p. 289). Article 3 of this Convention exempts the following aircraft from precautionary attachment:

"(*a*) Aircraft assigned exclusively to a Government service, the postal service included, commerce excepted;

"(*b*) Aircraft actually put in service on a regular line of public transportation and indispensable reserve aircraft;

"(*c*) Any other aircraft assigned to transportation of persons or property for hire, when it is ready to depart for such transportation, except in a case involving a debt contracted for the trip which it is about to make or a claim arising in the course of the trip."

(See L. J. Bouchez, "The nature and scope of State immunity from jurisdiction and execution", *Netherlands Yearbook of International Law, 1979*, vol. X, p. 27.)

The International Civil Aviation Conference (Chicago, 1 November-7 December 1944), in its resolution VI, recommended that the States represented at the Conference consider the desirability of ratifying or adhering to the Rome Convention, if they had not already done so, because:

". . . the seizure or detention of aircraft where the attaching creditor cannot invoke a judgment and execution obtained beforehand in the ordinary course of procedure, or an equivalent right of execution, affects the expeditious movement of aircraft in international commerce". (*International Civil Aviation Conference, Final Act and Related Documents* (Washington, D.C., 1945), Department of State publication 2282, p. 38.)

[81] "1944 Chicago Convention" (United Nations, *Treaty Series*, vol. 15, p. 295).

[82] "1952 Rome Convention" (*ibid.*, vol. 310, p. 181).

[83] Bouchez, *loc. cit.* (footnote 80 above).

[84] The "conditions" are related to the meaning of "international carriage".

ment. The following provisions of the Convention are noteworthy:

Article 2

1. The liability for compensation contemplated by Article 1 of this Convention shall attach to the operator of the aircraft.

2. (*a*) For the purposes of this Convention the term "operator" shall mean the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.

. . .

3. The registered owner of the aircraft shall be presumed to be the operator . . .

Article 26

This Convention shall not apply to damage caused by military, customs or police aircraft.

Article 30

For the purposes of this Convention:
—"Person" means any natural or legal person, including a State.
. . .

31. The Special Rapporteur is inclined to the view that, apart from the above-mentioned treaties, there is not a uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. One scholar observed in a work published in 1967 that the practice was not uniform with regard to State-owned or State-operated aircraft and that the United Kingdom granted immunity to them, taking into account the extent of State ownership or control in each case.[85] According to the view of socialist countries, aircraft engaging in international transport are State property (i.e. fixed assets funds under the operative management of the nationally owned enterprise) and the immunity of the aircraft is not waived in general.[86] According to Soviet law, the Soviet airline Aeroflot is not a juridical person and no suit concerning liability of the airline for damage arising out of international air carriage may be brought in a foreign State.[87] However, since the Soviet Union is a party to the 1929 Warsaw Convention and the 1952 Rome Convention, it may be inferred that, in spite of its legal position, the USSR practically accepts non-immunity for State-owned commercial aircraft operated by Aeroflot in accordance with the rules on liability established by those two Conventions. Nevertheless, apart from those treaties, relevant legal cases which may constitute State practice are scanty.[88] The Special Rapporteur would therefore suggest that the question of aircraft be dealt with along the lines set out in the above comments, instead of introducing a special provision concerning aircraft in article 18.

ARTICLE 19 (Effect of an arbitration agreement)

32. With regard to the two bracketed alternative provisions contained in article 19, the Special Rapporteur considers that the expression "civil or commercial matter" is preferable to "commercial contract".[89] If the rationale of article 19 is the implied consent, there is no reason why denying immunity in cases involving agreement to arbitrate should be linked to one of the exceptions such as a commercial contract exception.[90] Indeed, arbitrations between States and private persons of foreign nationality are often envisaged in commercial contracts concluded between them, but this fact does not seem to be directly related to the recognition of the arbitration exception to immunity. Most of the recently enacted State immunity laws also contain the rule of non-immunity deriving from the existence of arbitration agreements, which are not necessarily concerned with commercial contracts.[91] Furthermore, the reference to

[85] G. Schwarzenberger, *A Manual of International Law*, 5th ed. (London, Stevens, 1967), p. 103.

[86] Concerning the position of the German Democratic Republic in particular, see F. Enderlein, "The immunity of State property from foreign jurisdiction and execution: Doctrine and practice of the German Democratic Republic", *Netherlands Yearbook of International Law 1979*, vol. 10, p. 123. The German Democratic Republic is a party to the 1929 Warsaw Convention (the signature and ratification of which were effected by Germany on 30 September 1933) by virtue of a note dated 1 September 1955 to the effect that it considered itself bound by the said Convention (see C. N. Shawcross and K. M. Beaumont, *Air Law*, 3rd ed. (London, Butterworth, 1975), appendix A, p. 7).

[87] See C. Osakwe, "A Soviet perspective on foreign sovereign immunity: Law and practice", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 23 (1983), pp. 24-25. The Union of Soviet Socialist Republics has been a party to the 1929 Warsaw Convention since 1934 and to the 1952 Rome Convention since 1982.

[88] Some relevant cases have been decided in the United States of America. In *Sugarman* v. *Aeromexico, Inc.* (1980) (*Federal Reporter*, 2nd series, vol. 626 (1980), p. 270), the court held that the Mexican airline had waived State immunity in an action relating to its operations to the United States when it obtained a foreign air carrier permit, not referring to the commercial activity exception of section 1605 (*a*) (2) of the Foreign Sovereign Immunities Act of 1976; in *Aboujdid* v. *Singapore Airlines Ltd.* (1986) (*New York Supplement*, 2nd series, vol. 503, p. 555), the court held that State immunity did not apply to commercial transactions, even if the alleged negligent acts of airlines occurred outside the United States without causing direct effect in the United States. In *Barkanic* v. *General Administration of Civil Aviation of the People's Republic of China* (1987) (*Federal Reporter*, 2nd series, vol. 822 (1987), p. 11; *United States Reports*, vol. 484 (1987), p. 964 (*certiorari* denied)), the court held that it had subject-matter jurisdiction over a foreign State's airline if an American passenger bought and paid for a ticket in the United States from an agent of the foreign airline and used the ticket for passage. In general, a foreign State-owned or State-operated airline qualifies as a foreign State under the Foreign Sovereign Immunities Act of 1976, and it has to waive its immunity in actions concerning flights which it operates to or from the United States when it obtains from the United States a foreign air carrier permit. It may be expected that the relevant cases in this area would almost all be dealt with by the application of the rule of commercial contract or transaction exception to State immunity under the above-mentioned Act of 1976.

[89] For comments by Governments, see document A/CN.4/415 (footnote 2 above), paras. 193-199. At the thirty-seventh session of the Commission, however, Mr. Razafindralambo observed that the "formulation 'out of a civil or commercial matter' could also pose problems in the case of investment, for an investment contract was hybrid *sui generis* and might contain clauses under administrative law, such as clauses on public works or clauses concerning concessions" (*Yearbook . . . 1985*, vol. I, p. 243, 1917th meeting, para. 17).

On this point, Mann argued that a concession was still a contract under municipal law depending upon the proper law applicable in a given case, even if the concession was a contract under public law and not an ordinary commercial contract. (F. A. Mann, "State contracts and international arbitration", *The British Year Book of International Law, 1967*, vol. 42, p. 8.)

[90] See Schreuer, *op. cit.* (footnote 48 above), p. 69.

[91] The 1972 European Convention (art. 12) refers to arbitration on "a civil or commercial matter". The United Kingdom State Immunity Act 1978 (sect. 9), the ILA Montreal Draft Convention on State Immunity (see footnote 57 above) (art. III) and the Australian Foreign States Immunities Act 1985 (sect. 17) deal with arbitration in general.

"civil" matters seems to have the advantage of not excluding cases such as the arbitration of claims arising out of the salvage of a ship which may not be regarded as solely commercial.

33. As to the reference to a court, article 19 uses the words "before a court of another State which is otherwise competent", while the original proposal made by the previous Special Rapporteur in his sixth report was "a court of another State on the territory or according to the law of which the arbitration has taken or will take place".[92] The Special Rapporteur prefers the latter formulation.

34. Although it is sometimes said that arbitration is a particular procedure of dispute settlement distinct from adjudication by a court of law,[93] ordinary courts have played a supportive role in arbitration.[94] In the light of such legal practice, article 19 introduces in the draft a denial of State immunity before domestic courts in proceedings relating to arbitration, even if one party thereto is a foreign State. Of course, modalities of that supervisory function of domestic courts may vary with the relevant rules of each domestic law. According to the text of article 19 and the commentary thereto, the supervision of arbitrations extends over "questions connected with the arbitration agreement", such as the interpretation and validity of that agreement, the arbitration procedure and the setting aside of arbitral awards.[95] Some domestic laws concerning civil procedure provide that the setting aside of the award will take place for reasons of public policy. The 1958 New York Convention[96] provides that the setting aside of an award may be ordered only by a court of the State in which the arbitration has taken place.

35. On this question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, Qatar suggested that a mention of a proceeding relating to the "recognition and enforcement" of an arbitral award should be added in subparagraph (*c*) of article 19.[97] The previous Special Rapporteur seemed to consider that the subject would be covered in part IV of the draft, dealing with enforcement in general. Expressing this view at the thirty-seventh session, he said that "arbitration was also linked to pre-trial attachment, enforcement and execution, all of which would be dealt with in more detail in part IV of the draft".[98] On the other hand, he suggested, in the discussion of article 19 (then article 20), that some courts of States in which arbitration took place would need authority to confirm and enforce the arbitral award, going beyond the usual supervision of arbitration.[99] This would be a correct view but, as Reuter pointed out with regard to the enforcement of arbitral awards, there are two other cases: (*a*) enforcement by a court of another State in accordance with the law of which the arbitration has taken or would take place; (*b*) enforcement by a court of another State in which the property at issue is located.[100] The Special Rapporteur, therefore, calls the Commission's attention to the question of the enforcement of arbitral awards in article 19.

36. Except for the Australian Foreign States Immunities Act 1985,[101] recent codifications do not regard the submission by a State to arbitration as a waiver of immunity from enforcement jurisdiction. In contrast to article 19 of the draft, they make no reference to the question of enforcement of arbitral awards[102] or simply treat it within their general provisions concerning enforcement.[103] In State practice, it also appears that two conflicting views have been asserted as to whether, by entering into an agreement to arbitrate, a State cannot invoke its immunity in proceedings relating to the enforcement of the resulting award against it. One point of view is that it should be taken to have waived its

---

[92] Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 256 (art. 20).

[93] See, for example, the view of R.-J. Dupuy, the sole arbitrator in *Texaco and Calasiatic* v. *Government of Libya* (1977) (*International Law Reports* (Cambridge), vol. 53 (1979), p. 389, para. 44 of the award), cited by Mr. Mahiou in *Yearbook ... 1985*, vol. I, p. 238, 1916th meeting, para. 28. See also document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Bulgaria, para. 12.

[94] See Schreuer, *op. cit.* (footnote 48 above), pp. 71-75. See also the sixth report of the previous Special Rapporteur, document A/CN.4/376 and Add.1 and 2 (footnote 4 above), paras. 247-248. Mr. Sucharitkul stated:

"... Arbitration may exist as a legal process in court or out of court. As an out-of-court settlement, an arbitral proceeding is still not entirely free from judicial control, by way of judicial review, appeal or enforcement order. ..." (*Ibid.*, para. 234.)

Mr. Razafindralambo clearly admitted this supportive function as follows:

"... An arbitration agreement necessarily entailed a waiver of jurisdictional immunity with respect to the arbitral tribunal and also with respect to a domestic court for any action relating to arbitration. ..." (*Yearbook ... 1985*, vol. I, p. 243, 1917th meeting, para. 16.)

The action is related to questions, such as the appointment of arbitrators and an appeal to a court, which the parties must refer to an external and impartial judicial body.

[95] See *Yearbook ... 1985*, vol. II (Part Two), p. 63, para. (1) of the commentary to article 20.

[96] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (United Nations, *Treaty Series*, vol. 330, p. 3).

[97] According to that State, "The obvious fact that the enforcement of an arbitral award may depend on judicial participation has to be recognized." (See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Qatar, para. 9.)

[98] *Yearbook ... 1985*, vol. I, p. 249, 1918th meeting, para. 13.

[99] *Ibid.*, p. 249, para. 10. He had stated in his sixth report as follows:

"Once a State agrees in a written instrument to submit to arbitration disputes which have arisen or may arise between it and other private parties to a transaction, there is an irresistible implication, if not an almost irrebuttable presumption, that it has waived its jurisdictional immunity in relation to all pertinent questions arising out of the arbitral process, from its initiation to *judicial confirmation and enforcement of the arbitral awards**. ..." (Document A/CN.4/376 and Add.1 and 2 (see footnote 4 above), para. 255.)

[100] *Yearbook ... 1985*, vol. I, p. 241, 1916th meeting, para. 47.

[101] The Australian Act (sect. 17) admits the exercise of the supervisory jurisdiction of a court in a proceeding (*a*) by way of a case stated for the opinion of a court, (*b*) to determine a question as to the validity or operation of the arbitration agreement or as to the arbitration procedure, or (*c*) to set aside the award. Furthermore, it provides for the foreign State's non-immunity in proceedings concerning "the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made", under certain conditions.

[102] See, for example, the 1972 European Convention and the United States Foreign Sovereign Immunities Act of 1976.

[103] See, for example, the United Kingdom State Immunity Act 1978 (sect. 13, paras. (2) to (4)) and the ILA Montreal Draft Convention on State Immunity (footnote 57 above) (art. VIII).

immunity from enforcement in any other State where the award can be enforced. In the *Ipitrade International, S.A.* v. *Federal Republic of Nigeria* case,[104] Ipitrade requested[105] the United States District Court, District of Columbia, to confirm the arbitral award made in Switzerland on 25 April 1978 against Nigeria.[106] On 25 September 1978, the Court ordered the award enforced, on the grounds that Nigeria had waived its immunity by concluding the arbitration agreement.[107] A similar position was taken by the same court in *Libyan American Oil Company (LIAMCO)* v. *Socialist People's Libyan Arab Jamahiriya* (1980).[108] After receiving LIAMCO's petition to confirm and enforce the arbitration award made in Switzerland on 12 April 1977,[109] the Court held that, by agreeing to the arbitration clauses in the concessions, Libya had impliedly waived its sovereign immunity in the United States, since the clauses provided that the arbitration might take place anywhere. Although the Court admitted its jurisdiction, it did not exercise it.[110] The Svea Court of Appeals in Sweden, to which LIAMCO then applied, held, in its judgment of 18 June 1980, that the acceptance of an arbitration clause by a State had constituted a waiver of its immunity, with respect also to proceedings relating to the enforcement of the award.[111]

37. The other view is that the arbitration agreement cannot always be taken as a waiver of State immunity in proceedings concerning enforcement. According to a recently proposed amendment to the United States Foreign Sovereign Immunities Act of 1976, an agreement to arbitrate by a foreign State would amount to non-immunity in proceedings to compel submission to arbitration or to confirm, recognize or enforce an award, for example (*a*) if the arbitration takes place in the United States or (*b*) if the award is or may be governed by a treaty in force for the United States calling for the recognition and enforcement of arbitral awards.[112] In addition to those views, it should also be noted that in Switzerland the Federal Tribunal refused enforcement of an arbitral award which had been rendered at Geneva in 1977 against Libya because the merits of the dispute did not have a "sufficient domestic relationship".[113] Perhaps, in view of the rather confusing State practice, the Commission could have avoided referring, in article 19, to proceedings with regard to the enforcement of arbitral awards. One scholar has observed: "Recent decisions in the United States and other countries . . . have denied foreign States immunity from execution on the basis of the foreign State's agreement to arbitrate";[114] while another considers the more recent judicial practice concerning the enforcement of arbitral awards as being far from clear.[115] In the light of this, the Special Rapporteur believes that the question of the enforcement of arbitral awards has been dealt with correctly but negatively in the draft, in spite of the comment by Australia suggesting the need for a more explicit treatment.[116]

38. Furthermore, there is a particular question concerning the enforcement of arbitral awards on which the Commission should take a clear position in reconsidering the present article 19. On this point, attention should be given to the fact that there are at least two types of enforcement of arbitral awards. One is execution in the generally accepted sense of the term, which would be a proper subject of part IV of the draft, and the other is "turning the award into a judgment or a title equivalent to a judgment by providing it with an *exequatur* or some similar judicial certificate".[117] Quite apart from the first type of enforcement of the award by execution, it is not

---

[104] *Federal Supplement, 1979*, vol. 465, p. 824; *International Law Reports* (Cambridge), vol. 63 (1982), p. 196.

[105] In accordance with article 5 of the 1958 New York Convention (see footnote 96 above), to which Nigeria and Switzerland were also parties.

[106] Though Nigeria refused to participate in the arbitration proceedings, relying on the defence of State immunity, the award was considered final and binding under Swiss law.

[107] The agreement provided that performance of the contract would be governed by the laws of Switzerland and that any disputes arising under the contract would be submitted to arbitration by the International Chamber of Commerce.

[108] *Federal Supplement, 1980*, vol. 482, p. 1175; *International Law Reports* (Cambridge), vol. 62 (1982), p. 220.

[109] See *International Law Reports*, vol. 62, p. 198.

[110] The dispute was non-arbitrable under the law of the United States, i.e. the Court was precluded from ruling on the validity of the nationalization as an act of State. See Schreuer, *op. cit.* (footnote 48 above), p. 79.

[111] For the purpose of enforcing the arbitration award of 12 April 1977 mentioned above (para. 36), LIAMCO had requested the Court to rule that it be executed as a binding Swedish judgment (see *International Law Reports*, vol. 62, p. 225). However, two judges expressed a dissenting opinion to the effect that a sovereign State had immunity from the jurisdiction of Swedish courts, which also applied to the *exequatur* proceedings, and that the arbitration clause contained in the concession agreements might not be equiparated with an explicit waiver of the right to invoke immunity (*ibid.*, p. 228).

[112] See T. B. Atkeson and S. D. Ramsey, "Proposed amendment of the Foreign Sovereign Immunities Act", *American Journal of International Law* (Washington, D.C.), vol. 79 (1985), p. 771.

[113] *Socialist People's Libyan Arab Jamahiriya* v. *Libyan American Oil Company (LIAMCO)*, judgment of the Federal Tribunal of 19 June 1980 (*Annuaire suisse de droit international, 1981*, vol. 37, p. 217; *International Legal Materials* (Washington, D.C.), vol. 20 (1981), p. 151). Since the dispute was related to the financial consequences arising from the cancellation of an oil concession in Libya, the Federal Tribunal held that Libya was immune from the attachment order obtained by LIAMCO from the Zurich District Court in 1977. See M. Blessing and T. Burckhardt, "Sovereign immunity—A pitfall in State arbitration?", *Swiss Essays on International Arbitration* (Zurich, Schulthess, 1984), p. 113.

[114] P. M. McGowan, "Arbitration clauses as waivers of immunity from jurisdiction and execution under the Foreign Sovereign Immunities Act of 1976", *New York Law School Journal of International and Comparative Law*, vol. 5 (1984), p. 430.

[115] Schreuer, *op. cit.* (footnote 48 above), p. 76. See also J. W. Dellapenna, *Suing Foreign Governments and Their Corporations* (Washington (D.C.), Bureau of National Affairs, 1988). Dellapenna reasons as follows:

> "No consensus exists among nations either on recognition of foreign judgments or on the proper means of enforcing judgments against foreign States. . . .
>
> "If one has obtained formal recognition abroad of a judgment from a United States court against a foreign State, one will then confront the extent to which the law of the enforcing country permits execution or other enforcement against a foreign State. Most countries long continued to follow the tradition of absolute immunity from execution even when firmly committed to restrictive immunity from suit . . . [and] probably still adhere to this tradition." [pp. 401-403.]

[116] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of Australia, para. 37.

[117] Mann, *loc. cit.* (footnote 89 above), p. 18.

clear whether the proceeding to obtain a preliminary order for an *exequatur* of the award is precluded from the proceedings to which State immunity cannot be invoked by article 19. If the proceedings to be brought to turn an arbitral award into an order of the domestic court are considered the "final point" of the arbitration proceedings, rather than the beginning of execution, a State party to an arbitration agreement would have to be regarded as not immune from those proceedings.[118]

39. If one approaches the question from the view that "an application for enforcement serves no useful purpose except as a first step towards execution",[119] the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as the State's consent has not been given to the jurisdiction of the courts relating to actual execution. On the other hand, if one considers that—distinguishing the recognition of an award from its execution—recognition is "the normal complement of the binding character of the arbitration agreement and should not be affected by considerations of sovereign immunity",[120] the immunity would apply to the process of execution but not to the preceding recognition of the arbitral award.

40. With regard to this question, mention should also be made of the practice of the French courts, in which a strict distinction has been drawn between recognition of arbitral awards and actual execution of the awards. According to the decision of the Tribunal de grande instance of Paris in the *Socialist Federal Republic of Yugoslavia* v. *Société européenne d'études et d'entreprises* case (1970):[121]

> By the very fact of becoming a party to an arbitration clause the Yugoslav State agreed to waive its immunity from jurisdiction with regard to arbitrators and their award up to and including the procedure for granting an *exequatur* which was necessary for the award to acquire full force;
>
> Waiver of jurisdictional immunity does not in any way involve waiver of immunity from execution. The order granting an *exequatur* for the disputed arbitral award does not, however, constitute a measure of execution but simply a preliminary measure taken prior to measures of execution. . . .

The same position was taken by the Court of Appeal of Paris in the *Benvenuti and Bonfant SARL* v. *Government of the People's Republic of the Congo* case (1981).[122] Though it might be France's "own peculiar method of dealing with applications to enforce arbitral awards against foreign States",[123] the Special Rapporteur considers that the method would provide the Commission with a useful guide for rethinking the question and he would therefore suggest that the Commission consider adding to article 19 the following subparagraph (*d*):

"(*d*) the recognition of the award,"

on the understanding that it should not be interpreted as implying waiver of immunity from execution.

ARTICLE 20 (Cases of nationalization)

41. The provision of article 20 of the draft has to be reviewed in connection with article 15. The position of the developing countries with regard to article 15 is that, since their economic policies require the expropriation or nationalization of certain businesses or industries which may involve intangible property, subparagraph (*b*) of article 15 might operate to hinder their economic and industrial development in regard to their competence to take measures of expropriation or nationalization affecting the rights mentioned in the article. After similar concerns were expressed by some members of the Commission, article 20 was proposed as a general saving clause.[124] The Special Rapporteur considers that article 20 should be retained in the draft. In fact, a domestic court might be required to judge the lawfulness of foreign nationalization measures in connection with a proceeding concerning intellectual or industrial property rights. Let us assume (i) that company A, incorporated under the laws of State X, has registered a patent in State X and also in State Y, to which company A exported its product, and further (ii) that State X nationalized company A and then applied to the authorities in State Y for the patent in State Y to be reissued or registered in the name of State X. In this case, if State Y's patent office reissued the patent for State X and company A brought an action for patent infringement, State Y's court would encounter the issue of the validity of State X's nationalization. Under article 15, subparagraph (*b*), of the draft, State X could not invoke State immunity in the court of State Y, and the court could judge the lawfulness of State X's nationalization under the existing rules of international law. In such a case, irrespective of the provision of article 20, the domestic court may apply the existing rules of international law concerning nationalization.

---

[118] *Ibid.*

[119] *Ibid.*, p. 19.

[120] See G. R. Delaume, *Transnational Contracts: Applicable Law and Settlement of Disputes* (Dobbs Ferry, N.Y., Oceana Publications), binder II, booklet 16 (1990), chap. XIV, p. 19, para. 14.03 (publication in fascicle form). The Tribunal de grande instance of Paris also held, in the *Socialist Federal Republic of Yugoslavia* v. *Société européenne d'études et d'entreprises* case (see para. 40), that the order granting an *exequatur* for the award,

> ". . . affirming the validity of the award for all purposes, *constituted merely the necessary sequel to the award** and did not violate in any way the immunity from execution enjoyed by the Yugoslav State". (See footnote 121 below.)

[121] *Journal du droit international* (Clunet) (Paris), 98th year (1971), p. 131 and in particular pp. 132-133; *International Law Reports* (Cambridge), vol. 65 (1984), pp. 46 *et seq.*

[122] *Journal du droit international* (Clunet) (Paris), 108th year (1981), p. 843, at p. 845; *International Law Reports* (Cambridge), vol. 65 (1984), p. 89. An arbitral award had been made in this case, in 1980, in accordance with the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (United Nations, *Treaty Series*, vol. 575, p. 158). At the request of Benvenuti and Bonfant, the Tribunal de grande instance of Paris granted the company an *exequatur* to enforce the award, subject to the condition that it would obtain prior authorization for any measures of execution. The company then appealed to the Court of Appeal of Paris to revoke this condition. The Court held that, though article 55 of the Washington Convention provided that nothing in article 54, which governed the procedure for obtaining an *exequator* for awards, was to be construed as restricting the immunity from execution, "the order granting an *exequatur* for an arbitral award did not . . . constitute a measure of execution but simply a preliminary measure prior to measures of execution".

[123] Schreuer, *op. cit.* (footnote 48 above), p. 77.

[124] Corresponding to paragraph 2 of former draft article 11 (see *Yearbook . . . 1984*, vol. II (Part Two), p. 59, footnote 200, and *ibid.*, p. 69, para. 12 of the commentary to article 16 (now article 15)).

III. Comments on part IV of the draft: State immunity in respect of property from measures of constraint

42. The majority view of Governments as well as writers is that immunity from measures of constraint is separated from the jurisdictional immunity of a State. However, there are some writers who argue that allowing plaintiffs to proceed against foreign States and then withholding from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of being left with an unenforceable judgment and expensive legal costs.[125] Among Governments, Switzerland points out that immunity from execution is not different in nature from immunity from jurisdiction and that the Commission's draft departs appreciably from that of the 1972 European Convention with regard to measures of execution.[126] The 1972 European Convention adopts a complicated solution. The basic rule is a general prohibition of enforcement measures subject to the possibility of an express waiver. However, the Convention provides for a direct obligation of contracting States to (voluntarily) abide by a judgment given against them. In the case of non-compliance, the judgment creditor is given the possibility of instituting proceedings before a court of the State against which the judgment has been given. Alternatively, an additional protocol opens the possibility of bringing an action before a special tribunal on State immunity, the European Tribunal. There is also a possibility for States parties to make an optional declaration which restores the possibility of taking enforcement measures after all. As between the States making the optional declaration, judgments arising from industrial or commercial activities may be enforced against property of the debtor State which is used exclusively for such activity. The system under the European Convention is based on the obligation of States parties to abide voluntarily by the judgment rendered against them, and it would therefore be difficult to apply elsewhere the same system in its entirety.

43. In addition to a waiver, the United Kingdom State Immunity Act 1978 permits enforcement of a judgment or an arbitral award in respect of property which is for the time being in use or intended for use for commercial purposes. The United States Foreign Sovereign Immunities Act of 1976 establishes a general rule of immunity from execution with a number of exceptions. However, the exceptions refer only to commercial property. One of the differences between the United Kingdom Act and the United States Act is that under the United States Act a waiver is only possible with respect to commercial property, while under the United Kingdom Act a waiver can apply to non-commercial property. The general tendency of State practice in European countries is to permit enforcement with regard to commercial property but deny it in the case of property designated for public purposes. Article 21 of the draft has been drawn up along these lines. The only point for consideration is whether the phrase in subparagraph (*a*) "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" should be deleted, as suggested by several Governments.[127] Practice in European countries would be better reflected if this suggestion were adopted. If the phrase is not deleted, the addition of the words "Unless otherwise agreed between the States concerned" at the beginning of the article might alleviate the difficulties on the part of those countries which prefer the deletion of the above-mentioned phrase from subparagraph (*a*).

44. Bank accounts of a State are involved in many cases concerning constraint measures. One possible view is that bank accounts are inherently commercial assets which may not be regarded as serving any public purpose. Another view is that a mere future possibility of public use is sufficient to consider the bank account immune. Both views are somewhat extreme. In the *National Iranian Oil Company* (NIOC) case (1983),[128] involving the attachment of assets of NIOC held in various banks in the Federal Republic of Germany, the Federal Constitutional Court found that the mere possibility of future use of the funds for sovereign functions was no basis for immunity. A similar judgment was rendered by the District Court of Frankfurt in the *Non-resident Petitioner* v. *Central Bank of Nigeria* case (1975).[129] Moneys in bank accounts under the control of a diplomatic or consular mission carry the presumption of a public purpose and, therefore, immunity.[130] According to the United Kingdom Act, immunity from execution would apply if it could be shown "that the bank account was earmarked by the foreign State solely . . . for being drawn on to settle liabilities incurred in commercial transactions".[131] The burden of proof would lie on the judgment creditor. Indeed, the present wording of article 23, paragraph 1 (*a*), seems to express the understanding on customary law sufficiently clearly.

---

[125] See Schreuer, *op. cit.* (footnote 48 above), p. 125.

[126] See document A/CN.4/410 and Add.1-5 (footnote 8 above), comments of Switzerland, para. 31.

[127] *Ibid.*, comments of: Australia, para. 39; Canada, para. 2; Nordic countries, para. 11; Qatar, para. 11; United Kingdom, para. 33 (*c*); Switzerland, para. 31.

[128] *Entscheidungen des Bundesverfassungsgerichtes* (Tübingen), vol. 64 (1984), p. 1; *International Law Reports* (Cambridge), vol. 65 (1984), p. 215.

[129] *Neue juristische Wochenschrift* (Frankfurt), vol. 23 (1976), p. 1044; *International Legal Materials* (Washington, D.C.), vol. 16 (1977), p. 501; United Nations, *Materials on Jurisdictional Immunities . . .*, pp. 290 *et seq.*

[130] The 1961 Vienna Convention on Diplomatic Relations (United Nations, *Treaty Series*, vol. 500, p. 95) has no express provisions concerning bank accounts.

[131] Lord Diplock's dictum in *Alcom Ltd.* v. *Republic of Colombia* (1984) (*The All England Law Reports, 1984*, vol. 2, p. 13).

45. As to the account of the central bank, the British Court of Appeal has twice denied immunity to the Central Bank of Nigeria.[132] On the other hand, the United States Foreign Sovereign Immunities Act of 1976 preserves the immunity from attachment and execution of property belonging to a foreign central bank or monetary authority held for its own account. Taking into account the provisions of the United States Act and the comments of the Federal Republic of Germany,[133] article 23, paragraph 1 (*c*), could be reformulated as follows: "(*c*) property of the central bank or other monetary authority which is in the territory of another State and serves monetary purposes, unless that property is allocated or earmarked within the meaning of subparagraph (*b*) of article 21;" and, as a consequence, paragraph 2 could be deleted.

[132] See *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (see footnote 29 above); and *Hispano Americana Mercantil S.A.* v. *Central Bank of Nigeria* (1979) (*Lloyd's Law Reports, 1979*, vol. 2, p. 277; reproduced in United Nations, *Materials on Jurisdictional Immunities . . .*, p. 449).

[133] See document A/CN.4/410 and Add.1-5 (footnote 3 above), comments of the Federal Republic of Germany, para. 31.

Proposed changes

46. The Special Rapporteur suggests that the following changes be made in articles 21 and 23:

ARTICLE 21 (State immunity from measures of constraint)

Addition of the following words at the beginning of the article: "Unless otherwise agreed between the States concerned";

or

Deletion of the following words in subparagraph (*a*): "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed".

ARTICLE 23 (Specific categories of property)

Addition of the following words at the end of paragraph 1 (*c*): "and serves monetary purposes".

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 4]

DOCUMENT A/CN.4/420

Comments and observations received from Governments

[*Original: English*]
[*30 March 1989*]

CONTENTS

NOTE

Multilateral conventions referred to in the present document

	Source
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, *Treaty Series*, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, *Juridical Yearbook 1969* (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 referred to as the "1975 Vienna Convention on the Representation of States")	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

Introduction

1. At its thirty-eighth session, held in 1986, the International Law Commission adopted provisionally, on first reading, the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.[1] The Commission decided that, in accordance with articles 16 and 21 of its statute, the draft articles should be transmitted through the Secretary-General to Governments for comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1988.[2]

2. By paragraph 9 of resolution 41/81 of 3 December 1986, and again by paragraph 10 of resolution 42/156 of 7 December 1987, both entitled "Report of the International Law Commission", the General Assembly

[1] For the text of the draft articles, see *Yearbook ... 1986*, vol. II (Part Two), pp. 24 *et seq.*

[2] *Ibid.*, p. 24, para. 32.

urged Governments to give full attention to the request of the International Law Commission for comments and observations on the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

3. Pursuant to the Commission's request, the Secretary-General addressed circular letters, dated respectively 25 February 1987 and 22 October 1987, to Governments inviting them to submit their comments and observations by 1 January 1988.

4. The replies received in 1988 are to be found in document A/CN.4/409 and Add.1-5.[3] An additional reply received on 29 March 1989 is reproduced below.

[3] *Yearbook ... 1988*, vol. II (Part One), p. 125.

COMMENTS AND OBSERVATIONS RECEIVED FROM THE UNITED STATES OF AMERICA

[*Original: English*]
[*23 March 1989*]

1. The International Law Commission developed draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier that were adopted provisionally by the Commission, on first reading, at the thirty-eighth session, held in 1986.[1] At that time, the Commission transmitted the draft articles through the Secretary-General to the Governments of Member States with a request that they submit written comments and observations to the Secretary-General, to be transmitted to the Commission. The draft articles were discussed in the Sixth Committee during the forty-first, forty-second and forty-third sessions of the General Assembly. The United States of America, among other States, provided its views on the draft articles in the Sixth Committee.[2]

2. The Special Rapporteur examined in his eighth report[3] the written comments and observations submitted by Governments as well as the summary of views expressed by States during the debate in the Sixth Committee. At its fortieth session, the Commission began the "second" reading of the draft articles and discussed the proposals made by the Special Rapporteur for revision of the articles in the light of the comments of Governments. At the conclusion of that discussion, the Commission decided to refer the draft articles to the Drafting Committee, together with the proposals made by the Special Rapporteur as well as those formulated during the discussion in the plenary Commission, on the understanding that the Special Rapporteur could make new proposals to the Drafting Committee on the basis of the comments and observations made in the Commission's plenary discussion and those that might be made in the Sixth Committee.[4] Although the report of the Commission on its fortieth session was not available until just before the Sixth Committee commenced, a number of States expressed views on the draft articles in the Committee.[5]

3. Having had the opportunity to review that report, the United States submits the following comments and observations for the consideration of the Special Rapporteur and other members of the Commission at the forty-second session of the Commission. Our initial comments generally address our view that there is no need for draft articles on this topic at this time and that approval of the draft articles would be counter-productive. We then comment specifically on certain articles. The absence of United States comments on particular articles or matters raised by particular articles does not indicate and should not be construed as indicating support for such articles or matters.

I. General comments

4. While the United States Government commends the International Law Commission, and especially its Special Rapporteur, Mr. Alexander Yankov, for the work done on this subject, the United States, like a number of other States that have submitted written comments and observations, remains convinced that articles on the subject are not necessary, or even desirable.[6]

5. The subject of the status of the diplomatic courier and the diplomatic bag, in one form or another, has been before the Commission since 1949. Unlike many, if not most, of the other topics of which the Commission has been seized recently, the topic has already been addressed by the Commission and acted upon by the United Nations and most Member States in a variety of circumstances.

[1] For the text of the draft articles, see *Yearbook ... 1986*, vol. II (Part Two), pp. 24 *et seq.*

[2] For the views expressed in the Sixth Committee, see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-first session of the General Assembly" (A/CN.4/L.410), sect. C; "Topical summary ... forty-second session of the General Assembly" (A/CN.4/L.420), sect. F.3; "Topical summary ... forty-third session of the General Assembly (A/CN.4/L.431), sect. E. See also the comments and observations of Governments transmitted to the Commission through the Secretary-General, reproduced in *Yearbook ... 1988*, vol. II (Part One), p. 125, document A/CN.4/409 and Add.1-5.

[3] *Yearbook ... 1988*, vol. II (Part One), p. 163, document A/CN.4/417.

[4] *Yearbook ... 1988*, vol. II (Part Two), p. 75, para. 292.

[5] See "Topical summary ... forty-third session of the General Assembly" (A/CN.4/L.431), sect. E.

[6] See document A/CN.4/417 (footnote 3 above), para. 13 and footnote 11.

6. The existing régime for the diplomatic courier and the diplomatic bag generally is provided in article 27 of the 1961 Vienna Convention on Diplomatic Relations. The Convention, which generally codified customary international law and practice relating to diplomatic relations, was based upon draft articles developed by the Commission between 1954 and 1958. The Commission in developing those articles and the United Nations Conference on Diplomatic Intercourse and Immunities in adopting them largely unchanged in 1961 recognized that the régime did not address many of the details of this subject, and the Commission was subsequently entrusted with the task of analysing these issues and further elaborating the régime for the diplomatic bag.

7. None the less, the Commission and the United Nations have subsequently dealt with the topic in a variety of different contexts and have continued to provide for the basic régime set out in article 27. The same basic régime was proposed by the Commission in the draft articles that it developed in regard to special missions between 1961 and 1968, and incorporated in the Convention on Special Missions adopted in 1969.[7] It was also proposed by the Commission in the draft articles that it developed in regard to the representation of States in their relations with international organizations of a universal character, and incorporated in the Convention adopted by the Conference convened by the United Nations on that topic in 1975.[8] The Commission now proposes a similar régime, modified to elaborate and, in some instances, develop new rights or obligations in relation to the bag and courier. In what has generally been recognized as the most important of the draft articles, the Commission continues to consider a provision that would permit the host State to request that the bag be opened or refuse entry of the bag. This provision is similar to the provisions that the Commission developed in regard to consular missions between 1955 and 1961 and incorporated in the Vienna Convention on Consular Relations, adopted by a conference convened by the United Nations on that topic in 1963. The United States, like other Governments and a number of members of the Commission, opposes any such change in the régime of the diplomatic bag and believes the history of the 1961 Vienna Convention is instructive on this point.

8. In part, the Commission and the United Nations Conference in 1961 declined to address the many details of the régime for the diplomatic bag because the proposed solutions to several specific and sometimes isolated issues created more problems than they appeared to resolve. While the United States commends the work that the Commission has done since it began this most recent effort on this topic, the draft articles reveal that the situation has not changed over the years. The draft articles attempt to bring together in one document the régime of the diplomatic bag as it has been applied in various different contexts, and to resolve the issues that may have arisen in State practice. The United States Government is concerned that the articles and the controversy that they have generated, particularly in regard to article 28, demonstrate that the situation that existed in 1961 continues.

9. In this respect, the United States Government believes that it is important not to overlook the value of the existing régime. The use of the diplomatic bag, with the protection that it provides to correspondence and other items transported in the bag for the official use of the mission, has been and remains vital to the operation of all diplomatic missions and, therefore, to the efficient conduct of foreign relations. The basic régime provided in article 27 of the 1961 Vienna Convention, as supplemented by customary international law and practice, adequately establishes a legal régime for the conduct of diplomatic relations which strikes the necessary and desirable balance between the corresponding rights and obligations of the sending and the receiving States. That régime, which reflects centuries of practice, has been adapted where necessary by the international community and particular States as circumstances have required. Attempting in these articles to deal with the special features of different adaptations of that régime in other contexts complicates the law in this area, diminishes the flexibility inherent in separate but parallel approaches to the régime of the bag in different contexts and is therefore unnecessary and undesirable.

10. It is the understanding of the United States Government that, given the constant and widespread use that is made of the bag by all countries, as both senders and receivers, the number of problems that have actually arisen, in reality, has been relatively small. In this respect, the United States joins at least one other State in lamenting the failure of the Commission to relate the draft articles to any survey of existing State practice that might demonstrate the need for the proposed articles.[9]

11. Without dismissing the serious nature of some of the problems that have arisen, particularly in regard to the possible use of the bag to support terrorism, the question is whether the comprehensive and detailed overhaul proposed by the Commission, with all the problems that the overhaul appears to entail, is useful or necessary to address those problems. The United States believes that, at this time, the existing problems are better resolved by the States concerned, within the present general framework. For that reason, the United States Government recommends that the Commission lay the topic aside for the time being.

II. Specific comments on individual articles

Article 1 (Scope of the present articles)
Article 2 (Couriers and bags not within the scope of the present articles)
Article 3 (Use of terms)

12. The draft articles purport to address the use of the diplomatic courier and the diplomatic bag by interna-

[7] Article 28 (Freedom of communication) of the Convention, adopted by the General Assembly on 8 December 1969 (resolution 2530 (XXIV), annex).

[8] Article 57 (Freedom of communication) of the 1975 Vienna Convention on the Representation of States.

[9] See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of Australia, para. 1.

tional organizations and missions to such organizations, as well as by special missions.

13. A number of States have objected to the comprehensive approach of the draft articles to the use of the bag and courier. While, as the Special Rapporteur suggests, only one Government expressly objected to the comprehensive approach to the bag,[10] it appears from the written comments that a number of States indirectly objected to that approach. At least two other Governments suggested that the draft articles be limited to the 1961 and 1963 Vienna Conventions, noting that the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States have not attained anything near the general acceptance of the 1961 and 1963 Conventions.[11] The comments of other Governments relating to the implications of article 33 seem to raise the same concern.[12]

14. For the reason set out above in its general comments, the United States believes that, if these articles are to be adopted, they should not extend beyond questions strictly relating to diplomatic and consular bags and couriers. They should not extend to special missions, permanent missions to international organizations and international organizations since many States are not parties to the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. If the Commission none the less insists upon extending the articles to cover those types of couriers and bags, the United States believes that, in order to promote acceptance of the articles by the many States that have not become parties to those two Conventions, it must retain a provision like that found in article 33.

Article 17 (Inviolability of temporary accommodation)

15. Article 17 would accord inviolability to the temporary accommodation of a diplomatic courier. It appears that a majority of States that commented on this provision objected to it.[13] The Special Rapporteur was of the view that the text of article 17 adopted on first reading without any formal reservations offered the basis for an appropriate provision, but that the question deserved further study in order to find a formulation which might offer better prospects for acceptance.[14] The United States would add its voice to that of those States and members of the Commission already objecting to this provision, on the grounds that the provision would depart from the existing law and practice under the 1961 and 1963 Vienna Conventions and would unreasonably impose a new burden on receiving and transit States without a case being made for such extraordinary protection.

Article 18 (Immunity from jurisdiction)

16. Article 18 would accord the diplomatic courier immunity from criminal jurisdiction in respect of all acts performed in the exercise of his functions and from civil jurisdiction except in the case of an action for damages arising out of an automobile accident in certain circumstances. It also addresses measures of execution and the obligation to give evidence. A number of States objected to this provision.[15] The Special Rapporteur stated that, in the light of the discussion in the Commission, the draft article, with certain proposed non-substantive amendments,[16] seemed to be acceptable to a great number of the members of the Commission.[17] At this time, the United States concurs with those other States that object to this provision, which departs from existing law and practice under the 1961 and 1963 Vienna Conventions, has the potential for creating confusion and controversy and is unnecessary to the performance of the courier's functions in the light of the personal inviolability already accorded the courier.

Article 28 (Protection of the diplomatic bag)

17. Article 28 is the most important provision in the draft. It also continues to be the most controversial article, as reflected in the comments submitted by Governments, their statements in the Sixth Committee,[18] the eighth report of the Special Rapporteur[19] and the report of the Commission on its fortieth session.[20] In the view of the United States and of many other States, the provisions of the 1961 and 1963 Vienna Conventions adequately establish an "acceptable balance between the confidentiality of the contents of the bag and the prevention of possible abuses",[21] and no changes are necessary or desirable.

18. If such articles are to be adopted, however, the United States agrees with those States and members of the Commission that believe that the inviolability of the bag is the basic requirement for ensuring the confidentiality of the contents of the bag and the proper functioning of diplomatic communications. With that objective in mind, the United States favours the retention of the bracketed language in paragraph 1 of article 28. In this respect, the United States agrees with what appears to be the overwhelming majority of Governments commenting that diplomatic bags should not be subject to examination.[22]

---

[10] Document A/CN.4/417 (see footnote 3 above), paras. 48-49.

[11] See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of Australia, para. 3; United Kingdom, para. 4.

[12] *Ibid.*, comments of Austria, paras. 2 and 4; Canada, para. 1; Greece, para. 2.

[13] *Ibid.*, comments of: Australia, para. 5; Austria, para. 8; Belgium, para. 6; France, para. 16; Germany, Federal Republic of, para. 3; Netherlands, paras. 5-6; Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), para. 6; United Kingdom, paras. 18-19; Switzerland, paras. 8-9.

[14] *Yearbook ... 1988*, vol. II (Part Two), p. 84, para. 378.

[15] See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of: Australia, para. 6; Belgium, para. 7; Germany, Federal Republic of, paras. 4-8; United Kingdom, paras. 20-21.

[16] Document A/CN.4/417 (see footnote 3 above), paras. 158-161.

[17] *Yearbook ... 1988*, vol. II (Part Two), p. 85, para. 385.

[18] See "Topical summary ... forty-first session of the General Assembly" (A/CN.4/L.410), paras. 294-330; and "Topical summary ... forty-second session of the General Assembly" (A/CN.4/L.420), paras. 246-247.

[19] Document A/CN.4/417 (see footnote 3 above), paras. 221-253.

[20] *Yearbook ... 1988*, vol. II (Part Two), pp. 89-93, paras. 429-452.

[21] *Ibid.*, para. 430.

[22] See document A/CN.4/409 and Add.1-5 (footnote 2 above *in fine*), comments of: Australia, paras. 10-11; Belgium, para. 8; Brazil, para. 7; Cameroon, paras. 3-4; Canada, para. 3; Czechoslovakia, para. 3;

19. Similarly, the United States strongly agrees with those States that oppose the provision found in paragraph 2 of article 28 that would permit a receiving State to require the return of a bag unless it is permitted to examine the bag.[23] The United States would also note that, even among those States that support such a provision, several expressed concern about the manner in which it would be implemented, stressing their view that such authority should only be exercised in the most extraordinary or exceptional circumstances.[24] In the view of the United States, this could set an impractical standard that would be subject to abuse. Other States were content to rely on the principle of reciprocity to prevent abuse in the implementation of the provisions of paragraph 2.[25] In the view of the United States, in many instances reciprocity is impractical and may exacerbate the situation, possibly triggering a circle of retaliatory actions that would, in fact, impede the free flow of diplomatic communications.

20. In conclusion, the United States reiterates its gratitude for the work of the Commission and its Special Rapporteur on the present topic, but submits that the Commission should not proceed with the second reading of the draft articles without first conducting an examination of State practice with respect to the diplomatic and consular courier and bag to determine whether any changes in the existing régime are necessary or desirable. In this respect, the United States notes that at least one Government has suggested that sending States do not commonly employ consular bags, given that the 1963 Vienna Convention permits States to use consular or diplomatic bags to communicate with consulates.[26]

21. If the Commission, none the less, should decide to proceed with the second reading of the draft articles, it is the view of the United States that the modifications discussed above are essential if the draft articles are to have any realistic prospect of being broadly acceptable to Governments. Finally, if the draft articles approved by the Commission are comparable to the present text, the United States believes that the recommendation, if any, that the Commission makes to the General Assembly under article 23 of its statute regarding the disposition of the draft articles ought to reflect the divergent views and practices of States in this matter. In this respect, the United States believes that the Commission should recommend that the General Assembly should, at most, take note of the draft as a possible set of guidelines, and should not envision the convocation of an international conference for the purpose of concluding a convention on the basis of the draft.

22. The United States appreciates this opportunity to make its views known to the Commission in written form, and hopes that they will be helpful to the Commission and the Special Rapporteur in their further work on the topic.

France, paras. 28-29; German Democratic Republic, para. 12; Greece, para. 10; New Zealand, paras. 2-3; Spain, para. 11; Venezuela, para. 3. But see also the comments of: Germany, Federal Republic of, paras. 11-12; United Kingdom, paras. 33-38; Yugoslavia, paras. 5-8; Switzerland, paras. 13-16.

[23] *Ibid.*, comments of: Australia, para. 7; Bulgaria, para. 10; France, para. 7; German Democratic Republic, para. 12; Greece, para. 10; USSR, para. 7.

[24] *Ibid.*, comments of: Germany, Federal Republic of, paras. 11-12; New Zealand, para. 4; Switzerland, para. 16.

[25] *Ibid.*, comments of: Austria, para. 10; Czechoslovakia, para. 4.

[26] *Ibid.*, comments of Australia, para. 9.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

DOCUMENT A/CN.4/419 and Add.1*

Seventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[*Original: French*]
[*24 February 1989*]

CONTENTS

Introduction

1. This seventh report deals with war crimes and crimes against humanity, the subject of draft articles 13 and 14. These draft articles are followed by comments summarizing the debates among jurists and the debates in the International Law Commission.

2. The Special Rapporteur felt that it was useful to refer to the debates in the Commission briefly, because some members were not yet on the Commission at the time when the debates took place. Sometimes, also, the comments are concerned with new points which have not yet been considered in the Commission, for example the distinction between the concept of a war crime and that of a grave breach within the meaning of the 1949 Geneva Conventions and Additional Protocol I thereto,[1] or attacks on cultural, artistic or historic property or on vital assets, such as the human environment. The comments also explain why one particular version was preferred to another appearing in the 1954 draft code,[2] and why certain new offences have been proposed.

* Incorporating document A/CN.4/419/Corr.1.

[1] See footnotes 5 and 6 below.

[2] Adopted by the Commission at its sixth session, in 1954; text reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

I. War crimes

A. Draft article 13

3. The Special Rapporteur proposes the following draft article 13:

CHAPTER II.
Acts constituting crimes against the peace and security of mankind

. . .

Article 13. War crimes

FIRST ALTERNATIVE

(*a*) Any [serious] violation of the laws or customs of war constitutes a war crime.

(*b*) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(*a*) Within the meaning of the present Code, any [serious] violation of the rules of international law applicable in armed conflict constitutes a war crime.

(*b*) The expression "rules of international law applicable in armed conflict" means the rules laid down in the international agreements to which the parties to the conflict have subscribed and the generally recognized principles and rules of international law applicable to armed conflicts;

(*c*)[3] The following acts, in particular, constitute war crimes:

(i) Serious attacks on persons and property, including intentional homicide, torture, the taking of hostages, the deportation or transfer of civilian populations from an occupied territory, inhuman treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) The unlawful use of weapons and methods of combat, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction.

[3] The comments that follow do not refer to paragraph (*c*) as the text of that paragraph (A/CN.4/419/Add.1) was submitted after the present report (A/CN.4/419) was distributed to the members of the Commission. See *Yearbook . . . 1989*, vol. I, p. 67, 2106th meeting, para. 2.

B. Comments

1. DEFINITION OF WAR CRIMES

4. It was considered necessary to have only a general definition rather than draw up a list of acts constituting war crimes. Such a list would give rise to the problem of determining whether or not it was exhaustive. Moreover, it would be difficult, if not impossible, to reach agreement on the crimes to be included in or omitted from the list of offences. Lastly, a list would constantly be called in question because of the rapid development of methods and technologies.

5. The famous Martens clause set forth in the preamble to the 1907 Hague Convention (IV)[4] and very appropriately included in article 1, paragraph 2, of Additional Protocol I[5] to the four 1949 Geneva Conventions[6] remains fully valid.

6. Commenting on article 1, paragraph 2, of Additional Protocol I, the International Committee of the Red Cross stated:

> There were two reasons why it was considered useful to include this clause yet again in the Protocol. First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.[7]

7. The late Jean Spiropoulos, the Special Rapporteur for the 1954 draft code, said:

> . . . To embark on such a venture now will render the attainment of our present goal, namely, the drafting and adoption by the governments of such a code in the near future, illusory. What the Commission can do, in our opinion, is to adopt a general definition of the above crimes, leaving to the judge the task of investigating whether, in the light of the recent development of the laws of war, he is in the presence of "war crimes". . . .[8]

[4] See the eighth paragraph of the preamble to Convention (IV) respecting the Laws and Customs of War on Land, of 18 October 1907 (see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), pp. 101-102).

[5] Protocol I relating to the protection of victims of international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Treaty Series*, vol. 1125, p. 3).

[6] Geneva Conventions of 12 August 1949 for the Protection of War Victims (*ibid.*, vol. 75).

[7] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), pp. 38-39, para. 55.

[8] First report by J. Spiropoulos on the draft code of offences against the peace and security of mankind, *Yearbook . . . 1950*, vol. II, document A/CN.4/25, pp. 266-267, para. 82.

8. This opinion is particularly worthy of note because the various breaches of the law of armed conflicts are mentioned in the relevant conventions, such as the 1907 Hague Conventions and the 1949 Geneva Conventions (Convention I, art. 50; Convention II, art. 51; Convention III, art. 130; Convention IV, art. 147) and Additional Protocol I thereto (arts. 11 and 85). It would be pointless and tedious to reproduce these texts in the code.

9. Whatever reservations one might have about the judgment rendered by the Nürnberg International Military Tribunal, one is bound to support its statement that the law of war is to be found in customs and practices which have gradually obtained universal recognition, and in the general principles of justice applied by jurists and practised by military courts; that this law is not static, but by continual adaptation follows the needs of a changing world; and that in many cases treaties do no more than express and define the principles of law already existing.[9]

10. Jurists themselves have come to support the idea that an exhaustive list of war crimes is impossible. Sir David Maxwell Fyfe, in his reply to a questionnaire from the International Association of Penal Law and the International Bar Association, said: "I do not think it practicable to produce a code of elaborate and detailed definitions". Vespasien V. Pella, at that time President of the International Association of Penal Law, expressed the following opinion:

> It is impossible in the present circumstances to draw up a complete list.
>
> It should be noted that the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, established in 1919 by the Preliminary Peace Conference, had compiled a list of 32 categories of breaches of the laws and customs of war. Even with the addition of other categories included in various national laws during or after the Second World War and by the United Nations War Crimes Commission, the list cannot be regarded as up to date.
>
> ...
>
> ... we feel that it is preferable to abide by the formula of article 2, paragraph (11), of the draft code of the International Law Commission.[10]

11. It is this formula which became article 2, paragraph (12), of the 1954 draft code.

2. Terminology

12. There had been some discussion as to whether the term "war" and the expression "war crime" were outmoded, and whether it would be better to use the expression "armed conflict". It seemed preferable—and there was strong support for that course in the Commission—to retain the word "war" and the expression "laws or customs of war", which have become established in many international conventions that are still in force, and also in national laws.

13. The 1907 Hague Convention (IV) is concerned with the "laws or customs of war", and this expression appears in article 6 (*b*) of the Charter of the International Military Tribunal[11] (Nürnberg Tribunal) and article 5 (*b*) of the Charter of the International Military Tribunal for the Far East[12] (Tokyo Tribunal). It also appears in the British Warrant of 14 June 1945 (regulation 1),[13] the French Ordinance of 28 August 1944 (art. 1, para. 1),[14] the Australian War Crimes Act, 1945 (art. 3),[15] the Chinese Act of 24 October 1946 (art. III, item 38) and other texts.[16]

14. These brief examples may reassure those who believe that defining a war crime simply as a "violation of the laws or customs of war" would be contrary to the principle *nullum crimen sine lege*. The States mentioned and many others which use this expression are all committed to the principle of non-retroactivity of criminal law.

3. Degree of gravity of war crimes, and distinction between war crimes and grave breaches

15. It may be noted that both alternatives for draft article 13 introduce the concept of degree of gravity in the definition of a war crime. This is something new. Neither the Hague Conventions, nor the Charters of the International Military Tribunals, nor Law No. 10 of the Allied Control Council[17] made a distinction between acts regarded as war crimes on the basis of their degree of gravity. The word "crime" in the expression "war crime" was not used in its technical and legal sense applying to the gravest breaches, but in the general sense of a breach, regardless of the degree of gravity.

16. The distinction between grave breaches and other breaches, or ordinary breaches, appeared only later, in the 1949 Geneva Conventions and Additional Protocol I thereto. Under those instruments legal consequences derive from that distinction, since only grave breaches of the instruments give rise to an obligation on the part of States to impose penal sanctions.

17. The Commission, for its part, had made no distinction between acts constituting war crimes on the basis of their degree of gravity. There is thus a difference of approach between the 1949 Geneva Conventions and the conventions which the Commission used as a basis for its 1954 draft code. This difference emerged in 1976 at the third session of the Diplomatic Conference on the reaffirmation and development of international humanitarian

---

[9] See United Nations, *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis* (memorandum by the Secretary-General) (Sales No. 1949.V.7), p. 64.

[10] V. V. Pella, "La codification du droit pénal international", *Revue générale de droit international public* (Paris), vol. 56 (1952), pp. 411-413.

[11] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[12] See *Documents on American Foreign Relations*, vol. VIII (July 1945-December 1946) (Princeton University Press, 1948), pp. 354 *et seq.*

[13] For a detailed commentary on this instrument, see *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. I, p. 105.

[14] *Ibid.*, vol. III, p. 93.

[15] *Ibid.*, vol. V, p. 94.

[16] *Ibid.*, vol. XIV, p. 152.

[17] Law relating to the punishment of persons guilty of war crimes, crimes against peace and against humanity, enacted at Berlin on 20 December 1945 (Allied Control Council, *Military Government Legislation* (Berlin, 1946)).

law applicable in armed conflicts. Mr. Roucounas, recalling the difficult debate which took place on the subject at that conference, noted:

> ... certain delegations have constantly argued either that grave breaches of humanitarian law and war crimes are qualitatively identical, or that grave breaches form part of the broader category of war crimes, while other delegations have put forward many arguments to reject the idea that there could be any confusion between the two concepts.[18]

In reality this debate, which is basically theoretical in nature, is liable to create an antagonism between two concepts which are intimately linked—indeed, inseparable.

18. War crimes and grave breaches have certain aspects in common. They are two concepts which overlap in part. They overlap in all matters relating to the protection of persons and property envisaged in the Geneva Conventions and Additional Protocol I; thus article 85, paragraph 5, of the Protocol expressly provides that grave breaches of the Protocol are war crimes.

19. Yet war crimes and grave breaches overlap only in part. The concept of a war crime is broader than that of a "grave breach" because it applies not only to grave breaches of the Geneva Conventions and Additional Protocol I but also to other breaches, particularly those relating to the conduct of hostilities and the unlawful use of weapons. For that reason the present draft code defines a war crime as a "serious violation" of the laws or customs of war, in preference to the expression "grave breach", attributing to the latter term the limited technical sense given to it in the Geneva instruments.

20. In the present draft article 13, however, the adjective "serious" is provisionally in brackets, because it will be up to the Commission to make its choice: either to call any violation of the law of war a war crime, or to regard as war crimes only serious violations which are criminal in nature, as distinct from those which fall into the category of correctional offences.

21. This problem did not escape the attention of the Commission. At its second session a debate took place, on 4 July 1950, about the proposal made by a member of the Commission, the late Manley O. Hudson, to include in the definition of a war crime only acts of a certain gravity.[19] This proposal was based on the 1949 Geneva Conventions, which had included the concept of degree of gravity in their definition of certain breaches. The Special Rapporteur, Jean Spiropoulos, said that he regarded "every violation of the laws of war as a crime".[20]

22. In the course of more recent debates, however, during the consideration of the fourth report of the present Special Rapporteur, some members said that only serious violations should be included. In their view, since the Commission had defined crimes against the peace and security of mankind as very serious offences, only war crimes of a very serious nature should be included. War crimes would then come within the purview of, and become part of, a broader concept—that of crimes against the peace and security of mankind; and it is hard to imagine how acts which are not highly serious could be considered as crimes against the peace and security of mankind.

23. Among the actions currently termed "war crimes", some are merely correctional offences: grievous bodily harm, for example. Some of the military tribunals, particularly those of the British Zone, have been criticized for sometimes applying Law No. 10 to trifling offences. One explanation for this situation was the desire of those tribunals to cast a wide net so as not to allow reprehensible acts to go unpunished, even if they did not fall into the category of crimes *stricto sensu*. Moreover, it should be borne in mind that Law No. 10, unlike the Charters of the Nürnberg and Tokyo Tribunals, had defined war crimes as atrocities or offences (art. II, para. 1 (*b*)). The word "crime" did not have its technical meaning, but its general meaning of a breach.

24. Today, for the sake of greater legal accuracy, it might be appropriate to restore to the word "crime" its meaning of grave breach. It is hard to see how petty offences, or correctional offences, could be brought before an international criminal court, unless they were related to criminal actions brought before the same court. Minor incidents cannot be regarded as crimes against the peace and security of mankind. The act prosecuted must have a certain degree of criminality; not all the acts characterized as war crimes are equally horrific.

25. Even when limited to acts constituting a serious violation of the law of war, the concept of a war crime would always be broader than that of a grave breach, particularly since the list of these breaches in the Geneva instruments is limitative. There is an area where the concept of a war crime prevails, where the concept of a "grave breach" will not apply: that is the area concerning the conduct of hostilities and the unlawful use of weapons. There are already many international instruments on these subjects.[21] Independently of these instruments, there are the complex and as yet unresolved problems of weapons of mass destruction: chemical weapons, nuclear weapons, etc. It does not seem necessary to provide a list of these weapons in the code. The drawbacks of the enumerative method have already been indicated above, and that method will not be reverted to.

26. In short, the concept of "grave breach" within the meaning of the 1949 Geneva Conventions and of Additional Protocol I is narrower than that of a "war crime" within the meaning of the present draft code, which covers not only the grave breaches envisaged in those instruments but also other violations of the law of

[18] E. J. Roucounas, "Les infractions graves au droit humanitaire", *Revue hellénique de droit international* (Athens), vol. 31 (1978), p. 70.

[19] See *Yearbook ... 1950*, vol. I, pp. 148-149, 60th meeting, paras. 12 and 21.

[20] *Ibid.*, para. 15.

[21] For example: Declaration renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, signed at St. Petersburg on 11 December 1868 (*British and Foreign State Papers, 1867-1868*, vol. LVIII (1876), p. 16); Declaration concerning expanding (dumdum) bullets, signed at The Hague on 29 July 1899 (J. B. Scott, *op. cit.* (footnote 4 above), p. 227); Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, signed at The Hague on 18 October 1907 (*ibid.*, p. 151); Treaty relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington on 6 February 1922 (M. O. Hudson, ed., *International Legislation*, vol. II (1922-1924) (Washington, D.C., 1931), p. 794); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

armed conflicts. It is true that article 1, paragraph 2, of Additional Protocol I uses the famous Martens clause of the preamble to the Hague Convention (IV) of 1907. Yet it can hardly be assumed on that basis that the enumeration of grave breaches in the Geneva instruments is not limitative. It would seem that the intention of the authors of those instruments was, instead, to draw up an exhaustive list. Therefore the concept of a grave breach has a content which is not only limited but to some extent established, while the concept of a war crime has a content which will expand as new prohibitions add to the arsenal of prohibited weapons.

27. These differences should not be used as a justification for establishing a division between war crimes and grave breaches of humanitarian law, however. A distinction has sometimes been made between what was known as the law of The Hague and the law of Geneva, the latter referring more particularly to the fate of persons and property protected by the Geneva Conventions, and the law of The Hague relating more particularly to the conduct of hostilities or the regulation and prohibition of the use of certain weapons. This distinction would be all the less valid today because article 35 of Additional Protocol I reproduces article 22 of the Hague Convention (IV) of 1907 and develops it further. The distinction between a war crime and a grave breach is therefore less clear-cut today. However, there are differences which should be stressed.

4. Drafting comments on the two alternatives for draft article 13

28. The first alternative retains the expression "laws or customs of war", on the understanding that the word "war" is to be taken in its material sense, not in its traditional and formal sense. As such it applies to any armed conflict, not only armed conflicts between States.

29. The second alternative uses the expression "rules of international law applicable in armed conflict" in preference to "laws or customs of war".

II. Crimes against humanity

A. Draft article 14

30. The Special Rapporteur proposes the following draft article 14:

Article 14. Crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) killing members of the group;

(ii) causing serious bodily or mental harm to members of the group;

(iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(iv) imposing measures intended to prevent births within the group;

(v) forcibly transferring children from one group to another group.

2 (FIRST ALTERNATIVE). *Apartheid*, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2 (SECOND ALTERNATIVE). *Apartheid*, which shall include policies and practices of racial segregation and discrimination [as practised in southern Africa] and shall apply to the following inhuman acts committed for the purpose of establishing or maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(*a*) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(*b*) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(*c*) any legislative measures and other measures calculated to prevent a racial group or groups from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(*d*) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) exploitation of the labour of the members of a racial

group or groups, in particular by submitting them to forced labour;

(*f*) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

3. Slavery and all other forms of bondage, including forced labour.

4. (*a*) Expulsion or forcible transfer of populations from their territory;

(*b*) Establishment of settlers in an occupied territory;

(*c*) Changes to the demographic composition of a foreign territory.

5. All other inhuman acts committed against any population or against individuals on social, political, racial, religious or cultural grounds, including murder, deportation, extermination, persecution and the mass destruction of their property.

6. Any serious and intentional harm to a vital human asset, such as the human environment.

B. Comments

31. Crimes against humanity were dealt with in article 2, paragraphs (10) and (11), of the 1954 draft code. Paragraph (10) is devoted to acts constituting the crime of genocide, and paragraph (11) to so-called "inhuman acts". Nevertheless, the 1954 draft contains neither the expression "crimes against humanity" nor the word "genocide", and it seems useful to give them their rightful place, for the reasons stated below. Further, although the 1954 draft makes a distinction between acts of genocide and inhuman acts, it does not offer any definition of an inhuman act but simply provides an enumeration based solely on the motives of the act (political, racial, religious, cultural motives, etc.).

32. The new draft article 14 takes up the concept of crimes against humanity, which is reflected in its title. This concept must not be abandoned, since it is this which endows such crimes with their specific characteristics, that is, as crimes of particular infamy and horror, and which emphasizes their status as crimes under international law.

1. The concepts of crimes against humanity and genocide

33. It was not by chance that the expression "crimes against humanity" was included in the Charters of the International Military Tribunals created following the Second World War; it was included only after thorough consideration. The question dates back to the work of the United Nations War Crimes Commission, established on 20 October 1943 in London.[22] Let there be no confusion, here, as to the meaning of "United Nations", which is not related to the organization of that name which came into being two years later at San Francisco; the reference is only to the Allied nations at war with the Axis Powers. The question quickly arose within that Commission as to whether the investigations should be restricted to war crimes in the traditional sense of the expression or whether they should be extended to include other offences. The 1943 Commission first attempted to extend the list of offences that had been drawn up by the 1919 Commission on Responsibilities on the basis of the Martens clause in the preamble to the 1907 Hague Convention (IV).[23]

34. However, it soon became apparent to the 1943 Commission that recourse to that clause would not allow for coverage of all the categories of crimes committed during the Second World War. In fact, some breaches, however broad the concept of war crime, could not be included in such a category. That applied particularly to crimes where the perpetrators and victims were of the same nationality, or where the victims had the nationality of a State allied to that of the perpetrator. This was true of Nazi crimes against German, Austrian and other nationals, and crimes against stateless persons and against other persons on the basis of racial, religious, political or other motives.

35. The 1943 Commission then proposed to term such breaches "crimes against humanity", considering that they represented breaches of a particular kind which, even though committed during the war, had original characteristics which set them apart, in certain respects, from war crimes.

36. The 1943 Commission extended its competence to such crimes "committed against any person without regard to nationality, stateless persons included, because of race, nationality, religious or political belief, irrespective of where they have been committed".[24] The British Government, on being consulted, supported that argument as early as 1944 but emphasized that such crimes should be taken into account only if they were linked to a state of war.

37. With the signing of the London Agreement, on 8 August 1945,[25] the concept of "crimes against humanity" was definitively incorporated in the Charter of the Nürnberg Tribunal (art. 6 (*c*)), in the Charter of the Tokyo Tribunal (art. 5 (*c*)) and in Law No. 10 of the Allied Control Council (art. II, para. 1 (*c*)).

38. First linked to a state of belligerency, as stated above, the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes. Thus, not only the 1954 draft code but even conventions which have entered into force (on genocide and *apartheid*) no longer link that concept to a state of war.

39. The question thus arises of why the 1954 draft code failed to use the expression "crimes against humanity" in article 2, paragraphs (10) and (11). Nevertheless, in the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal",[26] the International Law Commission gave the expression its rightful place. The omission should here

[22] See *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, H.M. Stationery Office, 1948).

[23] See footnote 4 above.

[24] *History of the United Nations War Crimes Commission* . . ., p. 176.

[25] See footnote 11 above.

[26] Hereinafter referred to as the "Nürnberg Principles"; for the text, see *Yearbook* . . . *1985*, vol. II (Part Two), p. 12, para. 45.

be made good and the concept restored once and for all. It is one of the tenets of international law, evolved through its progressive development. Crimes against humanity have their own specific characteristics which differentiate them from war crimes.

40. It is true that a single act may be both a war crime and a crime against humanity if committed in time of war (thus article 85, paragraph 4 (*c*), of Additional Protocol I to the 1949 Geneva Conventions includes the practice of *apartheid* among war crimes). But this fact, while justifying dual categorization, should not lead to any confusion of the two concepts. The concept of crimes against humanity is broader than that of war crimes from at least two standpoints:

(*a*) Crimes against humanity may be committed in time of war or in time of peace; war crimes can be committed only in time of war;

(*b*) War crimes can be committed only between belligerents, between perpetrators and victims who are adversaries; crimes against humanity may be committed between nationals or between belligerents.

41. Thus the concept again has its own content and specific characteristics which justify retaining the expression "crimes against humanity".

42. The same is true of the term "genocide". The acts listed in article 2, paragraph (10), of the 1954 draft code are those which constitute the crime of genocide. The list was taken from the Convention of 9 December 1948.[27] Paragraph 1 of the new draft article 15 thus applies the term "genocide" to such acts in general.

2. The concept of inhuman acts

43. The concept of inhuman acts may be applied both to attacks on persons and to attacks on property.

(a) *Attacks on persons*

44. Two comments are necessary in this regard. First, the acts listed in article 2, paragraph (11), of the 1954 draft code may all constitute common crimes and appear in nearly all internal criminal codes. Next, they may be either physical ill-treatment or humiliating or degrading acts.

45. The thing that distinguishes inhuman acts from common crimes is the motive. They are acts that are prompted by ideological, political, racial, religious or cultural intolerance and strike at a person's innermost being, i.e. his convictions, beliefs or dignity. It is worth mentioning in this regard the decisions of the Supreme Court of the British Zone, which stated, in one of its first rulings:

> . . . all sorts of attacks which cause injury to persons may constitute or cause crimes against humanity: any type of interference in a person's existence, growth and development or sphere of action, any alteration in his relations with his environment, any attack on his property or his values by which he is indirectly affected . . .[28]

46. Accordingly, humiliating or degrading acts which cannot be considered physical atrocities, such as inflicting flagrant public humiliations or forcing individuals to act against their conscience and, in general, ridiculing them or forcing them to perform degrading acts, may constitute crimes against humanity. For this reason, draft article 14 is specifically concerned with any humiliating or degrading treatment meted out to population groups or groups of persons on political grounds or because of their race, religion, etc.

(b) *Attacks on property*

47. The 1954 draft code did not include attacks on property within the definition of crimes against humanity. They were, however, included in the list of war crimes provided in Principle VI (*b*) of the Nürnberg Principles, as well as in the Charters of the International Military Tribunals, which mentioned the "plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".[29] The controversy aroused by the phrase "not justified by military necessity" will not be dealt with here. That issue relates to the laws of war and is not part of the present discussion.

48. The question which arises here is whether attacks on property may constitute crimes against humanity. The existing instruments relating to crimes against humanity do not specifically mention attacks on property. It may be asked whether they are of a sufficiently serious nature to be treated as crimes against humanity.

49. Judicial opinion had tended to favour the treatment of mass attacks on property as criminal. The matter of the collective fine of 1 billion marks imposed on German Jews by the decree of 12 November 1938, following the assassination of a German diplomat in Paris by a Jew of Polish origin, is illustrative. A United States military tribunal, in the judgment it rendered against certain ministers of the Third Reich,[30] had seen in this fine a typical example of "the persecution to which German Jews were subjected", falling into the category of "persecutions on political, racial or religious grounds" included in the definition of crimes against humanity in the Charter of the Nürnberg Tribunal (art. 6 (*c*)). According to the judgment, the confiscation and liquidation for the benefit of the Reich of property belonging to German Jews were a "part of the Jewish persecutions carried on in the Reich and constitute[d] violations of international law and agreements and crimes under count five" of the indictment. According to count five, the German authorities' appropriation and liquidation of the possessions of concentration-camp prisoners, among other things, were considered to be crimes against humanity. One may also cite the decision of 4 July 1946 of the Court of Appeal of Freiburg im Breisgau on the subject: "The illegal confiscation of Jewish property in 1940 by govern-

---

[27] Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaty Series*, vol. 78, p. 277).

[28] *Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen*, vol. 1 (Berlin, 1949), p. 13; cited in Meyrowitz, *op. cit.* (footnote 30 below), p. 274.

[29] Article 6 (*b*) of the Charter of the Nürnberg Tribunal; see also article II, para. 1 (*b*), of Law No. 10 of the Allied Control Council.

[30] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (Nuernberg, October 1946-April 1949)* (Washington, D.C., U.S. Government Printing Office, 1952), case No. 11 (*The Ministries Case*), vol. XIV, in particular pp. 676 and 678; cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 267.

ing bodies of the State constitutes a crime against humanity".[31]

50. It therefore follows from such judicial precedents that attacks on property may constitute crimes against humanity if they display the dual characteristics of being inspired by political, racial or religious motives and of being mass actions.[32]

51. Such precedents remain fully valid today, not only because prejudices are still deeply rooted but especially because, in addition to national property, a new category of property has appeared which is increasingly considered to be the heritage of mankind. Many monuments throughout the world have a historical, architectural or artistic significance which places them in that category.

52. In the past, many monuments were destroyed because they were not protected. That resulted in a great loss to mankind, as in the case of the fire which destroyed the Alexandria Library at the beginning of the Christian era. In recent years, UNESCO has classified certain sites and monuments as belonging to the heritage of mankind. An example is the island of Gorée in Senegal, which for centuries was a major centre of the slave-trade and the farthest point in Africa from which the slave-ships departed for the Americas. The former trading-posts which have been preserved there for centuries symbolize that wretched period of human history and constitute a place of contemplation and pilgrimage.

53. Furthermore, it should be noted that attacks on property of cultural value were already prohibited by conventions still in force. The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments, signed at Washington on 15 April 1935[33] (reinforcing the Roerich Pact), was already a step in that direction. It should be noted that the Treaty was concerned both with wartime and with peacetime. After the Second World War, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954, under the auspices of UNESCO,[34] also aimed, despite its title, at the protection of cultural property in peacetime; article 3 stipulated that such protection was incumbent upon the parties in time of peace. This Convention gave the following very broad definition of cultural property:

Article 1. Definition of cultural property

...

(*a*) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(*b*) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (*a*) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (*a*);

...

54. It should also be noted that the 1954 Hague Convention provided for penal or disciplinary sanctions against persons committing an offence against the property to which it referred.

55. Even more recently, the provisions of article 85, paragraph 4 (*d*), of Additional Protocol I to the Geneva Conventions of 12 August 1949 classified as a grave breach

(*d*) Making the clearly recognized historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof . . .[35]

56. It is true that in this case the destruction of property may not constitute a war crime if the property so destroyed is located in immediate proximity to military targets, but this does not undermine the principle. Moreover, when it is a question of crimes against humanity, this restriction does not apply, for such crimes are incited by different motives and may be committed irrespective of any state of war.

57. Vital human assets, such as the environment, should also be mentioned.

58. The reasons outlined above therefore led the Special Rapporteur to include attacks on property in draft article 14, paragraph 5.

3. Mass or systematic nature

59. The Charters of the International Military Tribunals are concerned with inhuman acts committed against the "civilian population".

60. Does an act need to affect a mass of people in order to constitute a crime against humanity? The mass nature of an act is one criterion of a crime against humanity, but it is not the only one. On occasion, an inhuman act committed against a single person may also constitute a crime against humanity if it is part of a system, or is carried out according to a plan, or has a repetitive nature which leaves no doubt as to the intentions of the author.

61. The mass nature of the crime obviously implies a plurality of victims, which is often made possible only by the plurality of authors and the mass nature of the means employed. Crimes against humanity are often committed by individuals making use of a State apparatus or means placed at their disposal by major financial groups. In the case of *apartheid*, it is the State apparatus; in the case of genocide or mercenarism, it is either or both of these means.

62. As stated above, however, an individual act may constitute a crime against humanity if it is part of a coherent system and of a series of repeated acts incited by the same political, racial, religious or cultural motive.

63. In reality, the conflict between supporters of the "mass crime" position and supporters of the "individual crime" position seems to be a non-debate.

[31] *Deutsche Rechts-Zeitschrift* (Tübingen), vol. 1 (1946), p. 93; cited in Meyrowitz, pp. 267 and 268.

[32] Meyrowitz, p. 269.

[33] League of Nations, *Treaty Series*, vol. CLXVII, p. 289.

[34] United Nations, *Treaty Series*, vol. 249, p. 215.

[35] See footnote 5 above.

64. An examination of the Charters of the International Military Tribunals (Charter of the Nürnberg Tribunal, art. 6 (*c*); Charter of the Tokyo Tribunal, art. 5 (*c*); Law No. 10 of the Allied Control Council (art. II, para. 1 (*c*)) shows that they are concerned with mass crimes (extermination, enslavement, deportation) and with cases involving individual victims (murder, imprisonment, torture, rape).

65. The Legal Committee of the United Nations War Crimes Commission expressed its views in these terms:

> . . . As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.[36]

66. Meyrowitz, for his part, wrote that:

> Crimes against humanity must in fact be interpreted as comprising not only acts directed against individual victims but also acts of participation in mass crimes, according to one of the methods specified in article II (2) [of Law No. 10].[37]

The author cites a memorandum dated 15 October 1948 by the British military government (Zonal Office of the Legal Adviser) stating that it was neither the number of victims nor who they were that allowed an act to be characterized as a crime against humanity, but rather the fact that the act was linked

> to systematic persecution of a community or a part thereof. An inhuman act committed against a single person might thus constitute a crime against humanity "if the motive for that act resides wholly or partly in such systematic persecution" directed against a specific group of persons. . . .[38]

67. In summary, where the mass element is absent, an individual act should constitute a link in a chain and be part of a system or plan. The notion of system, plan and repetitiveness is necessary in order to categorize an act committed against an individual victim as a crime against humanity.

4. Other crimes

68. In addition to attacks on property, other offences have also been included: *apartheid*, the practice of slavery, the expulsion or forcible transfer of indigenous peoples from their territory, the establishment of settlers in an occupied territory, and changes in the demographic composition of a foreign territory, by force or by any other means.

69. There is no need to go over again the controversies generated by the mention of *apartheid*. Some members of the Commission preferred that it should not be specifically mentioned and that the Commission should confine itself to the more general term "racial discrimination". However, a very large group held an opposing view based on the specific features of that crime which put it in a class of its own. It should merely be noted that two alternatives have been proposed for paragraph 2 of draft article 14, one referring to the 1973 Convention on *apartheid*,[39] the other reprinting the entire text of article II of the Convention in the body of the draft.

70. With regard to slavery, article 1, paragraph 1, of the Slavery Convention of 25 September 1926[40] defined it as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". Article 1, paragraph 2, defined the slave-trade as including

> all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

The slave-trade was already considered a crime in this Convention, for the contracting States undertook to bring about its abolition (art. 2). Later, the Universal Declaration of Human Rights[41] of 10 December 1948 (art. 4) and the International Covenant on Civil and Political Rights[42] of 19 December 1966 (art. 8) condemned the practice of slavery in the strongest terms.

71. Similarly, the International Covenant on Civil and Political Rights (art. 8, paras. 2 and 3) referred to servitude and forced labour. The Covenant thus took as its model the provisions of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956,[43] which states in its preamble that "no one shall be held in slavery or servitude".

72. It should be noted that the 1954 draft code had already classified enslavement as an inhuman act. However, some members of the Commission deemed it preferable to devote a special provision to the subject.

5. Drafting comments on draft article 14

73. Acts constituting the crime of genocide and acts constituting "inhuman acts" were dealt with in two separate paragraphs in the 1954 draft code. Though it had been pointed out at a previous session of the Commission that the distinction between acts constituting genocide and so-called inhuman acts did not appear to be warranted, as genocide was also an inhuman act (it is, in fact, the prototype of an inhuman act), the present report has retained this distinction owing to the differing degrees of gravity of the various inhuman acts and the specific features which characterize some of them.

74. The second comment concerns the listing of acts which may constitute inhuman acts within the meaning of the draft code. As stated earlier, certain acts listed in

---

[36] *History of the United Nations War Crimes Commission . . ., op. cit.* (footnote 22 above), p. 179; cited Meyrowitz, *op. cit.* (footnote 30 above), p. 253.

[37] Meyrowitz, p. 255.

[38] Meyrowitz, p. 281, citing an excerpt from the British note published in *Zentral-Justizblatt für die Britische Zone* (Hamburg), vol. 2 (1948), pp. 250-251. See also the Special Rapporteur's fourth report (*Yearbook . . . 1986*, vol. II (Part One), pp. 58 *et seq.*, document A/CN.4/398), paras. 31-51.

[39] International Convention on the Suppression and Punishment of the Crime of *Apartheid* (United Nations, *Treaty Series*, vol. 1015, p. 243).

[40] League of Nations, *Treaty Series*, vol. LX, p. 253.

[41] General Assembly resolution 217 A (III) of 10 December 1948.

[42] United Nations, *Treaty Series*, vol. 999, p. 171.

[43] *Ibid.*, vol. 266, p. 3.

the 1954 draft (murder, imprisonment) may also constitute common crimes. Murder as such does not constitute a crime against humanity, nor does arbitrary imprisonment. These acts become crimes against humanity only by virtue of the surrounding circumstances. They do not in and of themselves constitute crimes against humanity. Accordingly, this was taken into account in the drafting of article 14, with emphasis being placed on the moral aspects of the act and on its motives, rather than on its material aspects, for the same act may be characterized differently depending on the circumstances in which it was committed.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 6]

DOCUMENT A/CN.4/421 and Add.1 and 2*

Fifth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur

[*Original: English*]
[*5 April, 4 and 19 May 1989*]

CONTENTS

*Incorporating documents A/CN.4/421/Corr.1, 2 and 4.

Introduction

1. In his fourth report on the law of the non-navigational uses of international watercourses,[1] which was before the International Law Commission at its fortieth session, the Special Rapporteur set forth a "schedule for submission of remaining material" concerning the present topic.[2] The schedule indicated that in 1989 he would submit for the consideration of the Commission parts VI (Water-related hazards and dangers) and VII (Relationship between non-navigational and navigational uses) of the proposed outline of the draft articles, as well as material relating to the subtopic "Regulation of international watercourses". The Special Rapporteur noted that he intended to submit the full set of draft articles by 1990, and that adhering to this schedule would allow the Commission to complete the first reading of the draft articles by the end of its current term of office (1991). Accordingly, the present report considers the subtopics of water-related hazards and dangers (part VI of the draft articles), the relationship between non-navigational and navigational uses (part VII of the draft articles) and the regulation of international watercourses (part VIII of the draft articles).

[1] *Yearbook ... 1988*, vol. II (Part One), p. 205, document A/CN.4/412 and Add.1 and 2.

[2] *Ibid.*, p. 208, paras. 8-10.

CHAPTER I

Water-related hazards and dangers

(Part VI of the draft articles)

Introduction

2. In his fourth report, the Special Rapporteur submitted an article entitled "Pollution or environmental emergencies" (article 18 [19]) as part of a set of draft articles on the subtopic of environmental protection, pollution and related matters. Owing to the limited time available during the fortieth session of the Commission for consideration of the fourth report, as well as for organizational reasons, the Special Rapporteur suggested that this particular article not be discussed extensively at that session. He indicated his intention to submit a new, comprehensive article on water-related hazards and dangers at the forty-first session.[3] The idea of broadening the scope of the article received support both in the Commission[4] and in the Sixth Committee at the forty-third session of the General Assembly.[5]

3. On the surface, there might appear to be a basic difference between emergencies and dangerous situations involving pollution and those caused by floods and floating ice: while the former are often the result of human activity, the causes of the latter are frequently natural. Such a difference in factual causes of disasters or dangerous situations could be thought to justify different regulatory régimes. However, while it is sometimes possible to separate water-related dangers, hazards and catastrophes that are man-made from those whose causes are entirely natural, this is not always the case. Phenomena which are often purely natural may in some instances be exacerbated, or even wholly caused, by human intervention. Floods, for example, may be caused or rendered more harmful by such activities as the construction of canals[6] or dams[7] or land-use practices, such as deforestation,[8] which cause unnaturally rapid run-off. Conversely, nature may interact with human activities to produce disastrous consequences, as in the case of flooding caused by earthquake damage to dams.

4. Thus there is a continuum of possibilities, ranging from the wholly natural hazard or disaster at one end to that which is entirely man-made at the other.[9] The legal régimes of prevention, mitigation and reparation should therefore take into account not only the nature of the disaster (e.g., flood versus chemical spill) but also the degree to which human intervention contributes to harmful consequences. It would appear, prima facie, that the obligations of watercourse States would increase with the degree of human involvement. As will be seen below, however, this does not necessarily indicate a complete absence of obligation even where natural forces are entirely responsible for a water-related danger. On the contrary, State practice, chiefly in the form of international agreements, is replete with examples of obligations of co-operation, notification and the like which are triggered by dangers whose causes are entirely natural, such as floods and floating ice (see paras. 20-34 below).

5. It may be concluded from the foregoing discussion that all types of water-related hazards and dangers,

---

[3] *Yearbook ... 1988*, vol. II (Part Two), p. 25, para. 130.

[4] See, for example, the statements of Mr. Yankov (*Yearbook ... 1988*, vol. I, p. 156, 2067th meeting, para. 14), Mr. Calero Rodrigues (*ibid.*, p. 157, para. 25) and Mr. Eiriksson (*ibid.*, p. 161, 2068th meeting, para. 22).

[5] See, for example, the statement of the representative of Venezuela (*Official Records of the General Assembly, Forty-third Session, Sixth Committee*, 29th meeting, para. 31).

[6] Canals may collect and concentrate surface run-off, discharging a large quantity of water at a single point (the end of the canal). For an instance of State practice involving such a problem, see the Rose Street canal case discussed below (paras. 55-63).

[7] The sudden release of a large volume of water from a dam may produce harmful effects downstream. The release may be deliberate (e.g., in order to protect the dam itself) or may be caused by rupture of the dam. Finally, the damming of a river may prevent it from being "scoured" downstream of the dam by spring run-offs, resulting in siltation of the river bed and consequent inadequate carrying capacity of the river channel. This, in turn, may cause the river to overflow its banks.

[8] Some observers have attributed the particularly severe floods in Bangladesh in 1987 and 1988 in part to upstream deforestation. See, for example, *The New York Times*, 3 October 1988, pp. A1 and A6; Masum, "Some aspects of impact of floods on Bangladesh economy", and Kahn, "Flood hazard in Bangladesh and its impact on the rural environment", papers presented at the International Seminar on Bangladesh Floods: Regional and Global Environmental Perspectives, organized jointly by the Bangladesh Research Bureau and SCOPE/Bangladesh from 4 to 8 March 1989 (hereinafter referred to as "1989 Bangladesh Flood Seminar"); the papers presented to the seminar appeared in the conference brochure. See generally footnote 11 below and the sources cited therein.

[9] See the following description, in a study prepared by the Secretariat in 1977, of the nature of instances of *force majeure*:

"... the material causes giving rise to events or occurrences termed *force majeure* may vary. *Force majeure* may certainly be due to a natural disaster like an earthquake, but also to situations having their roots in human causes such as a war, a revolution, mob violence etc. Moreover, certain causes that eventually may give rise to *force majeure* may originate from natural as well as from human causes. For instance, a fire may be man-made but also be provoked by a thunderbolt; a situation of absolute economic necessity amounting to *force majeure* may be due to a drought by lack of rain but also to disruption in world commodity markets or mismanagement of the national economy, etc." ("'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine" (*Yearbook ... 1978*, vol. II (Part One), p. 66, document A/CN.4/315) para. 4.)

whether natural, man-made or a combination of the two, may be treated in a single article or set of articles. Nevertheless, the Commission may wish to consider whether the draft articles relating to this subtopic should contain not only primary rules setting forth the obligations of watercourse States but also secondary rules specifying the consequences of the breach of those obligations. For while watercourse States may well bear obligations in respect of hazards and dangers whose causes are entirely natural, the consequences of breaching those obligations may not be so extensive as those that would follow from the breach of rules requiring watercourse States to refrain from causing or exacerbating harmful water-related hazards or dangers.[10]

6. Indeed, it is precisely the potential for harmful, or even catastrophic, extraterritorial consequences of a State's use of a watercourse (or even of other resources)[11] that makes co-operation between watercourse States essential. The Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development emphasizes in its report the necessity for States to "organiz[e] themselves to deal with [harmful effects of the use of water] in a rational manner on the basis of technical information and careful, integrated basin, or system, co-operation and planning".[12] It continues:

The conditions most often giving rise to . . . complaints and creating the need for deliberate international planning (in order to satisfy or forestall complaints) are those that cause, in other States, shortage of surface or ground-water supply; flooding; siltation; salinization; depletion of fish and elimination of breeding areas; eutrophication; excess vegetation; concentrations of salts or other chemicals, untreated sewage, radio-active substances, oil or other waste products (introduced from ship or shore); changes in temperature; blockage of passage (fish, vessels and timber); the diminishing of scouring; and, of course, changes in flow. Thus, even the otherwise innocent and beneficial use of fertilizers, the attempt to control the invasive water hyacinth, the construction of weirs for water storage and flood control, the drainage of a swamp, the cooling of a thermoelectric plant, or the return of irrigation water to the river may produce damaging results in other parts of the basin. Although the harm occurs most often downstream, among the numerous exceptions to this general rule are the effects in boundary streams and lakes. Some conditions are likely to be felt both upstream and downstream, particularly when fishing, navigation or timber floating is involved.

The aspects discussed above are only illustrative of the kinds of problems that have greater prospect of solution once the States sharing the same water resources system accept the necessity of active international co-operation or collaboration to achieve their own objectives more effectively. . . .[13]

7. Another factor that may contribute to water-related dangers and which therefore makes co-operation between watercourse States increasingly important is the phenomenon of global warming.

About 35 per cent of the continental U.S. experienced severe drought conditions in 1988. . . .

. . .

Western parts of the Soviet Union were also hot and dry in 1988. China showed the variability of weather, with some areas of the north-central and south-central regions receiving torrential rains and much of eastern and south-eastern China being abnormally dry. The monsoon in India, which had largely failed in 1987, came back in 1988 with the heaviest rains in 70 years. Bangladesh experienced one of the most devastating floods in its history; three quarters of the land was under water, and loss of life was heavy. Torrential rains also caused extreme flooding in the Sudan in August [of 1988].

. . .

The intense drought, heat, and other extreme weather triggered renewed concern over global climate changes caused by the greenhouse effect, whereby gases—primarily carbon dioxide—trap the Sun's radiant energy in the lower atmosphere and warm the air near the Earth's surface. Although there was vigorous debate among atmospheric scientists over direct linkage of the 1988 drought to the greenhouse effect, there was irrefutable evidence of the continued rise worldwide in levels of atmospheric carbon dioxide and other trace gases as a result of a century of human industry. Three major international organizations—the International Council of Scientific Unions, the United Nations Environment Programme, and the World Meteorological Organization—issued a report calling for immediate action in developing policies for responding to climatic change. The report also urged approval and implementation of the Montreal Protocol on Substances that Deplete the Ozone Layer. . . .[14]

Scientists and other observers have predicted that global warming could lead to especially severe conditions in countries with tropical climates.

. . . Semi-arid areas like much of sub-Saharan Africa might suffer from even lower rainfall. Many semi-arid areas are already marginal for agriculture, are highly sensitive to changes in climate, and have had severe droughts and famines for the last several decades. Tropical humid climates could become hotter and wetter, with an increase in the frequency and severity of tropical storms. Floods, which between 1968 and 1988 killed more than 80,000 people and affected at least 200 million more, could worsen. Natural disasters such as floods, now unusual, could become increasingly common.

Indeed, climate disruption caused by the greenhouse effect may already be evident. Global temperatures in 1988 were again at or near the record for the period of instrumental data, with temperatures elevated by 0.7°F relative to the average for the 30-year period beginning in 1950. The five warmest years in this century all occurred during the 1980s. Moreover, the rate of global warming for the past two decades was higher than any in recorded history. . . .[15]

---

[10] Article 6 of part 2 of the draft articles on State responsibility, proposed by Mr. Riphagen (*Yearbook . . . 1984*, vol. II (Part Two), p. 100, footnote 322) gives an indication of the possible range of consequences, i.e. of the elements of reparation *lato sensu*.

[11] According to the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development:

". . . the development or exploitation of resources other than water by one State in the system may cause a substantial impact on the quantity or quality of water available for development or utilization by another State in the system. The logging off of the headwaters area of a stream in one State may trigger serious land erosion that causes a heavy burden of silt to be carried downstream into another State and a detrimental alteration in the natural timing of flow, thereby adversely affecting the downstream State's uses." (United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), para. 42.)

The Panel of Experts refers in this connection to a working paper on the relationship between water and other natural resources prepared by G. J. Cano (see ILA, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), annex, pp. 531 *et seq.*).

[12] United Nations, *Management of International Water Resources* . . ., para. 50.

[13] *Ibid.*, paras. 51-52.

[14] *1989 Britannica Book of the Year* (Chicago, Encyclopaedia Britannica, Inc., 1989) pp. 159-160; see also p. 195.

[15] D. A. Wirth, "Climate chaos", *Foreign Policy* (Washington, D.C.), No. 74 (1989), pp. 9-10. Wirth observes: "The greenhouse effect, if unchecked, is likely to cause unpredictable disruptions in the balance of power worldwide, exacerbating the risk of war" (*ibid.*, p. 10). See also the report of the World Commission on Environment and Development:

"Environmental threats to security are now beginning to emerge on a global scale. The most worrisome of these stem from the possible consequences of global warming caused by the atmospheric build-up of carbon dioxide and other gases. . . ." (World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987), p. 294.)

These phenomena indicate that demands for fresh water are likely to intensify in some regions of the world, while other areas may experience increased flooding. It is submitted that the Commission should bear these factors in mind in its consideration of the subtopic of water-related hazards and dangers.

8. The balance of this chapter will be divided into two sections, in each of which the Special Rapporteur will survey authorities on different kinds of natural hazards or conditions. The first section will deal with floods and related problems, and the second will treat other water-related problems and conditions. As these problems have been discussed in reports previously submitted to the Commission,[16] the surveys of authorities presented below will be illustrative only and no attempt will be made at exhaustive coverage. The chapter will conclude with the submission of a proposed set of articles on water-related hazards and dangers. While the articles to be proposed will cover both man-made and natural incidents, as explained above, the following survey will not deal with pollution as such,[17] since that subject was covered in the fourth report.[18]

A. Floods and related problems

General observations

9. Because floods and other water-related hazards are often factually interrelated, international agreements and other authorities frequently deal with them together. These factual interrelationships and the consequent legal ones provide the basis for the grouping of a number of different problems in this section of the report. The problem that has received by far the most attention in treaties as well as in the work of international organizations is that of floods. This is probably due to the fact that floods consistently rank at the top of the list of natural disasters.[19] Section A will therefore focus on that particular hazard but will also deal with the following situations: ice conditions; drainage problems; flow obstructions; siltation; and erosion. Section B will then take up the problems of saline intrusion, drought and desertification.

10. As already indicated, floods constitute one of the world's most serious natural hazards.[20] They occur annually in many parts of the world—for example, India, Pakistan, Bangladesh and China—and have struck countries on nearly every continent.[21] Losses of life, property and income caused by floods in some parts of the world are extremely high. In the South-East Asia region as a whole, floods annually destroy more than 10 million acres of crops and cause property losses of more than $1 billion.[22] There have been floods which have caused the death of more than 1 million people, have left as many as 10 million homeless and have inundated up to 10 million acres of agricultural land.[23] In South-East Asia alone, there is a heavy loss of life from floods every year, and floods appear to be increasing in severity in the Asian subcontinent and Africa.[24]

11. Developing countries have been particularly hard hit by floods.

> . . . In South-East Asia thousands of people drown annually and floods destroy more than 10 million acres of crops each year. Flood losses, already large, are getting larger owing to the continual movement of population and economic activities onto flood plains. This process is exemplified by Bangladesh, most of which is in the Ganges-Brahmaputra delta. . . .[25]

But floods can strike developed and developing countries alike:

> . . . more than 20 per cent of the population of Hungary, Iraq, Japan, Malaysia, Netherlands and Senegal lives in areas that may be inundated by major floods.[26]

To the same or similar effect, see SIPRI and UNEP, *Global Resources and International Conflict: Environmental Factors in Strategic Policy and Action*, A. H. Westing, ed. (Oxford, Oxford University Press, 1986); P. H. Gleick, "The implications of global climatic changes for international security", Background Paper No. 14 prepared for the Workshop on Developing Policies for Responding to Climatic Change, held at Villach, Austria, from 28 September to 2 October 1987.

[16] See especially the third report of Mr. Schwebel (*Yearbook . . . 1982*, vol. II (Part One), pp. 151 *et seq.*, document A/CN.4/348), paras. 337-379. See also the first report of Mr. Evensen (*Yearbook . . . 1983*, vol. II (Part One), pp. 185-186, document A/CN.4/367), paras. 177-182.

[17] Two of the subjects to be considered, siltation and salt-water intrusion, could be regarded as forms of pollution; beyond those subjects, however, pollution is not dealt with in the present report.

[18] A/CN.4/412 and Add.1 and 2 (see footnote 1 above), paras. 38-88 and chap. III, sect. C, article 18 [19].

[19] For example, one study reports that floods caused nearly 40 per cent of the total loss of life from all natural disasters during the 20-year period after 1947. See L. Sheehan and K. Hewitt, "A pilot survey of global natural disasters of the past twenty years", Natural hazard research, Working Paper No. 11 (University of Toronto, Canada) (1969) (mimeographed).

[20] See 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), pp. 2-9 ("The magnitude of the world flood problem").

[21] See table 1 in the study cited in the previous footnote, documenting "significant historical flood events" in Asia, North and South America, Europe and certain island States. With regard to Africa, see, for example, the report of particularly heavy flooding in the Sudan in 1988 (footnote 24 below *in fine*).

[22] W. R. D. Sewell and H. D. Foster, "Flood loss management in developing countries: A model for identifying appropriate strategies", in United Nations, *River Basin Development: Policies and Planning*, Natural Resources/Water Series No. 6 (Sales No. E.77.A.4), vol. 1, p. 84 (Proceedings of the United Nations Interregional Seminar on "River Basin and Interbasin Development" (Budapest, 16-26 September 1975), hereinafter "Budapest Seminar").

[23] United Nations, *Guidelines for Flood Loss Prevention* . . . (see footnote 20 above), p. 1.

[24] See the discussion, in paragraph 7 of the present report, of the possible relationship between the phenomenon of global warming and increased flood activity. As already noted, Bangladesh experienced particularly severe flooding in 1987 and 1988. In the 1988 flood, nearly three quarters of the country was inundated. According to government reports, more than 2,000 people died as a result of the floods, many more suffered from waterborne diseases, and at least 30 million were believed homeless (*1989 Britannica Book of the Year*, pp. 154 and 159). See, generally, the report prepared in 1988 by the Joint Task Force of the Government of Bangladesh and the United Nations, "The 1988 floods in Bangladesh: impact, relief and recovery" (SG/CONF.4/1). The death toll from floods that submerged many areas in India's north-west provinces was estimated at thousands, and hundreds of thousands of residents in four affected States of India had to be evacuated; 9,000 towns and villages were said to be affected (*The New York Times*, 3 October 1988, p. A1). See also the report on hurricane Gilbert in *The New York Times*, 1 October 1988, p. A3. "Torrential rains also caused extreme flooding in the Sudan in August [of 1988]" (*1989 Britannica Book of the Year*, p. 159).

[25] United Nations, *Guidelines for Flood Loss Prevention* . . . (see footnote 20 above), p. iii.

[26] *Ibid.*

12. Increases in flood loss can be expected in the future as greater use is made of flood plains, particularly in developing countries, for agricultural, industrial and urban development.[27]

Flood plain occupancy poses a major dilemma. On the one hand flood plains provide attractive locations for various human activities, notably agriculture and transportation. Taking advantage of the rich alluvial soils, some of the world's great civilizations developed in the bottom lands of major rivers, notably along the banks of the Tigris and Euphrates, the Nile, the Indus and the Yangtze. The flat lands in river valleys also provide transportation corridors and building sites for homes and factories. . . . Not surprisingly, therefore, flood plains have become the focus of a considerable portion of the world's settlements and economic activities.

Flood plain occupancy, however, can be costly and in some cases may lead to disaster, for once in a while the river may overflow its banks and exact a heavy toll of property damage, income loss, and perhaps loss of life as well.[28]

13. Deforestation in upland watersheds has been identified as a major cause of increased flooding in the countries of South and South-East Asia and Latin America.[29] In India, for example, 20 million hectares are flooded annually, partly as a result of upland deforestation, resulting in flood damage in excess of $1 billion annually in the Ganges plain alone.[30]

14. Five types of floods have been recognized. These are: (*a*) floods caused by melting snow; (*b*) floods caused by ice-jams and ice breaking up; (*c*) conventional storm floods; (*d*) cyclonic storm floods; and (*e*) rain-induced mud flows.[31] Of course, other factors, such as upstream embankments (reducing the total area of the flood plain) and land-use practices, and the deposition of large quantities of sediment (thus reducing the carrying capacity of a river channel) can also contribute to a more regular cycle of flooding.

15. When the problem of floods affects more than one country, experience has demonstrated that the most effective method of dealing with it is through international co-operation.[32] At minimum, co-operation is necessary in the collection and exchange of data relating to hydrological conditions.[33] But effective flood-control and disaster-prevention programmes entail higher levels of co-operation. These may be achieved by building upon the data-exchange relationship, step by step, through the development of forecasting and warning systems, and ultimately the joint planning and execution of flood prevention and control works.[34]

16. The report on flood control presented to ILA in 1972 by the Committee on International Water Resources Law provides an interesting historical perspective upon human experience with floods, describes their causes and effects and lists typical preventive measures:

Floods and their disastrous effects upon the adjoining lands have occupied and vexed mankind since immemorial times. Together with the need for irrigation, water control was one of the decisive factors of the rise of the first civilizations originating in the river valleys of the Nile, the Tigris-Euphrates, the Indus and the Hoangho . . .

The periodic floods occurring in these river valleys have been converting large tracts of naturally dry lands into fertile fields by transforming inundation into regulated irrigation. But at the same time, these floods can be the causes of catastrophes in many parts of the world. . . . 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.

It appears at first sight that flood control is primarily a problem of science and technology, and that its execution is an object of municipal legislation and administration.

Of the various causes of floods, the most important are: intense and prolonged rainfall, thunderstorms, hurricanes, cyclones, snowmelts, 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, heavy rainfall synchronizing with the spill of the rivers, inadequate and inefficient drainage in low lying and flat areas, silting of river beds due to large amounts of silt brought down by the rivers, earthquakes, land slides and erosion, flooding in the lower reaches and deltas due to heavy silting at the mouths of the rivers, synchronizing of high tides and floods in the channels, creating of bars due to littoral drifts and lack of proper controlling structures to regulate the distribution of water in different channels in the deltaic regions.

Some of the usual methods which have been developed to minimize the damage created by floods are the following:

(1) Construction of dikes, flood walls, levees, or embankments to protect lands from flood waters and keep flood waters within the usual main channel.

(2) Increasing the discharge capacity of the main channel by either straightening or widening or deepening or by a combination of all 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.[35]

17. While floods are often associated with purely harmful consequences, it should not be forgotten that some kinds of flooding can have certain beneficial effects as well. In some countries, either historically or at

---

[27] Sewell and Foster, *loc. cit.* (footnote 22 above), p. 84.

[28] United Nations, *Guidelines for Flood Loss Prevention* . . . (see footnote 20 above), p. 1.

[29] United Nations, *Overall Socio-economic Perspective of the World Economy to the Year 2000* (Sales No. E.90.II.C.2), para. 364.

[30] *Ibid.*, citing World Bank, Development Committee, *Environment, Growth and Development*, publication No. 14 (Washington, D.C., 1987), p. 5.

[31] United Nations, *Guidelines for Flood Loss Prevention* . . . (see footnote 20 above), p. 13. See also part II of the report of the Committee on International Water Resources Law, relating to flood control (rapporteur, F. J. Berber) (ILA, *Report of the Fifty-fifth Conference, New York, 1972* (London, 1974), p. 44).

[32] This conclusion is borne out by the numerous international agreements and other authorities reviewed below.

[33] This form of co-operation would already be required by article 10 (Regular exchange of data and information), provisionally adopted by the Commission at its fortieth session; for the text of this article and the commentary thereto, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 43 *et seq.*

[34] See Sewell and Foster, *loc. cit.* (footnote 22 above), p. 91. For examples of such strategies for the minimization of flood damage, see the methods identified in the report of the Committee on International Water Resources Law (para. 16 below).

[35] ILA, *Report of the Fifty-fifth Conference* (see footnote 31 above), pp. 43-45.

present, floods are an annual occurrence[36] and may serve to irrigate agricultural land, and even enrich it through sediment deposition (see para. 46 below).

In some cases man has learned to live with such periodic inundations of the flood plain and has turned them to economic advantage. In most cases, however, floods are regarded as a hazard rather than as an advantage. Flood hazards in the third world countries [have] become [a] serious problem for overall development since recovery from flood damage in these countries [is] much more difficult.[37]

1. State practice

(a) *State practice as reflected in international agreements*[38]

18. One form of evidence of international custom is the appearance of similar provisions in a wide range of international agreements.[39] There is indeed a broad array of treaties that contain provisions concerning floods. Many of these agreements also address, often in the same article, ice conditions such as ice-jams (which may block river flows and subsequently release them, leading to flooding) and ice-floes;[40] some also deal with problems of flow obstruction, siltation and erosion.

(i) *Floods*

19. Treaty provisions concerning floods are collected and systematized most usefully in part II of the report presented to ILA in 1972 by the Committee on International Water Resources Law.[41] Only illustrative examples will be referred to here.

20. A number of agreements require consultation, notification, the exchange of data and information, the operation of warning systems, the preparation of surveys and studies, the planning and execution of flood-control measures, and the operation and maintenance of works. Perhaps most frequent are provisions requiring the monitoring of river levels, regular reporting, and warning of any sudden change that may give rise to flood danger. Illustrative is article 20 of the 1963 Treaty between Hungary and Romania concerning the régime of the Hungarian-Romanian State frontier and

[36] Bangladesh, for example, is subject to annual flooding by overbank spills due to drainage congestion, rainfall run-off and storm-tidal surges (Bhuiya, "Environmental aspects of floods and flood-control measures of Bangladesh", paper presented at the 1989 Bangladesh Flood Seminar (see footnote 8 above).

The nilometer of Ancient Egypt was a device that measured human welfare in terms of the level of the River Nile. See, for example, Curry, "Questioning the nilometer", paper presented at the 1989 Bangladesh Flood Seminar, p. 2, figure 1. The scale ranged from "hunger" at 12 "ells" of water (one ell is equivalent to 1.1 metres or 45 inches), through "suffering" (13 ells), "happiness" (14 ells), "security" (15 ells) and "abundance" (16 ells), to "disaster" (18 ells). Thus, while extremely low levels of water were equated with an insufficient food supply and high levels with prosperity, extremely high water levels meant terrible misfortune.

[37] Kahn, *loc. cit.* (footnote 8 above), p. 37.

[38] Complete references to the international instruments cited in the text or in footnotes are given in an annex to the present report.

[39] This is especially true when bilateral agreements "deal with matters generally regulated by international law", as opposed to "treaties which deal with matters which are clearly recognized as within the discretion of the States . . .". An example of the former category "would be treaties on riparian rights as there are requirements of international customary law about riparian States' duties toward others". (L. Henkin and others, *International Law: Cases and Materials*, 2nd ed. (St. Paul, Minn., West Publishing Co., 1987), p. 87.) See also G. H. Hackworth, *Digest of International Law* (Washington, D.C., 1940), vol. I, p. 17; and C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Co., 1945), vol. I, pp. 10-11.

On "the general international law significance of similar provisions contained in many separate treaties", specifically with regard to the law of international watercourses, see R. D. Hayton, "The formation of the customary rules of international drainage basin law", *in* A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds., *The Law of International Drainage Basins* (Dobbs Ferry, N.Y., Oceana Publications, 1967), pp. 868-871. See also the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3). The ICJ there recognized the possibility that a rule embodied in a treaty or treaties could pass into the general corpus of international law, and be

> ". . . accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained." (*Ibid.*, p. 42, para. 71.)

Judge Lachs, in his dissenting opinion, declared that

> ". . . the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted—even on the test of practice itself, if it shows 'much uncertainty and contradiction' (*Asylum*, judgment, *I.C.J. Reports 1950*, p. 277). It may also be controverted on the test of *opinio juris* with regard to 'the States in question' or the parties to the case." (*Ibid.*, p. 231.)

A memorandom dated 21 April 1958 by the State Department of the United States of America on legal aspects of the use of systems of international waters provides further support for the use of similar treaty provisions as evidence of a rule of general international watercourse law:

> "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.
>
> "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 neighbouring States. . . ." (*Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909*, 85th Congress, 2nd session, Senate document No. 118 (Washington, D.C., 1958), p. 63.)

See generally M. Akehurst, "Custom as a source of international law", *The British Year Book of International Law, 1974-1975*, vol. 47, p. 42; R. R. Baxter, "Treaties and custom", *Collected Courses of The Hague Academy of International Law, 1970-I* (Leyden, Sijthoff, 1971), vol. 129, p. 25; I. F. I. Shihata, "The treaty as a law-declaring and custom-making instrument", *Revue égyptienne de droit international* (Cairo), vol. 22 (1966), p. 51; and H. W. A. Thirlway, *International Customary Law and Codification* (Leyden, Sijthoff, 1972).

[40] As already noted (see para. 14 above), one of the five ways in which floods may be caused is by ice-jams and the break-up of ice.

[41] Part II of that report deals with flood control (ILA, *Report of the Fifty-fifth Conference* . . . (see footnote 31 above), pp. 43 *et seq.*). See also the consolidated report on international co-operation on flood management prepared by P. Chaperon for the Committee on Water Problems of ECE (WATER/R.143, 22 October 1986) and the note by the Secretariat on legal provisions contained in transboundary water agreements in the field of flood management (WATER/R.143/Add.1, 3 December 1986), which contain compilations of relevant provisions of international agreements relating to flood management.

co-operation in frontier matters, which provides:

Article 20

The two Parties shall transmit to each other in good time any information concerning the level of water and ice conditions in frontier waters which is of interest to the Contracting Parties if such information may serve to avert danger from floods or drifting ice. Similarly, they shall agree, if necessary, on a regular system of signals to be used during periods of high water or drifting ice. . . .

Another provision requiring the exchange of information with a view to averting flood hazards is the first sentence of article 17 of the 1958 Treaty between the USSR and Afghanistan concerning the régime of the Soviet-Afghan State frontier:

Article 17

The competent authorities of the Contracting Parties shall exchange as regularly as possible such information concerning the level and volume of water in frontier rivers and also concerning precipitation in the interior of the territory of the two Parties as might avert danger or damage from flooding. . . .[42]

21. A number of agreements emphasize the necessity of providing early warning of flood danger. For example, article 17 of the 1944 Treaty between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico provides:

Article 17

. . . Each Government agrees to furnish the other Government, as far in advance as practicable, any information it may have in regard to such extraordinary discharges of water from reservoirs and flood flows on its own territory as may produce floods on the territory of the other.

. . .

Similarly, in article IV, paragraph 8, of the 1960 Indus Waters Treaty between India and Pakistan, each of the two States

agrees to communicate to the other Party, as far in advance as practicable, any information it may have in regard to such extraordinary discharges of water from reservoirs and flood flows as may affect the other Party.

To the same effect is article 8 of the 1955 Agreement between Yugoslavia and Hungary,[43] which provides as follows:

Article 8

The local authorities of the Contracting Parties shall advise each other, by the quickest possible means, of any danger from high water or ice and of any other danger which may arise on watercourses which form the State frontier and watercourses and water systems intersected by the State frontier.

22. The 1952 Agreement between Poland and the German Democratic Republic concerning navigation in frontier waters and the use and maintenance of frontier waters calls for the parties not only to take precautionary measures against and warn of flood danger but also to take concerted action to remedy any dike failure. Chapter III of the Agreement, entitled "Principles of co-operation in precautionary measures against flooding and ice-floes", provides in article 21 as follows:

Article 21

Each Contracting Party shall take precautions against flooding on its own territory in accordance with its applicable provisions and shall where necessary inform the other Party of the danger of a burst in any dike.

If a dike bursts, the two Parties shall immediately combine their efforts to repair the damage, furnishing technical facilities and the necessary labour.

The Party which asks for assistance shall bear the cost involved.

23. Some agreements include very specific requirements concerning the monitoring of water levels during periods of high water. For example, Protocol No. 1, relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries, annexed to the 1946 Treaty of friendship and neighbourly relations between Iraq and Turkey, provides in article 3 as follows:

Article 3

. . .

During periods of high-water the levels of water observed every day at 8 a.m. by the stations equipped for telegraphic communication, such as Diyarbakir, Cizre, etc., on the Tigris and Keban, etc., on the Euphrates, shall be communicated by telegram to the competent authorities designated by Iraq for this purpose.

The levels of water observed outside periods of high-water shall be communicated to the same authorities by means of bi-monthly bulletins.

The cost of the above-mentioned communications shall be defrayed by Iraq.

A similar provision is found in the 1956 Treaty between France and the Federal Republic of Germany concerning the settlement of the Saar question. Under article 9 of annex 8 the authorities of the two countries are to maintain a water-level reporting service. In particular,

---

[42] An identical provision is contained in article 14 of the 1957 Treaty between the USSR and Iran concerning the régime of the Soviet-Iranian frontier and the procedure for the settlement of frontier disputes and incidents. The following are further examples of treaty provisions concerning the exchange of data and information with a view to averting flood danger:

The 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin provides that "Hydrometeorological information will be made available to the entities in both countries for immediate and continuing use in flood control and power operations" (annex A, para. 2).

The 1964 Agreement between Bulgaria and Greece on co-operation in the utilization of the waters of the rivers crossing the two countries provides for the parties to exchange the necessary data and information, in order "that measures may be taken in time to prevent the flooding of lands under cultivation . . ." (art. 4).

The 1948 Agreement between Poland and the USSR concerning the régime on the Soviet-Polish State frontier provides in article 19, first sentence:

"*Article 19*

"The competent authorities of the Contracting Parties shall exchange information concerning the level and volume of water and ice conditions on frontier waters, if such information may help to avert the dangers created by floods or floating ice. . . ."

See also the 1927 Agreement between Germany and Poland regarding the administration of the section of the Warta forming the frontier, and traffic on that section.

[43] The Agreement includes the statute of the Yugoslav-Hungarian Water Economy Commission. See also article 1, para. 2 (*m*) and (*n*), of the statute.

Article 9

. . .

2. As soon as a flood warning alert is transmitted by the Sarrebourg station on the upper course of the Saar, the operations of the Saar flood warning service at Saarbrücken shall be set in motion. From that time onward, the competent reporting services shall remain in constant touch with each other until notice of the end of the alert is transmitted by the Saarbrücken station.

3. With a view to expediting the transmission of reports, the Federal Republic of Germany shall maintain a special telephone line between the competent office at Sarreguemines and the inland navigation office at Saarbrücken. The said telephone line shall run along the tow-path as a cable and shall accordingly be situated on French soil upstream from kilometre 75.617 (as measured on the left bank).

24. Reflecting the importance that States attach to the proper functioning of monitoring and early-warning systems, some agreements allow one party to inspect gauging stations on the territory of the other party. For example, article 3 of the above-mentioned Protocol No. 1 to the 1946 Treaty between Iraq and Turkey provides in pertinent part as follows:

Article 3

Turkey shall install permanent observation stations and shall ensure their operation and maintenance. The cost of operation of these stations shall be defrayed in equal parts by Iraq and Turkey, as from the date of entry into force of the present Protocol.

The permanent observation stations shall be inspected at stated intervals by Iraqi and Turkish technical experts.

. . .

25. A number of agreements provide for the parties to take joint measures to avert flood damage. Among these is the 1969 Convention between France and the Federal Republic of Germany concerning development of the Rhine between Strasbourg/Kehl and Lauterbourg/Neuburgweier, article 9 of which provides as follows:

Article 9

1. On the basis of the findings of the Commission to Study Flooding of the Rhine, the Contracting Parties shall as soon as possible conclude an Agreement 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 States concerned.

. . .

26. Similarly, the 1964 Agreement between Poland and the USSR concerning the use of water resources in frontier waters provides for the parties to "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).[44]

27. The 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters provides in article 8 for the parties not only to provide each other with reports on high water, drifting ice and other hazards (para. 1(*c*)) but also to "come to agreement on what joint steps are to be taken for the elimination or reduction of danger in the event of floods or drifting ice and on how the costs thereby incurred are to be met" (para. 2).

28. A large number of agreements call for co-operation between watercourse States in the preparation and exchange of surveys and studies relating, *inter alia*, to flood control. The 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin,[45] for example, contains the following pertinent provisions:

Article XV Permanent Engineering Board

. . .

2. The Permanent Engineering Board shall:

(*a*) assemble records of the flows of the Columbia River and the Kootenay River at the Canada-United States of America boundary;

(*b*) report to Canada and the United States of America whenever there is substantial deviation from the hydroelectric and flood control operating plans and if appropriate include in the report recommendations for remedial action and compensatory adjustments;

. . .

ANNEX A

PRINCIPLES OF OPERATION

General

. . .

2. A hydrometeorological system, including snow courses, precipitation stations and stream flow gauges, will be established and operated, as mutually agreed by the entities and in consultation with the Permanent Engineering Board, for use in establishing data for detailed programming of flood control and power operations. . . .

. . .

29. Another of the many examples of treaties containing this kind of provision is the 1956 Agreement between the USSR and the People's Republic of China on joint research operations to determine the natural resources of the Amur River Basin and the prospects for development of its productive potentialities and on planning and survey operations to prepare a scheme for the multipurpose exploitation of the Argun River and the Upper Amur River.[46] Annexes I and II of the Agreement contain the following provisions of present interest:

ANNEX No. 1

. . .

Research operations shall be carried out as indicated in the following sections:

I. STUDY OF NATURAL CONDITIONS

. . .

[44] Cf. the 1955 Agreement between Yugoslavia and Hungary, together with the statute of the Yugoslav-Hungarian Water Economy Commission, which empowers the Commission "to draw up . . . regulations for protection against flooding and ice and such other regulations as may be necessary" (art. 4, para. 2).

[45] See also the 1944 Treaty between the United States of America and Mexico, arts. 6, 12 (*d*), 13 and 16.

[46] See also the 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters (art. IV, paras. 1 and 2) and the 1960 Protocol concerning the establishment of the Permanent Joint Technical Commission; the 1926 Agreement between South Africa and Portugal regulating the use of the waters of the Kunene River for the purposes of generating hydraulic power and of inundation and irrigation in the Mandated Territory of South West Africa (arts. 8, 9 and 10); and the 1959 Agreement between Nepal and India on the Gandak River irrigation and power project (arts. 1 and 3).

3. SURVEYS OF WATER AND WATER POWER RESOURCES

Study of the water power potential of the Amur River and of the main rivers of the Amur River Basin and preparation of preliminary proposals relating to possible outline schemes for the regulation and use of its waters, with a view to the construction of hydro-electric power stations, the improvement of navigation conditions, the prevention of floods, the execution of land-improvement projects and the development of the fishing industry.

. . .

ANNEX No. 2

. . .

Planning and survey operations shall be carried out as indicated in the following sections:

A. Survey operations

1. Hydrometric operations to study the régime of the Argun and Amur Rivers from the source to the Maly Khingan range, and of their main tributaries on both banks.

The purpose of the hydrometric operations shall be to provide data to determine the variations in the level and flow of the rivers, their winter flow, their solid flow and the chemical composition of the water.

2. Geodetic and topographical operations:

. . .

(*c*) Surveys of flood areas of water reservoirs of top-priority projects, on the scale 1:25,000;

. . .

3. Engineering and geological surveys:

. . .

(*g*) Exploration of flood areas, for top-priority projects;

. . .

B. Planning operations

. . .

4. Evaluation of the economic consequences of regulating the flow of water in order to reduce the frequency and scale of flooding of economically valuable territory on both banks caused by sudden rises in the river level and to create favourable conditions for land improvement.

. . .

6. Estimation of losses due to flooding under different variants of the scheme.

. . .

(ii) *Ice conditions*

30. It has been seen that States, in their agreements, often deal with floods and ice conditions together. The present section contains some additional illustrations of provisions concerning the latter problem.

31. Ice conditions may give rise to flood hazards or may pose dangers of their own, such as obstruction of navigation and threats to such structures as piers and bridges. The manner in which ice conditions cause flooding is explained in a United Nations study as follows:

Floods caused by ice jams and ice breaking up also occur in the early spring. They often occur at constriction points such as at a sharp bend, gorge, bridge crossing or any other physical obstacle. They may also occur where the gradient of a channel changes from steep to gentle, or at the point where a stream discharges into a lake. In Canada and the USSR such floods typically occur when the ice and snow in the headwaters of northward flowing streams melt more rapidly than the ice and snow in the lower reaches.[47]

32. Chapter III of the 1952 Agreement between Poland and the German Democratic Republic concerning navigation in frontier waters, already referred to in connection with concerted action against flood danger (para. 22 above), contains detailed provisions requiring co-operative action in relation to ice conditions:

Article 19

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 technical direction of works for protection against ice shall be undertaken by the Polish Party.

The Polish Party shall inform the German Party in good time of the place and time of ice clearance operations on the frontier sector of the river Oder, the middle and lower reaches of the Oder, and the Nysa Luzycka (Lausitzer Neisse).

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.

The Polish Party shall take into account, in carrying out ice-breaking operations, the wishes and requirements of the German Party, with a view to preventing any danger to German territory. The German Party shall provide the Polish Party at its request with appropriate technical facilities (ice-breakers and blasting operatives) for the ice clearance operations. The competent authorities of the two Contracting Parties shall agree on the extent of the technical facilities which each Party shall be required to provide for ice-breaking purposes.

Article 20

In the event of damage or accident during blasting operations, each Party undertakes to come to the other's assistance, subject to reimbursement of the expenses entailed in the provision of such assistance.

Article 22

The labour costs involved in operating the ice-breakers used shall be borne by the Party to which the ice-breakers belong.

Where labour is employed in blasting operations carried out by one Party at the other Party's request, the two Parties shall divide the cost of such works equally between them.

33. An example of a treaty provision that addresses the problem of ice-floes is article 8 of the 1958 Agreement between Yugoslavia and Bulgaria concerning water economy questions:[48]

Article 8

The frontier and local authorities of the Contracting Parties shall advise each other, by the most rapid possible means, of any danger from high water or drifting ice and of any other danger which may arise on rivers and tributaries followed or intersected by the State frontier.

34. Some agreements call upon the parties to take positive measures, including the construction of works of various kinds, with a view to providing protection against hazardous ice conditions. An illustration of such a provision is found in the 1967 Treaty between Austria and Czechoslovakia concerning the regulation of water management questions relating to frontier waters, article 4 of which provides in pertinent part that

(2) The Contracting States shall, in accordance with their domestic regulations, promote the construction in their territory of hydraulic

[47] United Nations, *Guidelines for Flood Loss Prevention* . . . (see footnote 20 above), p. 13.

[48] See also the 1956 Treaty between Hungary and Austria concerning the regulation of water economy questions in the frontier region, which requires parties to "notify each other as quickly as possible of any danger of flood or ice . . . in connection with frontier waters which comes to their attention" (art. 11); the 1960 Treaty between Finland and the USSR (art. 17); the 1956 Agreement between the USSR and Czechoslovakia concerning the régime of the Soviet-Czechoslovak frontier and the procedure for the settlement of frontier incidents (art. 19); and the 1950 Treaty between the USSR and Hungary concerning the régime of the Soviet-Hungarian State frontier and Final Protocol.

installations and facilities to provide protection against the danger of flooding and ice along the frontier waters; . . .

(iii) *Drainage problems*

35. Like ice conditions, problems of drainage can be closely related to flooding. After noting other injurious effects of poor drainage, the present section briefly reviews treaty provisions dealing with this problem.

36. A helpful summary of the kinds of problem that can be caused by insufficient drainage is provided in the third report of Mr. Schwebel:[49]

Adequate drainage of surplus waters is an ancient problem [citing treaties dating from 1816]. Lack of it ruins soils, keeps groundwater tables injuriously high and causes standing, stagnant water, or local flooding.[50] 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 discharges 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.[51]

37. Such an agreement is the 1928 Treaty between Austria and Czechoslovakia regarding the settlement of legal questions connected with the frontier described in article 27, paragraph 6, of the Treaty of Saint-Germain-en-Laye of 1919. Article 29 of that instrument provides in relevant part as follows:

Article 29

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. In order to enable such works to be constructed in a businesslike way and in conformity with sound engineering principles, the Contracting States 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.

. . .

The 1967 Treaty between the same parties (see para. 34 above), after requiring that they provide protection against flooding and floating ice, stipulates that they shall also take measures "to ensure that frontier waters are kept clean and to construct hydraulic installations and facilities for the drainage or irrigation of adjoining territory . . ." (art. 4, para. 2).

38. Drainage problems are also addressed by the 1960 Treaty between the Netherlands and the Federal Republic of Germany concerning the course of the common frontier and boundary waters.[52] This agreement illustrates how a general obligation to consider the interests of the neighbouring State and to avoid injuring it may have as one of its concrete applications the duty to provide for adequate drainage:

Article 58

1. The Contracting Parties undertake to give due regard, in the performance of their tasks in the field of water management, to the neighbouring State's interests in the boundary waters.[53] To that end, they agree to take or to support all measures required to establish and to maintain within the sections of the boundary waters situated in their respective territories such orderly conditions as will mutually safeguard their interests, and they shall neither take nor tolerate any measures causing substantial prejudice to the neighbouring State.

2. In performing the obligations undertaken in paragraph 1, the Contracting Parties shall in particular take or support, within an appropriate period of time, all measures required:

(*a*) To secure and maintain the adequate drainage of the boundary waters, to the extent required in the interest of the neighbouring State;

(*b*) To prevent inundations and other damage resulting from the inadequate servicing of sluices and weirs;

. . .

3. In addition, the Contracting Parties shall endeavour, within the limits of their financial resources, . . . to participate financially, where such participation is equitable, in measures taken in respect of the boundary waters within the territory of the neighbouring State.

These provisions illustrate how the interrelated phenomena of inadequate drainage and floods (inundation) may be treated together and demonstrate a willingness to enter into the kind of co-operation that is necessary in dealing with these common problems.

39. The 1956 Agreement between Yugoslavia and Albania concerning water economy questions[54] contains in article 1 the following relevant provisions:

Article 1

. . .

2. The provisions of this Agreement shall apply to all water economy questions . . . and in particular to:

. . .

(*c*) The discharge of water, drainage and similar measures;

(*d*) Protection against flooding;

. . .

(*i*) Protection against soil erosion;

. . .

40. In the 1960 Indus Waters Treaty, article IV, paragraph (4), provides that Pakistan shall "maintain in good

[49] See document A/CN.4/348 (footnote 16 above), para. 356.

[50] Mr. Schwebel notes (*ibid.*, footnote 620): "Waterlogging and 'salinization' of once fertile soil is a well-known consequence of inadequate drainage. This is the case in the Indus Basin . . ." and refers to resolution VII of the World Food Conference, entitled "Scientific water management: irrigation, drainage and flood control" (*Report of the World Food Conference*, Rome, 5-16 November 1974 (United Nations publication, Sales No. 75.II.A.3), pp. 10-11).

Frequent reference to problems created by "ponding", due to insufficient drainage after floods, was made at the 1989 Bangladesh Flood Seminar. This phenomenon not only destroys crops but also can give rise to water-borne diseases and their vectors.

[51] Mr. Schwebel cites, *inter alia*, article 8 of the 1843 Convention between Belgium and the Netherlands on regulation of the drainage of the Flanders waters; and article I, sect. 4, article IV, sect. 2, and article V of the 1905 Convention between the Netherlands and Prussia concerning the Dinkel and Vechte rivers.

[52] See also article I, section 4, of the 1905 Convention between the Netherlands and Prussia concerning the Dinkel and Vechte rivers, which provides: "The draining of surplus water shall be carried out in such manner as to prevent, as far as possible, any overflowing of the banks of the lower reaches of the Dinkel river. . . ."

[53] The expression "boundary waters" is defined in article 56 of the Treaty as "surface waters . . . which cross or, in some of their sections, form the frontier between Germany and the Netherlands".

[54] The Agreement includes the statute of the Yugoslav-Albanian Water Economy Commission and the Protocol concerning fishing in frontier lakes and rivers.

order its portions of [certain] drainages . . .". The same article further provides:

(5) If India finds it necessary that any of [those] drainages . . . should be deepened or widened in Pakistan, Pakistan agrees to undertake to do so as a work of public interest, provided India agrees to pay the cost of the deepening or widening.

(6) Each Party will use its best endeavours to maintain the natural channels of the Rivers, as on the Effective Date, 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.

These provisions once again evidence a recognition of the interrelationship between flooding, drainage and flow obstructions.

(iv) *Flow obstructions*

41. Flow obstructions may be caused by ice, may inhibit drainage or cause erosion, and may ultimately lead to flooding. However, they may also be unrelated to these other conditions, constituting a hazard, in their own right, to such activities as hydropower generation and navigation, and may even cause the displacement of river channels. Obstructions of the flow of a watercourse may result from human activity, but they are often caused by events such as landslides and earthquakes, by natural log-jams, or by such processes as the accumulation of sediment or of debris. Most treaties addressing the other hazards and conditions dealt with in this chapter also provide for measures to be taken in respect of flow obstructions. In addition to the provisions already mentioned, the following are illustrative.

42. In the 1961 Treaty between the USSR and Poland concerning the régime of the Soviet-Polish State frontier and co-operation and mutual assistance in frontier matters, article 16, paragraph 3, provides that the parties "shall jointly take the necessary steps to remove any obstacles which may cause displacement of frontier rivers, streams or canals or which may obstruct the natural flow of water, navigation and timber-floating along them" and that, if joint works must be undertaken for the purpose of removing such obstacles, "the appropriate authorities of the two Parties shall decide how the works are to be executed. The expenses involved shall be divided equally between the two Contracting Parties unless a special agreement is concluded on this question".

43. In the 1963 Treaty concerning the régime of the Hungarian-Romanian State frontier and co-operation in frontier matters, Hungary and Romania agreed, in article 16, to ensure that their frontier waters are kept in good condition and to "take the necessary steps to remove any obstacles which may cause displacement of the beds of frontier rivers or streams or a change in the position of canals or which obstruct the natural flow of water" (para. 2). They agreed further that "[s]hould a frontier river, stream or canal shift its bed spontaneously or as a result of some natural phenomenon, the Contracting Parties must, jointly and on the basis of equality, undertake the work of correcting the bed if that is found necessary" (para. 4).

44. These agreements demonstrate the importance States attach to protection against damage caused by flow obstructions.

(v) *Siltation*

45. Less dramatic but sometimes equally harmful are accumulations of sediment, which can also change the course of entire rivers. Many watercourses carry heavy sediment loads, as evidenced by the formation of large deltas by the world's major rivers. The annual loads of the Paraná in South America and the Ganges-Brahmaputra system in Bangladesh are each approximately 250 million tons of dry solids.[55] Silt accumulations can create navigational and other hazards and can even divert a river from its original channel. The sediment carried by watercourses can gradually fill in reservoirs, smother spawning beds, clog or damage water-supply intakes and treatment plants, and foreclose recreational uses.[56] The introduction of sediment into watercourses can result from natural causes (e.g., heavy runoff), human conduct (e.g., land-use practices such as overgrazing or deforestation, leading to erosion)[57] or both.

46. Sedimentation can be both a cause and an effect of flooding. It can cause a river to overflow its banks by filling the river-bed, thus reducing its carrying capacity. While floods can cause widespread damage through the silt they transport, the same sediment can also have beneficial effects:

Catastrophic sediment movements which disrupt agricultural patterns and transport facilities are a major result of large-scale flooding. Sediment is also an essential component of soils, and an agent of transport of nutrients and essential minerals. Thus sediment is both a hazard and a resource and contingency planning for flood events requires provisions for sediment management.[58]

47. Efforts to remedy siltation problems are further complicated when the sediment originates in another country. Whether the causes of sedimentation are natural or not, watershed management to stabilize headwater areas may be necessary to curb its harmful effects. Not only is prevention generally more efficient than cure, but efforts to eliminate sediment build-up are often overwhelmed by the volume of silt being transported.[59] This is not to say, however, that elimination of the problem at its source is a simple matter:

---

[55] With regard to the Paraná, see Hayton, "The Plata Basin", in Garretson, Hayton and Olmstead, eds., *op. cit.* (footnote 39 above), p. 440, note 374. Concerning the Ganges-Brahmaputra system, see J. Riddell, "The role of dredging in flood alleviation", paper presented at the 1989 Bangladesh Flood Seminar (footnote 8 above).

[56] These and other adverse effects of siltation are described in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 16 above), paras. 366-367.

[57] "Dredging and placer mining for precious metals and stones, or dredging for sands and gravels, can result in considerable sediment load . . ." (*ibid.*, footnote 631).

[58] Kranck, "Sediment movement associated with flood events", paper presented at the 1989 Bangladesh Flood Seminar (see footnote 8 above), p. 29. See also Mr. Schwebel's third report:

". . . 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. . . ." (Document A/CN.4/348 (footnote 16 above), para. 366.)

[59] In his third report, Mr. Schwebel states:

"The Plata international watercourse system in South America suffers exceedingly from the problem of siltation. . . . 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 constant dredging required in the area of the port of Buenos Aires. . . ." (Document A/CN.4/348, para. 367.)

See also Riddell, *loc. cit.* (footnote 55 above). The author notes that, while it is unlikely that removal of the sediment is a practical proposal in all situations, and specifically in the case of Bangladesh, dredging may provide a useful solution in critical areas.

. . . 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 [by the silt]. Clearly, concerted action and contribution by the system States to be benefited by the measures are called for. . . .[60]

48. An early agreement that addresses the problem of siltation is the 1892 Treaty between Switzerland and Austria-Hungary 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, article XVII of which provides as follows:

Article XVII

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 sediments in order to reduce drifting in the bed of the Rhine as much as 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.

49. To the extent that harmful siltation results directly or indirectly from human conduct, it would fall within the definition of pollution proposed in paragraph 1 of article 16 [17] submitted in the fourth report.[61] While some of the effects of siltation are similar to those of the introduction of chemicals into a watercourse, other effects are more akin to those produced by flow obstructions. This may explain why States have sometimes dealt separately with problems of siltation and pollution.

(vi) *Erosion*

50. Soil erosion can have a number of harmful effects on watercourses and their use. As noted (paras. 45-46 above), it produces sediment, whose deposition can result in flooding, the filling in of channels and other harmful effects. Erosion may also cause damage to the banks and beds of watercourses. In recognition of these problems, States have included in their watercourse agreements provisions designed to avoid harmful erosion.

51. An illustration of a treaty whose scope is specifically defined to include the problem of erosion is the 1958 Agreement between Yugoslavia and Bulgaria concerning water economy questions.[62] Article 1 of that accord provides that it shall apply to all water-economy questions, and in particular to:

. . .

(*h*) Protection against soil erosion in forested and agricultural areas (afforestation, soil conservation, the erection of retaining-walls and silting control);

. . .

52. The 1960 Indus Waters Treaty between India and Pakistan includes a general safeguard clause concerning activities designed, *inter alia*, to promote drainage and to conserve soil against erosion:

Article IV

. . .

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

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

. . .

53. Finally, the 1969 Convention between France and the Federal Republic of Germany concerning development of the Rhine illustrates the concern of States for protecting watercourse channels against erosion. In that agreement, the two States undertake to develop jointly "[t]he course of the Rhine downstream from the Iffezheim barrage with a view to preventing or remedying erosion of the river-bed" (art. 1, para. 1).

(b) *State practice as reflected in diplomatic correspondence and other official papers dealing with specific cases*

54. The foregoing review of the practice of States as reflected in their agreements reveals a widely shared concern of long standing for the prevention and regulation of the different events, conditions and other problems that have been considered. Evidence of State practice in the form of diplomatic communications and official papers is not so readily available, as it is often not published. None the less, that which has been discovered offers further support for the proposition that States regard such hazards and dangers as floods as matters that are governed by rules of general international law.

55. Diplomatic exchanges between the United States of America and Mexico concerning two separate problems provide illustrations of the views taken by States regarding their mutual rights and obligations in such cases. The first is the Rose Street canal case, which concerned the channelling of surface runoff from Douglas, Arizona, into Mexico.[63] It is described in the following passages of a note to the United States Secretary of State (Acheson) from the Ambassador of Mexico (de la Colina), dated 1 October 1951:

I have the honor to inform Your Excellency that for several years, without any authorization therefor, part of the surface runoff caused by rains has been diverted artificially by a canal extending from the United States to Mexico east of the city of Douglas, Arizona, and crossing to the east of the Mexican town of Agua Prieta through areas which formerly were outside the boundary of the town but which now, because of the town's growth, are within its limits.

The rains that fell during 1948 destroyed part of the Mexican embankment of the canal and caused damage to private properties. Since then, during each rainy season, the roads from Agua Prieta to its airport and its municipal cemetery are cut off, and the properties and even the lives of the persons who live near the canal are endangered.

The Mexican authorities are suggesting three solutions to this problem:

One solution, and without doubt the most effective, consists in the construction of a new diversion canal more removed from Agua Prieta.

[60] Mr. Schwebel's third report, document A/CN.4/348, para. 366.

[61] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), chap. III, sect. C.

[62] A similar approach is taken by 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, together with the statute of the Yugoslav-Romanian Water Control Commission (art. 1(*i*)).

[63] See M. M. Whiteman, *Digest of International Law* (Washington, D.C.), Vol. 6 (1968), pp. 262-265.

With this in view, the two Sections of the International Boundary and Water Commission have proceeded to make the necessary topographical surveys. Since the canal was constructed by the United States, with no agreement whatever with my country, and since its location has been the principal cause of the damage sustained by our nationals, my Government considers that it devolves upon Your Excellency's Government to finance the necessary work and to pay the damages. The second solution lies in the reconstruction in Mexican territory of the damaged embankment of the canal and the recognition by the Government of the United States of its obligation to pay the costs connected therewith. The third and last solution consists in closing up the canal and constructing a small levee to protect the city of Agua Prieta, along the dividing line, although this diversion would cause damage to the city of Douglas and its inhabitants.

Obviously, the first of the above-mentioned solutions is the most equitable and desirable, and therefore my Government would like Your Excellency's Government to meet the costs of planning and constructing the new canal and of indemnifying the Mexican citizens who have sustained damage.

My Government takes the liberty of suggesting that Your Excellency's Government authorize the United States Commissioner to hold conversations with the Mexican Commissioner in order to reach an agreement on the points set forth above.

56. The United States replied to the Ambassador of Mexico in a note dated 5 February 1952, which described the results of informal discussions that had been held between the officials of Douglas and Agua Prieta:

> . . .I am informed that in the year 1919 the City of Douglas undertook the construction of a drainage canal known as the Rose Street Ditch for the purpose of preventing flood damage. The officials of Agua Prieta expressed an interest, and all construction was suspended while representatives of the two cities conferred. The Mexican officials participating in the discussions, according to my information, consented to resumption of construction and even persuaded the City of Douglas to extend the canal, at considerable expense to itself, from the boundary line southward for approximately 1500 feet so that it would discharge into the large arroyo where its flood waters now flow. All parties on both sides of the border seemed to be satisfied at the time and, I believe you will agree, most cordially took advantage of the canal for many years. Hence a question of damages does not seem to arise.
>
> The present unfortunate situation appears to have developed from the expansion of the City of Agua Prieta toward and beyond the flood arroyo. With the simultaneous expansion of the city of Douglas, the existing drainage canals have become inadequate and represent a matter of concern to both cities. As a consequence the International Boundary and Water Commission undertook informal studies and surveys in 1949 and 1950, and the results suggest the desirability of constructing new flood control works in each of our two countries.
>
> My Government agrees that the International Boundary and Water Commission should continue its studies with the intention of bringing them to a conclusion and of submitting a joint report as early as possible in this year. This report might include recommendations not only concerning remedial measures but also with respect to an equitable division of costs between our Governments . . .

57. In a note dated 24 March 1955, the Ambassador of Mexico (Tello) advised the United States Secretary of State (Dulles) that the situation had not yet been remedied and that, in order to protect Agua Prieta from floods, Mexico would "begin building certain protective works to prevent the entry into Agua Prieta of rain water collected by the Rose Street canal in Douglas". The Ambassador noted that United States authorities might wish to take measures "to prevent consequences which the return of such water might have in the city of Douglas" and stated: "my Government reserves the right to present a claim for the damage which the residents of Agua Prieta have suffered thus far . . .".

58. On 12 May 1955, the United States Assistant Secretary of State (Holland) wrote the following to the mayor of the city of Douglas concerning the flooding problem and the protective works to be built by the Government of Mexico:

> The Department understands that the problem results from the unnatural discharge into Mexico of flood waters originating near Douglas through works constructed by Douglas. There appears to be no occasion nor justification for an international project. In the opinion of both the United States and Mexican Sections of the International Boundary and Water Commission, the problem can be remedied by each city taking entirely feasible and relatively inexpensive steps to prevent the unnatural discharge of flood waters into the other. . . .
>
> . . . Since neither the United States nor the city of Douglas would have the right, without the consent of the Government of Mexico, to divert water from its natural course in the United States into Mexico to the detriment of citizens of the latter country, there would seem to be no doubt that Mexico has the right to prevent water coming into Mexico through the Rose Street canal by the construction at any time of a dike on the Mexican side of the international boundary. On the other hand, the principle of international law which obligates every state to respect the full sovereignty of other states and to refrain from creating or authorizing or countenancing the creation on its territory of any agency, such as the Rose Street canal, which causes injury to another state or its inhabitants, is one of long standing and universal recognition.

Mexico subsequently placed an earth embankment across the canal on the Mexican side of the boundary and the city of Douglas took measures that would be adequate to deal at least with normal storm runoffs.[64]

59. This exchange indicates a recognition of the principle that one State may not, through the alteration of natural runoff patterns (or "diver[sion] [of] water from its natural course"), cause appreciable harm to another State, and that a State threatened by such harm may take appropriate and reasonable precautionary measures. Similar principles were involved in a case that arose only several years later, involving the construction in Mexico of a highway across the Smugglers and Goat Canyons.[65]

60. On 20 May 1957, the United States Commissioner on the International Boundary and Water Commission informed the Mexican Commissioner that the construction of a highway in Mexico posed a flood danger to the United States. The highway, which paralleled the boundary, crossed two canyons that drain northward from Mexico into the United States. It was constructed of earth fill "up to 60 feet in height without culverts" and, according to the United States Commissioner, was "subject to failure [and] could result in flows at the mouths of the canyons at rates greatly exceeding those of natural flows. At the mouths of the canyons in the United States there are residences and properties which would be seriously damaged by such flows". The United States Commissioner concluded by stating:

> . . . I will appreciate an examination of the problem by your Section, and, if the conditions found are as reported to me, that appropriate arrangements be made with the proper authorities in Mexico to take such remedial measures as required to eliminate this threat to interests in my country.

61. The State Government of Baja California, Mexico, drew up a plan for culverts but the plan was considered inadequate by engineers of the United States Section of the International Boundary and Water Commission and was finally abandoned. The State Government prepared a new set of plans which the United States Section considered as appearing adequate with certain suggested modifications.

---

[64] *Ibid.*, p. 265, referring to a memorandum dated 11 July 1955 addressed to the United States Commissioner on the International Boundary and Water Commission by engineer Friedkin of the United States Section of the Commission.

[65] *Ibid.*, pp. 260-262.

62. In a note dated 29 July 1959 addressed to the Mexican Minister of Foreign Relations (Tello), the United States Ambassador (Hill) observed that culverts which had been installed were being covered by embankment fill, rendering compliance with the State Government's plan increasingly unlikely. The note continued:

> In the opinion of engineers of the United States Government who are closely familiar with the recent construction, the embankment at Arroyo de San Antonio [Goat Canyon] will fail in certain circumstances of flood, and the modifications made at the Arroyo de las Cabras are not adequate to ensure its security. It too must be expected to fail in certain circumstances. Since the rainy season in that area begins as a rule in November, when considerable runoff in the arroyos must be anticipated, the matter is not only grave but urgent.
>
> My Government has accordingly instructed me to urge the Government of Mexico to take appropriate steps to prevent the damage to property and the injury to persons that are likely to result from the improper construction of the highway. I urge particularly that further construction at the Arroyo de las Cabras be suspended until arrangements can be made by the Government of Mexico for adoption of features essential for the security of the embankment in that canyon, and that the embankment at the Arroyo de San Antonio be opened to prevent the accumulation of flood water pending installation of similar modifications at that canyon.
>
> In view of the foregoing, I am instructed to reserve all the rights that the United States may have under international law in the event that damage in the United States results from the construction of the highway.

63. While some steps towards remedying the situation were thereafter taken, part of the highway was subsequently washed away when water was captured behind the embankments as predicted. Legislation was later passed in the United States authorizing the Secretary of State to enter into an agreement with the Government of Mexico for the joint construction, operation and maintenance by the two States of an international flood control project. Such an agreement was concluded on 19 June 1967.[66]

64. Heads of State and other government officials sometimes make statements concerning the rights and obligations under international law of their States and others with reference to specific cases or situations. While not as illuminating as diplomatic exchanges with reference to a specific problem, these statements do indicate the position of the Government in question with reference to the situation being addressed.

65. At the opening session of the 1989 International Seminar on Bangladesh Floods, the President of Bangladesh delivered an address in which he stated in part, with reference to that country's flood problems:

> . . . these problems need co-operation and integrated approach of all the countries of this region. Nowhere is interdependence more vital than in the rational use and management of internationally shared rivers. Shared rivers are archetypical examples of [the need for] co-operation on the basis of equity, mutual trust and respect. . . . Bangladesh has agreed upon the formation of joint study teams and task force[s] [with neighbouring countries] to study and suggest ways and means for harnessing, developing and rationally managing this vitally important resource. . . .
>
> . . . The requirement of co-operation has now transformed from political concession or morality into international legal duty. An act contrary to this legal order is a breach of international obligation.[67]

[66] International Boundary and Water Commission, United States and Mexico, Minute No. 225. See also the statement by the President of the United States on the agreement, in *Weekly Compilation of Presidential Documents* (Washington, D.C.), vol. 3, No. 27, 10 July 1967, p. 981.

[67] Address by Hussain Muhammad Ershad, President of the People's Republic of Bangladesh, *loc. cit.* (footnote 8 above), pp. 8-9.

2. Declarations, resolutions and recommendations adopted by intergovernmental organizations, conferences and meetings

66. This emphasis on the need for co-operation in addressing flood problems is reflected not only in the agreements surveyed above but also in the work of international organizations, which will be reviewed in the present section.

67. The Mar del Plata Action Plan, adopted in 1977 by the United Nations Water Conference, contains recommendation E, "Natural hazards".[68] In this recommendation the Conference recognized the need in many countries to strengthen programmes for the reduction of losses associated with floods within the framework of programmes for land and water management and for disaster prevention and preparedness generally. It further called upon countries to provide effective flood protection by means of structural and non-structural measures; to develop flood forecasting and warning systems as well as measures to combat and evaluate floods; and to improve the collection of data on flood damage.

68. At its forty-second session in 1987, the Economic Commission for Europe adopted a set of principles on co-operation in the field of transboundary waters[69] and recommended that ECE member Governments apply them in formulating and implementing their water policies. As stated in the preamble to the principles, they "address only issues regarding control and prevention of transboundary water pollution, as well as flood management in transboundary waters . . .". Principles 2 and 2(*a*), set forth under the rubric "Co-operation", provide in relevant part as follows:

> **Co-operation**
>
> 2. Transboundary effects of natural phenomena and human activities on transboundary waters are best regulated by the concerted efforts of the countries immediately concerned. Therefore, co-operation should be established as practical as possible among riparian countries leading to a constant and comprehensive exchange of information, regular consultations and decisions concerning issues of mutual interest: objectives, standards and norms, monitoring, planning, research and development programmes and concrete measures, including the implementation and surveillance of such measures.
>
> 2(*a*). On the basis of the principles of reciprocity, good faith and good-neighbourliness and in the interest of rational water-resource management and protection of these resources against pollution, riparian countries are called upon to enter into consultation if a riparian country so desires, aiming at co-operation regarding:
>
> — Protection of ecosystems, especially the aquatic environment;
>
> — Prevention and control of transboundary water pollution;

[68] *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one, chap. I, paras. 62-65. See also "Improved efficiency in the management of water resources and developments in co-operative action in the field of shared water resources: report of the Secretary-General" (E/C.7/1989/6), part one, sect. I. F, "Improved efficiency in the management of natural hazards: floods".

[69] See decision I (42) adopted by ECE on 10 April 1987 (*Official Records of the Economic and Social Council, 1987, Supplement No. 13* (E/1987/33), chap. IV).

— Protection against such dangerous hazards as accidental pollution, floods and ice drifts in transboundary waters; and

— Harmonized use of transboundary waters.[70]

69. Recommendations concerning "Reduction of flood risks", "Monitoring and data processing", "Exchange of information", and "Warning and alarm systems" are set forth in principles 9 to 12, respectively. They provide in part as follows:

Reduction of flood risks

9. For transboundary water subject to risk of flooding, contracting parties should draw up programmes, jointly if necessary, in order to reduce the risk of floods and ice drifts.

9(*a*). Such programmes involve both harmonized construction measures along the waters and non-structural measures. The latter may comprise mutual information and notification (warning and alarm systems) before and during floods caused by precipitation and ice jams; relocation; flood mapping and zoning. When construction measures are envisaged, the entire river basin that may be affected should be investigated to avoid shifting problems onto other river sections as a result of measures taken elsewhere. In principle, activities that may increase the risk of flooding should be offset by measures which diminish these risks. The joint preparation of mathematical models for the simulation of floods is to be recommended as well as their application in designing measures and joint flood-control strategies.

Monitoring and data processing

10. Contracting parties should establish and implement co-ordinated programmes for monitoring and observation of transboundary water quality, transboundary water pollution, accidental pollution, floods and ice drifts. Likewise, common methodologies should be agreed upon for data processing and evaluation procedures.

. . .

Exchange of information

11. Contracting parties should, by means of transboundary agreements or other relevant arrangements, provide for the widest possible exchange, as early as possible, of data and information regarding transboundary water quality and quantity relevant to the control of water pollution, accidental pollution, floods and ice drifts in transboundary waters.

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

. . .

Warning and alarm systems

12. Contracting parties concerned should set up and operate efficient warning and alarm systems to counteract special cases of pollution such as pollution from accidents, negligence and offences and to reduce risks of floods and ice drifts. In such emergency cases, parties involved could consider the possibility of mutual assistance on an agreed basis.

12(*a*). Warning and alarm systems should consist of a small number of main communication centres, whether permanently manned or rapidly made operational which, on the basis of the national reporting system, would ensure the speediest possible transmission of data and forecasts following previously determined patterns.

12(*b*). Warning and alarm systems on transboundary waters should moreover be operated efficiently to permit early undertaking of corrective and protective measures, containment of damage and reduction of risks from natural phenomena and human activities on transboundary rivers.

12(*c*). In this connection, contracting parties should inform each other of measures taken on their territory to reduce or eliminate causes of accidental pollution, floods and ice drifts.

70. The Interregional Meeting on River and Lake Basin Development, held at Addis Ababa in 1988,[71] recognized, in one of its recommendations on legal and institutional aspects, the importance of the affirmative participation of watercourse States, on an equitable basis, in maintaining international watercourses in good order:

> . . . a basin State's right to an equitable share in the uses of the waters of an international drainage basin may be conditional upon that State's willingness, on a reciprocal basis, to participate affirmatively in the reasonable measures and programmes necessary to keep the system of waters in good order (equitable participation).[72]

71. More generally, in paragraph 3 of its resolution 42/169 of 11 December 1987, entitled "International decade for natural disaster reduction", the General Assembly decided to designate the 1990s as "a decade in which the international community, under the auspices of the United Nations, will pay special attention to fostering international co-operation in the field of natural disaster reduction"[73] and in paragraph 7 the Assembly called upon "all Governments to participate during the decade in concerted international action for the reduction of natural disasters".

72. The Council of OECD adopted on 8 July 1988 a decision on the exchange of information concerning accidents capable of causing transfrontier damage.[74] This decision, which relates principally to accidents at "hazardous installations",[75] calls upon member countries to

---

[70] See also decision B (41) on co-operation in the field of transboundary waters, adopted by ECE at its forty-first session (1986), especially recommendation 10 concerning the establishment of early warning systems and agreement on measures to prevent floods and to limit their downstream impact (reproduced in United Nations, *Two Decades of Co-operation on Water: Declarations and Recommendations by the Economic Commission for Europe* (1988) (ECE/ENVWA/2), p. 24). With regard to national water policy, see the ECE Declaration of Policy on the Rational Use of Water, adopted by ECE at its thirty-ninth session (1984) in its decision C (XXXIX), principle 3 of which provides:

"3. In formulating and adopting a future-oriented national water policy . . . special emphasis should be given to:

. . .

(*f*) Measures to combat harmful effects of water: flooding, soil erosion, etc." (*Ibid.*, p. 15.)

[71] See the Proceedings of the United Nations Interregional Meeting on River and Lake Basin Development with Emphasis on the Africa Region, Addis Ababa, Ethiopia, 10-15 October 1988 (hereinafter "Addis Ababa Meeting") in United Nations, *River and Lake Basin Development*, Natural Resources/Water Series No. 20 (Sales No. E.90.II.A.10).

[72] *Ibid.*, part one, chap. I, Report of the meeting, recommendations, B, para. 4.

[73] See also General Assembly resolution 43/202 of 20 December 1988 on the same subject.

[74] *European Yearbook*, 1988, vol. XXXVI, p. 40. See also the decision-recommendation adopted by the OECD Council on 8 July 1988 concerning provision of information to the public and public participation in decision-making processes related to the prevention of, and response to, accidents involving hazardous substances (*ibid.*, p. 47).

[75] The expression "hazardous installation" is defined in appendix II, subpara. (*a*), of the decision as:

"(*a*) . . . an industrial installation which contains more than the threshold quantity of any of the hazardous substances mentioned in Appendix III and in which are used, stored or produced such hazardous substances which are capable, in the event of an accident, of causing serious damage to human health or the environment, including property, outside the installation site, with the exclusion of military or nuclear installations;" (*ibid.*, p. 45).

"exchange information and consult one another, on a reciprocal basis if so desired, with the objective of preventing accidents capable of causing transfrontier damage and reducing damage should such an accident occur" (para. 1). In appendix I to the decision, detailed regulations are set forth for the exchange of information relating to the prevention of, and the response to, accidents at hazardous installations. Member States are enjoined to enter into consultations with a view to organizing emergency plans (title C, para. 9) and to transmit an emergency warning to exposed countries immediately "[i]n the event of an accident or imminent threat of an accident capable of causing transfrontier damage" (title D, para. 11). Appendix III to the decision contains a list of threshold quantities of specified hazardous substances. This list is to be reviewed and updated on a regular basis (para. 5 of the decision).

3. Reports and studies prepared by intergovernmental and international non-governmental organizations

(a) *Intergovernmental organizations*

73. The Office of the United Nations Disaster Relief Co-ordinator has prepared a useful study entitled "Water: resource and hazard", concerning protection from natural disasters in general and water-related disasters in particular.[76] In addressing prevention in relation to water-related disasters, the study makes the following observation under the heading "International co-operation and co-ordination":

> In the case of inter-state or international rivers, any failure on the part of river management and other authorities concerned to harmonize or co-operate in river improvement schemes, especially dam or channel enlargement or the construction of entirely new channels or embankments in higher reaches, will inevitably have adverse effects upon people living in downstream areas. . . .[77]

The study goes on to discuss preparedness for water-related disasters and makes the following suggestions concerning early warning systems:

> One important aspect of preparedness is forecasting and early warning. An effective flood warning system must be based on reliable forecasting. Flood forecasting involves the use of precipitation stations (rainfall gauges), stream flow gauges, weather radars, synoptic meteorological networks, reconnaissance aircraft and meteorological satellites. Warnings are disseminated through radio, television, local emergency communication facilities, sirens and visual signals, such as different colour lights placed in elevated locations.[78]

74. A report prepared by the Joint Task Force of the Government of Bangladesh and the United Nations, entitled "The 1988 floods in Bangladesh: impact, relief and recovery",[79] deals, *inter alia*, with strategies for flood control in Bangladesh. Under the heading "International", the report states the following:

> Co-operation between the riparian countries would ensure optimum use of flood control techniques so as to minimize the adverse consequences of floods. Attention in this regard is drawn to the joint work in pre-disaster planning of the participating countries of the UNDRO/World Meteorological Organization Panel on Tropical Cyclones, for in such storms the greater part of the damage is again caused by water. Major aspects of this approach which require consideration might include:
>
> (*a*) Impact on water flows of environmental degradation and accelerated soil erosion in the Himalayas, and possible corrective measures to reduce sediment load and runoff, such as reafforestation;
>
> (*b*) Impact of measures to regulate river flows in the basins, for both flood control and augmentation of dry-season flows;
>
> (*c*) Impact of obstructions on the natural flow of water;
>
> (*d*) Water management and planning.
>
> Since the catchments comprise areas in Bhutan, China, India and Nepal, the President of Bangladesh visited three of these countries in September/October (and is likely to visit the fourth soon) seeking their co-operation in finding a long-term solution to the problem of floods through a regional approach. As a result of these visits, joint task forces and study teams were set up and they are expected to submit their reports within six months.[80]

75. The Interregional Meeting of International River Organizations held at Dakar in 1981 stressed, in one of its conclusions on the topic "Progress in co-operative arrangements", the importance of concerted action to deal with water-related hazards and dangers:

> 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. 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.[81]

76. The Economic Commission for Europe in 1976 issued a report prepared under the auspices of the ECE Committee on Water Problems on the basis of the replies of Governments to a questionnaire adopted by the Committee.[82] The following conclusion was drawn from Government responses to questions on the topic "Principles and main trends of international agreements on flood control":

> International flood control agreements concluded by those countries which replied to the questionnaire aim at the establishment of a co-operation which in all cases refers to an exchange of information on the development of a flood situation and, in most cases, [to] the establishment of joint, co-ordinated plans for the construction of protective works and to mutual commitments resulting therefrom.

(b) *International non-governmental organizations*

77. Apart from the work of previous Special Rapporteurs of the Commission, the set of seven articles on flood control adopted in 1972 by the International Law Association[83] still constitutes the only major effort at stating

---

[76] UNDRO/87/3. See also the Draft Code of Conduct on Accidental Pollution of Transboundary Inland Waters (ENVWA/WP.3/R.1, 30 March 1988), prepared by government rapporteurs pursuant to a decision taken by the Senior Advisers to ECE Governments on Environmental and Water Problems.

[77] UNDRO/87/3, para. 48.

[78] *Ibid.*, para. 49.

[79] SG/CONF.4/1 (see footnote 24 above).

[80] *Ibid.*, paras. 115-116.

[81] United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (hereinafter "Proceedings of the Dakar Meeting") (Sales No. E.82.II.A.17), part one, Report of the meeting, para. 49, conclusion 5.

[82] *Rational Methods of Flood Control Planning in River Basin Development* (United Nations publication, Sales No. E.76.II.E.26).

[83] These articles and the comments thereon appear in part II of the report of the Committee on International Water Resource Law (see ILA, *Report of the Fifty-fifth Conference* (footnote 31 above), pp. 43 *et seq.*).

the general legal rules governing these problems and formulating recommendations in relation to them. The articles read as follows:

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;

(*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 [transmission] 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.

78. The World Commission on Environment and Development (often referred to as the "Brundtland Commission" after its Chairman, Gro Harlem Brundtland of Norway), an independent body established in 1983 by the General Assembly to study and report on proposed strategies for sustainable development, submitted its report in 1987.[84] In chapter 11, entitled "Peace, security, development, and the environment", the Commission makes the following pertinent observations:

The importance of early warning

Since it is often uncertainty and insecurity that prompts international conflict, it is of the utmost importance that Governments become aware of imminent environmental stress before the damage actually threatens core national interests. Governments are usually not well equipped with this kind of foresight.

It would be highly desirable if the appropriate international organizations, including appropriate United Nations bodies and regional organizations, were to pool their resources—and draw on the most sophisticated surveillance technology available—to establish a reliable early warning system for environmental risks and conflict. . . . Such a system would monitor indicators of risks and potential disputes, such as soil erosion . . . and uses of commons that are approaching the thresholds of sustainability. The organizations would also offer their services for helping the respective countries to establish principles and institutions for joint management.[85]

Also of interest for present purposes is the following excerpt from chapter 12, entitled "Towards common action: proposals for institutional and legal change":

Assessing global risks

The future—even a sustainable future—will be marked by increasing risk. The risks associated with new technologies are growing. The numbers, scale, frequency, and impact of natural and human-caused disasters are mounting. . . .[86]

In the same chapter, the Commission stated a number of general legal principles, among which the following are of relevance to the present inquiry:

---

[84] The report was transmitted to the General Assembly by the Secretary-General in the annex to his note of 4 August 1987 (A/42/427). Citations from the report in the present document are from the printed version: World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987).

[85] *Ibid.*, p. 302.

[86] *Ibid.*, p. 323. See also the Environmental Perspective to the Year 2000 and Beyond, prepared by the UNEP Intergovernmental Intersessional Preparatory Committee on the Environmental Perspective to the Year 2000 and Beyond and adopted by the Governing Council of UNEP at its fourteenth session, in June 1987 (*Official Records of the General Assembly, Forty-second Session, Supplement No. 25* and corrigendum (A/42/25 and Corr.1), annex II, also contained in the annex to General Assembly resolution 42/186 of 11 December 1987); see especially parts III. D (Security and environment) and IV. A (Assessment). The latter section contains the following recommendations:

"92. Countries, particularly developing countries, should be assisted, through international co-operation on environmental assessment, with the participation of the United Nations system and with the United Nations Environment Programme playing a leading role, in establishing effective national monitoring systems, geographic information systems and assessment capabilities, and improving data compatibility. *In order for this to take place, technical co-operation among countries regionally and globally has to increase significantly**."

> . . . States have a responsibility towards their own citizens and other States:
>
> . . .
>
> — to prevent or abate significant environmental pollution or harm;
>
> . . .
>
> — to undertake or require prior assessments to ensure that major new policies, projects, and technologies contribute to sustainable development . . .
>
> . . .[87]

79. The Brundtland Commission established an international group of experts on environmental law, which prepared a report on legal principles and recommendations on environmental protection and sustainable development, published in June 1986.[88] Among the legal principles adopted by the Experts Group[89] are several that are of present interest. As these provisions were set forth in the Special Rapporteur's fourth report,[90] only excerpts will be reproduced here. Article 4, entitled "Environmental standards and monitoring", provides in subparagraph (*b*) that States shall, *inter alia*,

> (*b*) establish systems for the collection and dissemination of data and regular observation of natural resources and the environment in order to permit adequate planning of the use of natural resources and the environment, to permit early detection of interferences with natural resources or the environment and ensure timely intervention . . .

Article 14 concerns the general obligation to co-operate on transboundary environmental problems, and specifically "in preventing or abating a transboundary environmental interference or significant risk thereof" (para. 1). To the extent possible, this co-operation is to be aimed at "maximizing the effectiveness of measures to prevent or abate a transboundary environmental interference" (para. 2). Finally, article 19 deals with emergency situations and provides that in such cases:

> 1. . . . the State . . . under whose jurisdiction the interference originates shall promptly warn the other States concerned, provide them with such pertinent information as will enable them to minimize the transboundary environmental interference, inform them of steps taken to abate the cause of the . . . interference, and co-operate with those States in order to prevent or minimize the harmful effects of such an emergency situation or other change of circumstances.

The articles goes on to provide, in paragraph 2, that States are under an obligation to develop contingency plans "in order to prevent or minimize the harmful effects of an emergency situation or other change of circumstances . . .". The comment on article 19 states that "many treaties", a large number of which concern international watercourses, afford support for a duty to provide prompt warning to "potential victim States" in the case of such emergencies, even those that do not threaten human health or life.[91] Also cited in support of the duties to warn and to co-operate in preventing and minimizing transboundary emergency situations are, *inter alia*, the *Corfu Channel* case[92] and principle 9 of the "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", adopted by the Governing Council of UNEP in 1978.[93]

80. To summarize, intergovernmental and international non-governmental organizations alike have recognized the need for co-operation, and indeed for collaboration, in the prevention and mitigation of water-related hazards and dangers and other so-called "harmful effects" of water (e.g., erosion, waterlogging and ice conditions). Some of the instruments reviewed have also recognized a broad range of largely procedural obligations, the purpose and effect of which are to prevent and alleviate harm and to avoid disputes. Thus, according to a number of these instruments, watercourse States are under an obligation not only to co-operate and exchange information relating to the kinds of problems under consideration but also, with a view to preventing or mitigating these problems, to engage in consultations, to warn of dangers and to work jointly in the preparation of contingency plans as well as the planning and execution of relevant measures and works.

4. Studies by individual experts

81. In an article dealing with environmental disasters in international law,[94] Edith Brown Weiss discusses international legal obligations concerning "man-induced environmental disasters having significant transboundary effects, natural disasters affecting shared natural resources, and disasters which affect important natural and cultural resources impressed with elements of common patrimony".[95] Addressing both natural disasters and those caused by human activities, she considers the subjects "Preventing environmental disasters", "Minimizing damage and providing emergency assistance" and "Compensating for injuries from environmental disasters". She finds that "the duty to prevent environmental disasters . . . comes within the principle of State responsibility and constitutes customary international law", although "efforts to define acceptable safety standards and practices have been lagging in many important areas".[96] Brown Weiss also concludes that "[t]he duty to minimize environmental injury by giving prompt notification, providing information [warning], and co-operating in minimizing injury is now part of customary international law and is encompassed within the principle of State responsibility".[97] As to compensation, Brown Weiss states:

> . . . There appears to be a consensus that under international law breaches of obligations . . . to prevent accidents and to minimize damage incur responsibility for resulting injuries and that even if no breaches occur, States may be liable for injuries resulting from ultra-

---

[87] World Commission . . . , *op. cit.*, p. 331.

[88] Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham and Trotman, 1987).

[89] *Ibid.*, pp. 25-33.

[90] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 75.

[91] Environmental Protection . . . , *op. cit.* (footnote 88 above), p. 117.

[92] *I.C.J. Reports 1949*, p. 4.

[93] UNEP, *Environmental Law. Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

[94] E. Brown Weiss, "Environmental disasters in international law", *Anuario Jurídico Interamericano, 1986* (Washington, D.C., 1987), p. 141.

[95] *Ibid.*, pp. 141-142. The author explains that "common patrimony . . . includes world natural and cultural heritages, international gene banks, and similar resources" (p. 142).

[96] *Ibid.*, p. 152.

[97] *Ibid.*

hazardous activities or the release of highly dangerous substances. Whether they may be liable under international law for injuries resulting from other kinds of accidents is not settled.[98]

A collective work on disaster assistance[99] contains a chapter on the relevance of international law to the prevention and mitigation of natural disasters. Among the conclusions reached by the author of the chapter, J. W. Samuels, are the following:

> ... general responsibility concerning natural disasters falls within the realm of international human rights law. In particular, States bear obligations to prevent and mitigate natural disasters as part of the responsibility flowing out of article 11 of the International Covenant on Economic, Social and Cultural Rights. The agreed right of all persons "to an adequate standard of living, including adequate [food], clothing and housing, and to the continuous improvement of living conditions", and the consequent obligation of States "to take appropriate steps to ensure the realization of this right", ought to translate into a threefold developing responsibility:
>
> A State's legal obligation to assist another in time of natural disaster.
>
> A State's legal obligation to prepare for disaster relief within its own territory and to take preventive measures in order to minimize the suffering resulting from natural disasters.
>
> A State's obligation to accept relief for its people from other States after the occurrence of a natural disaster, if its own resources are inadequate.[100]

82. The importance of co-operation between watercourse States in dealing with water-related hazards and dangers was emphasized by W. R. D. Sewell and H. D. Foster in a study prepared for the Budapest Seminar (16-26 September 1975).[101] Referring to the special problems presented when the watercourse causing flood damage is an international one, the authors identify possible prevention strategies and offer several examples of instances in which they have been implemented:

> **The role of international co-operation**
>
> An unfortunate feature of water management, in many parts of the world, is the tendency of countries to adopt independent strategies for dealing with flood-related problems. Experience has shown, however, that there may be a considerable advantage to be obtained through international co-operation. A wide variety of opportunities exist. These include bilateral or multilateral arrangements, whereby countries sharing a common river basin agree to co-operate in some phase of the planning, policy-making or implementation process. As a minimum they might co-operate in the collection of data about hydrological conditions. Such an arrangement, for example, has been worked out between Egypt and the Sudan. This might be extended to the development of warning systems, as has been the case in the Danube Basin. A higher level of commitment is involved in joint planning ventures, such as those in the Lower Mekong where Laos, Cambodia, Thailand and Viet Nam have been co-operating for almost three decades. There may also be opportunities for the construction of flood control facilities in one country to be used mainly for the protection of flood plain lands in the other one(s). An illustration is the construction of the dams on the Columbia River, in Canada, in part to protect communities in the United States' portion of this river basin.
>
> A second type of co-operation is that extended through the various international agencies, notably those relating to the United Nations ...[102]

83. In a paper prepared for the Addis Ababa Meeting, in October 1988, Robert D. Hayton addresses several topics of interest for the present survey.[103] The paper examines recent bilateral and multilateral efforts relating to a number of subjects, including the exchange of hydrometeorological and associated data and information, the prevention of land degradation and desertification and the alleviation of flood risks. On the subject of flood risks, Hayton describes recent action taken by Plata Basin countries which illustrates the importance States attach to the exchange of data and information and flood forecasting:

> ... In 1983, Paraguayan and Argentine officials at the technical level met in Asunción to confer about the problem of high waters in both the Paraguay and Paraná Rivers. It was concluded that all available information on the upper reaches of the two basins, including changes in reservoir levels, should be compiled; the information needed from Brazil, where the headwaters of both rivers are located, was to be officially requested. The information is to be processed and fed into a model so as to permit flood stage forecasts. Shortly thereafter, Argentina and Brazil met to discuss expansion of the exchange of meteorological and hydrological information in light of the 1982 and 1983 floods in the principal rivers of the Plata Basin.[104]

Hayton later surveys examples of co-operation in addressing flood problems in various parts of the world:

> The recent co-operative undertakings for the Zambezi Basin, the Middle Paraná and the Great lakes sub-basin ... have as a major component the alleviation of flood risks. In the other basins in Africa, the Amazon basin, the Plata Basin and the river systems of Europe, among others, Governments are continuing to incorporate flood control in their co-operative efforts. Flood control is also one of the objectives of the Canada-United States Columbia River Treaty. Canada (largely upstream) is entitled to downstream power benefits as the *quid pro quo* for having accepted substantial flood control obligations. ...[105]

Summarizing his overview of recent co-operative action with regard to international watercourses, Hayton notes that States are becoming increasingly aware of the interrelationships between the various elements of the biosphere:

> In numerous instances, including those described briefly above, system States have agreed to, or have undertaken, concrete measures for the study of the condition and operation of their shared water resources, and the land and other resources linked with those waters. Such studies are now being broadened to include the social and economic dimensions of land and water use and conservation. [The direct and indirect influences of human activities on an area's natural resources, and the mounting costs of corrective action, are generally appreciated.]
>
> [At the diplomatic level, there has been a long-standing reluctance of those not schooled in the reciprocal linkages between man and his environment to embrace land degradation and water body protection as integral parts of the challenge to develop, use, protect and control shared water resources in an optimum manner. Fresh water was not to be confused with or related to land, or to air or maritime waters (e.g. estuaries), since that would expand the dimensions of use regulation, which might have to be co-ordinated, if not shared, with another sovereign. But the reluctance has given way before the irrefutable evidence that the hydrologic cycle, disquieting in itself for some, acts and interacts with associated natural and human resources, and ignores man-made boundary lines. It is now acknowledged widely that management of this "fugitive resource", water, cannot be satisfactorily undertaken without certain land use controls, for example, range management and land-fill restrictions, and the protection of the integrity of

[98] *Ibid.*, p. 150.

[99] L. H. Stephens and S. J. Green, eds., *Disaster Assistance: Appraisal, Reform and New Approaches* (New York, New York University Press, 1979).

[100] J. W. Samuels, "The relevance of international law to the prevention and mitigation of natural disasters" (*ibid.*, p. 263).

[101] Sewell and Foster, *loc. cit.* (footnote 22 above), pp. 84 *et seq.*

[102] *Ibid.*, p. 91.

[103] R. D. Hayton, "Developments in co-operative action concerning shared water resources", *River and Lake Basin Development* (see footnote 71 above), pp. 362 *et seq.*

[104] *Ibid.*, pp. 376-377.

[105] *Ibid.*, p. 377.

the so-called "vessels"—the lake and river beds, watershed slopes and other geologic features, along with man's hydraulic works and canals in the drainage basin. International watercourses are no exception.][106]

It is precisely this kind of co-ordinated and comprehensive resource management that is essential if human populations are to be spared the ravages of water-related disasters and other more subtle forms of harm.

84. Problems of flooding and siltation are discussed by the same author in a study on the Plata Basin.[107] He makes the following observations concerning the watercourses comprising the Plata system:

> Vast tracts along the rivers and even whole areas between rivers in the Basin are subject to unexpected and seasonal floods. The Paraná deposits staggering quantities of silt annually, which encumber its own channels, push its delta steadily further into the mouth of the Uruguay and create mammoth, shifting mud banks in the Rio de la Plata; constant, large-scale dredging by Argentina scarcely keeps pace with the accumulation. The port of Buenos Aires, artificial to begin with, is in permanent peril. Unless elaborate measures far upstream in at least two basin States are undertaken, neither flooding nor silting can be eliminated, or even minimized. The urgent necessity for basin-wide collaboration, including compensation and contribution, could not be more dramatically demonstrated.[108]

These conclusions underscore the necessity of co-operation, and indeed of active "collaboration", between watercourse States in preventing and mitigating water-related hazards, dangers and related problems.

85. A final study that should be mentioned in this brief survey is one by Thomas Bruha,[109] which deals principally with emergencies caused by modern industrial accidents but is none the less relevant to the present inquiry. In this study, Bruha examines the rules of international law "concerning the protection of human beings and the environment against environmental emergencies linked to technological development".[110] In tracing the evolution of this field of law, he observes that the rules relating to protection against emergencies and humanitarian relief—particularly with regard to natural disasters—have their roots in the writings of the most prominent natural law theorists dating from the beginning of the seventeenth century.[111] According to Bruha, these jurists—including Suárez, Grotius, Wolff and de Vattel—explicitly or implicitly characterized this body of law as an undeniable element of a "social international law"[112] which is directed towards the promotion of the *bonum commune generis humani*. Of particular interest in this connection is the work of Emer de Vattel who, writing shortly after the 1755 Lisbon earthquake that resulted in 30,000 deaths, had the following to say about what he described as a general principle of the natural law (*principe général d'assistance mutuelle*).

> . . . Each State owes to every other State all that it owes to itself, as far as the other is in actual need of its help and such help can be given without the State neglecting its duties towards itself. Such is the eternal and immutable law of Nature.[113]

Bruha reviews numerous international instruments relating to environmental emergencies. He concludes that, even in the absence of such contractual duties, certain minimum obligations have become part of the corpus of general international law. These include the substantive duties of preventing serious harm to another State and seeing to it that other States are not placed under a significant risk of harm[114] and the procedural duties of entering into consultations, upon request, with any potentially affected State, for the purpose of agreeing upon international safety measures and the "means necessary to eliminate or minimize emergency risks produced through hazardous activities of the [source] States (joint or co-ordinated warning and monitoring systems, emergency plans, etc.)".[115] These principles would seem to be equally applicable to natural hazards and dangers, at least those that are caused in part through human intervention. With regard to measures to be taken in the event of an emergency, Bruha

> infers from the internationally guaranteed human rights a legal duty of States affected by an emergency to call for and facilitate international assistance whenever such help is necessary to prevent or minimize injuries to human health within [their] territory.[116]

86. To recapitulate, the works surveyed above emphasize the importance of international co-operation in dealing with floods and other water-related hazards and dangers. The studies confirm the existence, as a part of the corpus of general international law, of a number of obligations relating to these problems. Some of these obligations are derived from international humanitarian law and have their roots in the writings of such natural law thinkers as Grotius and Suárez. The most prominent of the duties identified by individual experts are in large measure subsumed under the general obligation to prevent or, as the case may be, to minimize injury. The constituent elements of this general duty have been recognized as including the following obligations: to exchange information relating to conditions bearing on the problem involved; to enter into consultations, on

---

[106] *Ibid.*, p. 390. The passages in square brackets are from the original version of the paper (ECA/NRD/IMRLBD/3) and were not reproduced in the publication cited in footnote 71 above.

[107] R. D. Hayton, "The Plata Basin", *in* Garretson, Hayton and Olmstead, eds., *op. cit.* (footnote 39 above), pp. 298 *et seq.*

[108] *Ibid.*, p. 401. The footnote to the quoted passage reads in part as follows:

> "The Paraná's annual load of silt is c. 250,000,000 tons, which has formed the broad delta that effectively chokes the river's flow. The Bermejo River is the main contributor of the silt. In the Rio de la Plata ships imperceptibly run aground in 30 feet of fine ooze that semi-floats on the bottom; vessels with bottom water intakes don't enter. . . ." (P. 440, note 374.)

[109] T. Bruha, "Internationale Regelungen zum Schutz vor technisch-industriellen Umweltnotfällen" (International rules designed to protect against environmental emergencies linked to technological development), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Stuttgart), vol. 44 (1984), p. 1.

[110] *Ibid.*, p. 62 (the quotation is from the English summary).

[111] *Ibid.*, p. 6.

[112] Bruha observes that the social principle of mutual kindness and helpfulness (*das soziale Prinzip der "gegenseitigen Liebe und Hilfsbereitschaft"*) stands in the centre of the leading natural law thinking of modern international law. He cites the works of Francisco Suárez, Hugo Grotius, Christian Wolff and, in particular, Emer de Vattel (*ibid.*, pp. 6-7, footnote 19).

[113] 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*, vol. 3 (Washington, D.C., Carnegie Institution, 1916) (transl. of 1758 ed. by C. G. Fenwick), book II, chap. I, sect. 3; cited by Bruha, *loc. cit.*, pp. 6-7, footnote 19; Bruha also refers to chap. I, sects. 2 and 5.

[114] Bruha, *loc. cit.* (footnote 109 above), p. 55.

[115] *Ibid.*, p. 63 (quotation from English summary).

[116] *Ibid.*

request, with potentially affected States in order to establish safety measures; to afford prompt notification of dangers; and to co-operate in the mitigation of damage. Furthermore, publicists have observed that, as part of its obligations under international human rights law, a State has the following specific duties in relation to water-related disasters: to prepare for disaster relief within its own territory; to take preventive measures in order to minimize human suffering; and to call for and to accept relief from other States (or international organizations) if its own resources are inadequate to provide satisfactorily for its population. In addition, some scholars subscribe to the view that a State may be liable for injury to another State that results from ultra-hazardous activities or from the release of highly dangerous substances in its territory.

87. More broadly, the works surveyed above underscore the necessity for active basin-wide collaboration in preventing and mitigating water-related hazards, dangers and other problems. It is all too often the case that disasters or other harmful effects in one watercourse State result from phenomena in another watercourse State or States. Scholars and other experts recognize that the co-operation and collaboration necessary to address these problems may entail, as part of the duty of equitable participation, contribution or the provision of compensation by watercourse States that are the beneficiaries of protective measures taken beyond their borders.

88. A final point that cannot be omitted from this brief summation is that, according to veteran observers, it is now widely acknowledged that the kind of international watercourse management that is necessary to protect against flooding and other harmful effects of water must include certain land-use regulations. Among the examples that could be cited are forestry regulations, restrictions on range use and land-fill practices, and requirements for the protection of river and lake beds, hydraulic works and geologic features such as watershed slopes. It is submitted that article 8, as provisionally adopted by the Commission at its fortieth session,[117] should be interpreted to prohibit land-use practices that result in harm to other watercourse States (through flooding, for example), or a significant risk thereof.[118] Article 8 reads:

Article 8. Obligation not to cause appreciable harm

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

The construction suggested above would require that a land-use practice having the effects described be considered a "utilization" of an international watercourse. Indeed, a land use that causes, for example, erosion, resulting in abnormally high quantities of sediment being washed into a watercourse, would seem to be as much a "use" of the watercourse as the dumping on land of toxic waste that finds its way into a transboundary river or aquifer. To ensure that such land-use practices are adequately covered, however, it is submitted that the articles on water-related hazards and dangers should specifically refer to them.

5. Decisions of international courts and tribunals

89. The decisions of international courts and tribunals that are relevant to the present subtopic have been examined in previous reports of the Special Rapporteur;[119] the aim of the present section, therefore, is merely to recall briefly certain of their aspects.

(a) *Judicial decisions*

90. The *Corfu Channel* case,[120] of course, dealt with the right of innocent passage through ocean straits and not with international watercourses. One of the principal questions before the ICJ, however, was whether Albania had an obligation to warn the United Kingdom of a known danger to its warships, namely the presence of mines in Albania's waters. The Court found that the British vessels were indeed exercising their right of innocent passage in transiting the Straits of Corfu, and concluded that the mines could not have been laid without Albania's knowledge. It continued:

> The obligations resulting for Albania from this knowledge are not disputed between the Parties. Counsel for the Albanian Government expressly recognized that ... "if Albania had been informed of the operation before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved ...".[121]

It should perhaps be underscored that Albania did not challenge the proposition that it had a duty to warn other States of a danger of which it had knowledge. Having found that Albania had knowledge of the minefield, the Court held that Albania was internationally responsible to the United Kingdom for the loss of life and damage to the two British warships that was sustained when the vessels struck mines in the straits on 22 October 1946. The Court's discussion of the obligations of Albania arising from its knowledge of the danger posed by the minefield offers valuable lessons for the present subtopic:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; ... and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.
>
> In fact, Albania neither notified the existence of the minefield, nor warned the British warships of the danger they were approaching.
>
> ...

---

[117] *Yearbook ... 1988*, vol. II (Part Two), pp. 35 *et seq.*

[118] This statement is not intended to include the very slight risks (albeit of great harm) that are posed by, for example, the construction of a soundly engineered dam.

[119] See the second report, *Yearbook ... 1986*, vol. II (Part One), pp. 113 *et seq.*, document A/CN.4/399 and Add.1 and 2, paras. 102-133; and the fourth report, document A/CN.4/412 and Add.1 and 2 (footnote 1 above), paras. 83-87.

[120] Judgment of 9 April 1949, Merits, *I.C.J. Reports 1949*, p. 4. The case is discussed in the second and fourth reports of the Special Rapporteur: document A/CN.4/399 and Add.1 and 2, paras. 108-110; and document A/CN.4/412 and Add.1 and 2, para. 83.

[121] *I.C.J. Reports 1949*, p. 22.

In fact, nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.

The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred . . . in Albanian waters, and for the damage and loss of human life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.[122]

It is significant that the Court based Albania's duties not upon conventional law but rather upon principles that, even in 1949, it considered to be "general and well recognized". In enumerating those principles, the Court gave pride of place to "elementary considerations of humanity", a principle which is certainly applicable as well in the context of water-related hazards and dangers that are known to a watercourse State. The Court stressed that these considerations are "even more exacting in peace than in war", lending further support to the applicability of the principle to water-related dangers and emergency situations that arise in peacetime. The obligation of every State "not to allow knowingly its territory to be used for acts contrary to the rights of other States" would, of course, apply to hazards, dangers and other "harmful effects of water" that are brought about or intensified by some human agency.

91. The Court reaffirmed the duty to warn of the danger posed by a minefield in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,[123] quoting and relying upon the passage of the *Corfu Channel* judgment referring to "elementary considerations of humanity", set forth above.[124]

(b) *Arbitral awards*

(i) San Juan River *case*

92. In the *San Juan River* case,[125] Costa Rica and Nicaragua submitted to arbitration certain questions relating to the Treaty of 15 April 1858 concerning the delimitation of their common boundary. The arbitrator,[126] in his award of 22 March 1888, made the following observations, which are pertinent to the present subtopic:

The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing . . . within her own territory . . . works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.

. . .

. . . The natural rights of the Republic of Costa Rica alluded to in [article VIII of the treaty] . . . are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded . . . .[127]

The award clearly recognizes that it is unlawful for one State to cause flooding damage to another and that such an internationally wrongful act entails the obligation to make reparation to the injured State.

(ii) Gut Dam *case*

93. A second international arbitration involving the question of flooding damage is the *Gut Dam* arbitration between Canada and the United States of America.[128] The claims tribunal established by the parties[129] "received 230 claims on behalf of United States citizens for flooding and erosion damage to property in the United States allegedly caused by a Canadian dam [the Gut Dam] built across the international boundary in the international section of the St. Lawrence River".[130] A few words about the background and factual context of the arbitration may be of assistance in arriving at an accurate understanding of its legal effect.

94. Canada had sought permission from the United States in 1900 for the construction of the part of the dam which would be situated in United States territory. This consent was given in 1902 by legislation enacted by the United States Congress, which provided however that work was not to be commenced on United States territory until plans had been approved by the United States Secretary of War. In 1903 the Secretary, Elihu Root, approved Canada's plans subject to two conditions. The

[122] *Ibid.*, pp. 22-23.

[123] *Nicaragua* v. *United States of America*, Merits, judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 4.

[124] *Ibid.*, p. 112, para. 215. The Court decided this point by a vote of 14 to 1, with Judge Oda dissenting (*ibid.*, pp. 147-148, para. 292, subpara. 8). Indeed, not even Judge Oda disagreed with the duty to warn of a known danger. He dissented only because, in his view, having recognized the validity of the United States' multilateral treaty reservation, the Court should have "ceased to entertain the Application of Nicaragua in so far as it is based on Article 36, paragraph 2, of the Statute [of the Court]"; and since the Court, in his view, could have remained seized of the case "only in relation to the alleged violation by the United States of the 1956 Treaty of Friendship, Commerce and Navigation between the two Parties", the Court's decision relating to the mines was one "concerning a breach of obligations *erga omnes* under customary international law [which] is out of place in this judgment" (*ibid.*, p. 214, paras. 1-2).

[125] See 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; the award is summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 190-191, document A/5409, paras. 1038-1041.

[126] The arbitrator was Grover Cleveland, President of the United States of America.

[127] Paras. 6 and 10 of the award (Moore, *op. cit.*, pp. 1965-1966).

[128] See the report of the Agent of the United States before the Lake Ontario Claims Tribunal, which took three decisions in this case, on 15 January, 12 February and 27 September 1968. The report and excerpts from the decisions are reproduced in *International Legal Materials* (Washington, D.C.), vol. VIII (1969), pp. 118 *et seq.* (periodical referred to in the present section as *ILM*). See also the following discussions of, and reports on, this case: "Arbitration of Lake Ontario (Gut Dam) claims", *External Affairs* (Ottawa), vol. XX (1968), p. 507; "The Gut Dam arbitration", *Netherlands International Law Review* (Leiden), vol. XVI (1969), p. 161; M. M. Whiteman, *Digest of International Law* (Washington, D.C.), vol. 3 (1964), pp. 768-771; *Yearbook . . . 1974*, vol. II (Part Two), p. 294, document A/CN.4/274, paras. 78-82. See also the Special Rapporteur's fourth report, document A/CN.4/412 and Add.1 and 2 (footnote 1 above), para. 86 and footnote 187.

[129] Agreement of 25 March 1965 between Canada and the United States of America concerning the establishment of an international arbitral tribunal to dispose of United States claims relating to Gut Dam. The tribunal established under the agreement was the Lake Ontario Claims Tribunal. For a map indicating the location of Gut Dam, see *ILM*, vol. IV (1965), p. 472.

[130] *ILM*, vol. VIII, p. 118.

first was that if the dam materially affected the water levels of Lake Ontario or caused "any injury to the interests of the United States", Canada was to make such changes to the project "as the Secretary of War may order". The second condition provided as follows:

> [If] the construction and operation of said dam shall cause damage or detriment to the property . . . of any . . . citizens of the United States, the government of Canada shall pay such amount of compensation as may be agreed upon between the said government and the parties damaged, or as may be awarded the said parties in the proper court of the United States before which claims for damage may be brought.[131]

A careful reading of the second condition reveals that it did not, strictly speaking, require Canada to make reparation to the United States for any damage caused by the dam, but only provided that Canada was to pay United States citizens such compensation as might be agreed upon between Canada and the injured United States citizens, or as might be awarded by a "proper" United States court—presumably a court having jurisdiction over the parties (including Canada) and the subject-matter of the proceedings.

95. The dam was completed in 1903 and remained in place until early 1953, when it was removed in connection with preparations for the St. Lawrence Seaway project. In the years 1947 to 1952, however, "considerable property damage was caused by erosion and inundation incident to excessively high water levels of Lake Ontario".[132] This was especially true in 1951-1952, when the high level of Lake Ontario and the St. Lawrence River "in combination with storms and other natural phenomena caused extensive flooding and erosion damage to the north and south shores of all of the Great Lakes including Lake Ontario". United States citizens who owned affected property "believed that at least part of the damage was caused by Gut Dam".[133]

96. After unsuccessful attempts to negotiate a settlement of their claims with the Government of Canada, the injured United States property owners filed several lawsuits against Canada in United States courts.[134] In each of the suits, which were ultimately dismissed, "the Canadian Ambassador to the United States addressed a communication to the court suggesting the immunity of his government from suit without its consent, [and] that its consent had not been given . . .".[135] While this position would seem to have rendered illusory the second condition quoted above, the Government of Canada later agreed to resolve the United States citizens' claims through arbitration. The questions before the tribunal concerned such matters as the class of persons entitled to compensation under the 1903 agreement, whether the obligations of Canada were temporally limited, whether the dam had caused the damage complained of, and the amount of compensation that was due.[136]

97. In the arbitration proceedings, Canada initially argued that a proper interpretation of the 1903 agreement would result in its being obligated to compensate only the owner of Galops Island.[137] The tribunal rejected this argument in its first decision, of 15 January 1968, holding that "on a true interpretation of the Agreement, . . . [Canada's] obligation extended not only to the owners of Les Galops Island but to any citizen of the United States".[138]

98. Indeed, Canada had earlier informed the United States Secretary of State, Dean Acheson, that it "recognize[d] in principle its obligation to pay compensation for damages to United States citizens provided that they are attributable to the construction or operation of Gut Dam in the sense of condition number (2) in the instruments of approval of the United States Secretary of War of August 18, 1903 . . .".[139] According to this statement, then, Canada admitted its obligation to compensate United States property owners who could prove that their injuries had been caused by the dam. The question of causation was one of the points that was to have been decided by the tribunal.

99. As previously indicated, however, the case was ultimately settled.[140] The settlement, which was reached after negotiations entered into at the suggestion of the tribunal, "was without prejudice to the legal or factual position of either party".[141]

---

[131] *Ibid.*, p. 120.

[132] Whiteman, *op. cit.* (footnote 128 above), p. 769, quoting from a United States Department of State memorandum of 12 May 1960.

[133] *ILM*, vol. VIII, p. 121.

[134] These actions were brought against the Government of Canada in the United States District Court for the Northern District of New York. One of the suits purported to be a class action on behalf of well over a thousand claimants. Process was served on the Canadian Consul General in New York City. The suits were consolidated for trial and were ultimately dismissed on 24 May 1956 for lack of jurisdiction over the person of the defendant, due to ineffective service of process (see *Oster* v. *Dominion of Canada* (1956) (*Federal Supplement*, vol. 144 (1957), p. 746)); the judgment was affirmed *per curiam*, without opinion, *sub nom. Clay et al.* v. *Dominion of Canada* (1956) (*Federal Reporter*, 2nd Series, vol. 238 (1957), p. 400). The United States Supreme Court denied *certiorari* in 1957 (*United States Reports*, vol. 353 (1957), p. 936). United States citizens also sued the United States Government in an attempt to recover for their injuries, "on the theory that the granting of permission to construct part of the dam on United States territory made the United States liable for damages allegedly resulting from operation of the dam". This action, brought before the Court of Claims in 1956, was also dismissed (*Huther* v. *United States* (*Federal Supplement*, vol. 145 (1957), p. 916)). The information in this note is taken from Whiteman, *op. cit.* (footnote 128 above), pp. 769-770.

[135] Whiteman, p. 769.

[136] *ILM*, vol. VIII, pp. 133-140. Compare the opinion expressed by J. A. Beesley at the Colloquium 1973 of The Hague Academy of International Law to the effect that the Canadian authorities "had accepted liability in effect and were only arbitrating damages" (A.-C. Kiss, ed., *The Protection of the Environment and International Law* (Leiden, Sijthoff, 1975), p. 497).

[137] *ILM*, vol. VIII, p. 133. "Since the Government of Canada had received a release in the early part of the 20th century from the owner of this island, the necessary result of this argument would be that Canada had no liability whatsoever" (*ibid.*). Interpretation of "the agreement" was especially important because:

> "Unlike most . . . international agreements, the agreement under which Gut Dam was constructed was not formally incorporated in a single bilateral document or an agreed bilateral exchange of documents such as an exchange of notes. . . ." (*Ibid.*, p. 134.)

[138] *Ibid.*, p. 136.

[139] Letter dated 10 November 1952 from the Canadian Embassy in Washington to the United States Secretary of State, relating to proceedings pending against Canada in United States courts (*ibid.*, p. 139).

[140] Canada agreed to pay the United States $350,000 in full and final settlement of all claims, which had originally amounted to $653,386 (*ibid.*, p. 140).

[141] *Ibid.*, p. 118.

100. One must be careful in assessing the legal value of this arbitration in view of its unique factual and legal context. Canada did accept an obligation to pay compensation for injuries caused by the dam but its commitment, by its terms, ran in favour of private United States citizens and was only to pay such compensation as might be agreed upon between the citizens and the Canadian Government, or as might be awarded by a "proper" United States court. While Canada cannot, therefore, be said to have expressly agreed to make reparation to the United States for any damage caused to it by the dam, it must be borne in mind that the United States Government did not condition its approval of the Canadian project upon such an agreement. It presumably would have had the power to do so, since part of the dam was to be constructed on United States territory.

101. An evaluation of the legal effect of this case should also take several additional considerations into account. First, Canada did agree, in the first "condition" attached to the United States instrument of approval, to take such corrective action as the United States Secretary "may order" if the dam were found to have affected water levels or to have caused "any injury to the interests of the United States". Evidently, these measures would have prospective effect only; no mention is made of a duty to repair past damage or to pay compensation to the United States therefor. While the instrument of approval does not expressly refer to obligations of prevention[142] or reparation, it is submitted that even in the absence of the agreement Canada would have been bound, under general international law, to make reparation to the United States for damage caused by the construction or operation of the dam and that this would be so even if the dam had been located wholly in Canadian territory.[143] Indeed, no evidence has been discovered suggesting that Canada ever denied that it had such an obligation. The fact that Canada questioned its obligation to compensate the injured United States citizens on the facts of this case is not surprising, nor should it be taken as a denial of any obligations towards the United States under general international law. First, it was Canada's position, in its argument before the tribunal, that the "agreement" under which the Gut Dam was constructed consisted of a series of documents and acts and that "all of the correspondence when taken together demonstrated that the Governments mutually intended that only the owner of Galops Island was to be compensated in the event of damage".[144] Secondly, Canada believed that there should be some time-limit on its obligation, since the claims had been brought some 50 years after the agreement was entered into.[145] And finally, it should not be forgotten that water levels had risen generally in all of the Great Lakes during the years in question (see para. 95 above); the issue of causation, therefore, appears to have been a very real one.

(iii) Lake Lanoux *case*

102. The *Lake Lanoux* case[146] involved the question whether France, the upstream State, could execute a project that would alter the natural conditions of the hydrographic basin of Lake Lanoux. In the course of its decision, the arbitral tribunal observed, with respect to the limits upon France's freedom of action, that "there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State".[147] On the other hand, the mere fact that the project would put France in a position to cause harm to Spain would not, according to the tribunal, entail the responsibility of France any more than would the establishment by France of an activity that posed a "technical risk" to Spain:

> ... Even if viewed solely from the standpoint of the relations of neighbours, the political danger alleged by the Spanish Government would be no more exceptional than the technical risk mentioned above. In any case, there is not, in the Treaty and Additional Act of 26 May 1866 or in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State.[148]

This conclusion was based in part on the "well-established general principle of law that bad faith is not presumed".[149] It may be concluded by analogy from these statements that the mere establishment by a State of, for example, a dam, though it places the State in a position to cause harm to another watercourse State, is not "forbidden" by international law and, therefore, would not by itself entail the responsibility of the first State. At the same time, any appreciable harm actually caused to another State by reason of failure of the *situs* State to operate safely or maintain adequately the works in question would clearly entail the responsibility of the latter State under article 8 of the draft (see para. 88 above). Furthermore, there is ample precedent for requiring a State planning such an activity, or aware of such a danger, to provide notification (warning) and an opportunity to consult concerning any threat which the situation, existing or prospective, may pose to the other

[142] An obligation of prevention could be implied in the first condition, but the only expressly mentioned consequence of breaching such an obligation was the duty to make such changes in the works as would be called for by the United States.

[143] This result would follow from the principles underlying article 8, as provisionally adopted by the Commission at its fortieth session (see para. 88 above), including the principle *sic utere tuo ut alienum non laedas*, and the decision in the *Trail Smelter* arbitration, noted below. Without more evidence relating to the negotiations that led up to the "agreement", it cannot be concluded that the "acceptance" by the United States of these conditions amounted to a waiver of its right to reparation in the event that the dam resulted in appreciable harm to the United States. Indeed, it is highly unlikely that the United States Government would have waived this right before the dam was even constructed, since it would have had no idea of whether, and to what extent, the dam would cause damage.

[144] *ILM*, vol. VIII, pp. 133-134. See also the discussion of this point in para. 97 above and footnote 137.

[145] The tribunal ruled against Canada on this point in its second decision, entered on 12 February 1968 (*ibid.*, pp. 138-140).

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

[147] Para. 13 (first subparagraph) of the award.

[148] Para. 9 (second subparagraph) of the award.

[149] *Ibid.*

State.[150] Thus, the above statements of the arbitral tribunal in the *Lake Lanoux* case should be viewed and understood in their legal context.

(iv) Trail Smelter *case*

103. The dispute that gave rise to the *Trail Smelter* case[151] concerned transfrontier air pollution; no international watercourse was involved. Nevertheless, the basic principle recognized by the arbitral tribunal is of broad significance, based as it is upon general principles of international law. In its second award, the tribunal stated 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 or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[152]

This statement may be regarded as an application of one of the holdings in the *Corfu Channel* case, and of the *sic utere tuo* principle, as well as one of the bases of principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[153] All of these authorities, implicitly or explicitly, recognize that States must, in the words of principle 21 of the Stockholm Declaration, "ensure that activities within their jurisdiction or control do not cause damage to the environment of other States . . .". This principle applies with equal force to activities resulting in water-related hazards, dangers or other problems that would threaten or cause damage in other watercourse States.

104. The decisions summarized above provide a number of valuable insights into the principles that tribunals and States themselves have accepted as governing the kinds of problems under consideration. First, the ICJ has twice recognized a State's obligation to warn other potentially affected States of dangers known to it. It has also invoked the "general and well-recognized principle", expressed in the *sic utere tuo* maxim, that a State must not allow "its territory to be used for acts contrary to the rights of other States".[154] This would presumably include acts that, directly or indirectly, give rise to water-related hazards, dangers or other problems that cause damage to other watercourse States. The general principle *sic utere tuo* has been confirmed in a number of arbitrations, some of which dealt specifically with actual or potential problems of flooding. On the other hand, it has been recognized that international law does not prohibit a State, "acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State".[155] This very passage suggests, however, that causing serious injury to a neighbouring State through, for example, improper construction or operation of a dam could amount to a "violation of [the] international obligations" of the State in which the dam was situated.

B. Other water-related problems and conditions

1. Salt-water intrusion

105. The expression "saline intrusion", or "salt-water intrusion", refers to the infiltration of marine water into fresh water. This occurs most commonly at the mouths of rivers but can also affect groundwater aquifers. Saline intrusion can be caused by human action, natural phenomena or a combination of the two. Upstream diversion of water from a watercourse for irrigation purposes, for example, can alter the equilibrium between opposing fresh and salt water pressures at the interface between river and ocean, resulting in increased penetration of sea water upstream.[156] But "[n]ature accomplishes this infiltration without any assistance from man in most cases, above all during the dry or low-flow season".[157] The problem may also be exacerbated by storms in low-lying coastal areas.[158]

106. Salt-water intrusion is a serious problem affecting many international watercourses,[159] such as the

---

[150] Indeed, this is required by the provisions of part III of the draft articles on the present topic and the authorities surveyed in the commentary to those articles, as well as the authorities catalogued in the relevant reports of the Special Rapporteur. See also, for example, Mr. Barboza's second report on international liability for injurious consequences arising out of acts not prohibited by international law (*Yearbook . . . 1986*, vol. II (Part One), p. 145, document A/CN.4/402), para. 14; "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat" (*Yearbook . . . 1985*, vol. II (Part One)/Add., p. 65, document A/CN.4/384, paras. 280-283); American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (St. Paul, Minn.), vol. 2 (1987), pp. 114-116, sect. 601, note 4; and the report of the Experts Group on Environmental Law of the Brundtland Commission, *Environmental Protection . . .*, *op. cit.* (footnote 88 above), pp. 98-119, arts. 16-19 and comments thereon.

[151] The awards of 16 April 1938 and 11 March 1941 in this case are reproduced in United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*, and excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 192 *et seq.*, document A/5409, paras. 1049-1054. See the discussion of this arbitration in the second and fourth reports of the Special Rapporteur, document A/CN.4/399 and Add.1 and 2 (footnote 119 above), paras. 125-128, and document A/CN.4/412 and Add.1 and 2 (footnote 1 above), para. 85, respectively.

[152] United Nations, *Reports of International Arbitral Awards*, vol. III, p. 1965.

[153] *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), chap. I.

[154] *Corfu Channel* case, *I.C.J. Reports 1949*, p. 22.

[155] *Lake Lanoux* case; see footnote 148 above.

[156] Mr. Schwebel states in his third report:

> "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 [earlier in the report] . . . ." (Document A/CN.4/348 (footnote 16 above), footnote 640.)

[157] *Ibid.*, para. 370.

[158] This is true, for example, in the case of Bangladesh. See B. M. Abbas, "River basin development for socio-economic growth: Bangladesh", paper presented at the Budapest Seminar of 1975, *loc. cit.* (footnote 22 above), vol. II, pp. 188-190. See also the conference brochure of the 1989 Bangladesh Flood Seminar (footnote 8 above), *passim*.

[159] The 1960 Treaty between Belgium and the Netherlands concerning the improvement of the Terneuzen and Ghent Canal and the settlement of various related matters provides, in article 32, for maintaining a specified proportion of fresh to salt water in a border canal.

Gambia[160] and the Ganges, Brahmaputra and Meghna systems which together form the Padma.[161] River flows that could otherwise be utilized for irrigation or other uses must often be allocated to "repelling saline intrusion from the sea".[162]

107. Whether it is caused by salt-water intrusion or irrigation, the salination of fresh water effectively converts it to brackish or salt water, making it unusable for many human needs.[163] While desalination technology exists, the process is at present quite expensive.

108. As an alteration of the quality of water which results from human conduct and which produces effects that are detrimental to, *inter alia*, human health, beneficial uses of water and the environment, salt water intrusion caused by human activity is a form of "pollution" within the meaning of paragraph 1 of draft article 16 [17] as submitted in the fourth report.[164] Since this may not be obvious, however, it may be worth emphasizing by making express reference to salt-water intrusion caused by human conduct in an article on the subject of water-related hazards and dangers. Equally if not more important, however, is the need for international co-operation and solidarity in dealing with the problem of saline intrusion resulting from natural phenomena such as drought or seasonally low water flows. This situation too should therefore be dealt with in the draft articles, especially since it would not be covered by the articles on pollution.

2. Drought and desertification

109. Most of the material in section A of the present chapter dealt with problems caused by an overabundance of water. Many regions of the world, however, suffer from precisely the opposite condition. Some areas can experience both drought and flood within the same 12-month period,[165] a cycle that can repeat itself on a regular basis.

110. Prolonged drought can result in aridity of agricultural and other land, leading in some areas to desertification. The latter phenomenon has been defined as the

> spread or encroachment of a desert environment into arid or semi-arid regions, caused by climatic changes, human influence, or both. Climatic factors include periods of temporary but severe drought and long-term climatic changes towards aridity. Human factors include the artificial alteration of the climate, such as degradation of the biological environment in arid regions by removing vegetation (which can lead to unnaturally high erosion), excessive cultivation, and exhausting surface or groundwater supplies for irrigation or industry, strip-mining, etc. ... The process is characterized by a declining groundwater table, salinization of topsoil and water, diminution of surface water, increasing erosion and the disappearance of native vegetation. ...[166]

The severe drought in the Sahel during the period 1968-1973 caused the Sahara desert to spread southward at an accelerated pace and focused international attention upon the problem of desertification.[167] In 1977, a conference on desertification was held under United Nations auspices at Nairobi. In a report prepared in 1983 at the request of the Economic and Social Council, the Secretary-General highlights the problem graphically: "[D]esertification is a world-wide phenomenon affecting over one third of the combined land area of the continents of Africa, South America and Asia."[168]

111. Problems of drought and desertification are likely to become more acute in the future due to the "greenhouse effect" and consequent global warming (see para. 7 above). As it is, more than one third of the world's arable land is situated in regions affected by drought.[169] The problem is most severe on the African continent, where it has been estimated that 50,000 to 70,000 square kilometres of arable land are lost to the advancing desert every year.[170]

112. The consequences of drought are many and varied. They range from lack of water for domestic, agricultural and industrial needs to environmental damage and outbreaks of disease due to contaminated drinking water or lack of proper sanitation. In the 1983 report referred to above (para. 110), the Secretary-General, noting that natural disasters such as floods and drought hamper the economic and social development efforts of many nations, called for the strengthening and integration of efforts to reduce the damage caused by these phenomena through both structural and non-structural measures, such as early warning systems and forecasting arrangements.[171] The importance of such measures, together with proper planning, was emphasized during the general debate at the United Nations Water Conference, in connection with natural hazards:

> 101. It was recognized that emergency measures could not be a substitute for pre-disaster planning and disaster prevention ...
>
> 102. A number of representatives drew attention to the tragic effects of the recent drought in the Sahel region which, in many instances, had irreversibly affected the ecosystem and induced desertification. While the cyclic drought had been of long duration, 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

---

[160] See, for example, the information concerning the Yellitenda salt control bridge-dam, in the paper presented to the 1981 Dakar Meeting by the Gambia River Development Organization, "Technical note on the Gambia River Development Organization", in United Nations, *Experiences in the Development and Management* ... (footnote 81 above), p. 423; and the background paper by R. D. Hayton on topic II of the Dakar Meeting, "Progress in co-operative arrangements" (*ibid.*, p. 65, at p. 71).

[161] See, for example, the paper prepared by the Bangladesh Ministry of Power, Water Resources and Flood Control, "International rivers —the experience of Bangladesh" (*ibid.*, pp. 270 and 272).

[162] *Ibid.*, p. 272.

[163] In his third report, Mr. Schwebel states: "High salinity renders the waters unusable for domestic, municipal, agricultural and most industrial purposes" (document A/CN.4/348 (footnote 16 above), para. 371).

[164] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), chap. III, sect. C.

[165] This is true, for example, of Bangladesh, which experienced extremely severe floods in the late summer and early fall of 1988, only to be hit by a drought in the spring of 1989.

[166] *The New Encyclopaedia Britannica*, 15th ed. (Chicago, 1987), vol. 4, p. 32.

[167] *Ibid.*

[168] Report of the Secretary-General on the item "*Water resources: progress in the implementation of the Mar del Plata Action Plan*" (E/C.7/1983/11), para. 165.

[169] See the statement made in the General Assembly on 27 September 1983 by Mr. Pereira, President of the Republic of Cape Verde (*Official Records of the General Assembly, Thirty-eighth Session, Plenary Meetings*, vol. I, 7th meeting, para. 17).

[170] *Ibid.*

[171] E/C.7/1983/11, para. 261.

region. Assessment studies in fact showed that the potentially available supply, especially in relation to ground water, was quite sizable in so far as foreseeable needs were concerned.[172]

113. These considerations resulted in a set of recommendations of the Conference on the subject of drought loss management.[173] After declaring that the taking of steps to mitigate the effects of drought in affected areas was "a top priority", the Conference pointed to the "need to develop improved bases for planning land and water management ... in areas subject to severe drought".[174] Accordingly, it 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 ground water through geophysical and hydrogeological 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, hydrometeorological 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.[175]

114. The practice of States situated in drought-stricken regions demonstrates their determination to co-operate with a view to controlling the problem. For example, article 4 of the 1980 Convention creating the Niger Basin Authority provides that the Authority shall undertake activities relating to the "[p]revention and control of drought and desertification" (para. 2 (*c*) (iv) and (*d*) (iv)). A further illustration of this practice may be found in the Convention establishing the Permanent Inter-State Committee on Drought Control in the Sahel, among whose functions are the co-ordination of all action to combat drought and its consequences at the subregional level and the mobilization of available resources in order to finance operations within the framework of subregional co-operation (art. 4 (i) and (iv)).[176]

115. Problems of drought and desertification have received considerable attention at recent intergovernmental meetings, particularly with regard to the African region, where these conditions are especially acute. For example, one of the decisions of the First African Ministerial Conference on the Environment, held at Cairo from 16 to 18 December 1985, was to strengthen subregional co-operation in respect of environment and ecodevelopment, giving priority to the following:

...

(*b*) Efforts to combat desertification and desert advance in the south Saharan zone and the Gum Belt through programmes of ecological rehabilitation;

...

(*e*) Support to the River Niger Basin Authority for the integrated development of the river Niger basin, in order to use its waters and ecosystems rationally, and in particular to halt the drying up of its inland delta (Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Guinea, Mali, Niger and Nigeria);

...

(*h*) Efforts to combat the spread of the deserts of southern Africa for the promotion of food production;

(*i*) Study and implementation of an integrated multi-purpose development plan for the basin of the Zambezi river (irrigation, navigation and energy) in order to use its waters rationally, combat desertification ...

...

(*l*) Consideration and implementation of the master development plan for the basins of the river Gambia (Gambia, Guinea, Guinea-Bissau and Senegal) and the river Senegal (Mali, Mauritania and Senegal), in order to use their waters and energy resources to combat desertification and prevent possible negative environmental effects;

...

(*q*) Design and implementation of a regional co-operation programme to combat desertification in the region covered by the Permanent Inter-State Committee on Drought Control in the Sahel, the Maghreb, the member States of the Economic Community of West African States, Egypt and the Sudan ...;

...

(*u*) Assistance to the States members of the Southern African Development Co-ordination Conference with programmes to halt individually and collectively the deleterious effects of the endemic drought in the region and to improve techniques for natural resource exploitation;

...[177]

116. At the Addis Ababa Meeting, in 1988, a report was presented by the Economic Commission for Africa on "Integrated river and lake basin management as a vehicle for socio-economic development in Africa".[178] In the discussion following the presentation of the report, a consensus view was expressed that, in the context of sub-arid zones in Africa, the integrated management of large basins was regarded as the only development strategy which could bring about the rapid economic growth needed to combat food deficits, drought and desertification.

117. As the foregoing survey indicates, problems of drought and desertification are among the most serious facing humankind. While they do not affect all inter-

---

[172] *Report of the United Nations Water Conference* (footnote 68 above), part three, chap. V.

[173] *Ibid.*, part one, chap. I, paras. 66-68.

[174] *Ibid.*, paras. 66-67.

[175] *Ibid.*, para. 68.

[176] For further examples of treaty provisions addressing the problem of potential water shortages but without using the term "drought", see, for example, the 1959 Agreement between Nepal and India on the Gandak River irrigation and power project (art. 10) and Protocol No. 1 relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries, annexed to the 1946 Treaty of friendship and neighbourly relations between Iraq and Turkey (fourth paragraph of the preamble).

[177] Cairo Programme for African Co-operation (UNEP/GC/14/4/Add.6, annex I), sect. E, para. 1.

[178] United Nations, *River and Lake Basin Development* (see footnote 71 above), p. 59.

national watercourse systems, these conditions are present or potentially present in most regions of the world: "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."[179] In view of the clear need for regional and international co-operation in addressing these problems, it is submitted that they are fitting subjects for regulation in the present draft articles.

C. The proposed articles

118. The Special Rapporteur recommends that the problems addressed in the present chapter, as well as the problem of pollution or environmental emergencies (the subject of draft article 18 [19] as submitted in the fourth report),[180] be dealt with according to the type of action to be taken by watercourse States in relation to the specific kind of problem confronting them. The incidents, hazards, dangers and conditions involved fall into two broad categories: those that are actually or potentially of an emergency nature and those that are not. The measures required to deal with the former category of problems are qualitatively different from those necessary to address the latter. The former require, *inter alia*, the provision of data and information, preventive and precautionary measures, contingency planning, notification of any threat or actual incident or occurrence, emergency action to prevent and mitigate harm during an incident or occurrence and remedial action after the event. It is clear that all of these actions must be based on co-operation between watercourse States, as required by article 9 (General obligation to co-operate), provisionally adopted by the Commission at its fortieth session.[181] The kind of action required to deal with the second category of problems is generally of a less urgent nature but may still include implementation of preventive measures, exchange of data and information and co-operation in taking remedial measures; it might also include such forms of ongoing co-operation as the construction of protective works, the removal of sediment, and other kinds of maintenance operations.

119. With these factors in mind, the Special Rapporteur submits the following articles for the consideration of the Commission.

PART VI

WATER-RELATED HAZARDS, DANGERS AND EMERGENCY SITUATIONS

Article 22. Water-related hazards, harmful conditions and other adverse effects

1. Watercourse States shall co-operate on an equitable basis in order to prevent or, as the case may be, mitigate water-related hazards, harmful conditions and other adverse effects such as floods, ice conditions, drainage problems, flow obstructions, siltation, erosion, salt-water intrusion, drought and desertification.

2. Steps to be taken by watercourse States in fulfilment of their obligations under paragraph 1 of this article include:

(*a*) the regular and timely exchange of any data and information that would assist in the prevention or mitigation of the problems referred to in paragraph 1;

(*b*) consultations concerning the planning and implementation of joint measures, both structural and non-structural, where such measures might be more effective than measures undertaken by watercourse States individually; and

(*c*) preparation of, and consultations concerning, studies of the efficacy of measures that have been taken.

3. Watercourse States shall take all measures necessary to ensure that activities under their jurisdiction or control that affect an international watercourse are so conducted as not to cause water-related hazards, harmful conditions and other adverse effects that result in appreciable harm to other watercourse States.

Comments

(1) *Paragraph 1* lays down a general obligation of co-operation with regard to water-related hazards, harmful conditions and other adverse effects. Co-operation between watercourse States is essential to the prevention of the kinds of problem to which draft article 22 is addressed.

(2) Both the previous Special Rapporteurs, Mr. Schwebel and Mr. Evensen, in their versions of the present article,[182] included the phrase "as the circumstances of the particular international watercourse system warrant", or its equivalent, in paragraph 1. This phrase has been omitted from the version proposed above on the theory that it is implicit in the expression "on an equitable basis". The Special Rapporteur does not perceive a problem, in principle, with the inclusion of the phrase, except that he believes that qualifications of an already very general obligation should be kept to a minimum.

(3) Co-operation "on an equitable basis" also encompasses the duty of an actually or potentially injured watercourse State to contribute to or provide appropriate compensation for protective measures taken, at least in part, for its benefit by another watercourse State.[183]

[179] Mr. Schwebel's third report, document A/CN.4/348 (see footnote 16 above), para. 378.

[180] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), chap. III, sect. C.

[181] *Yearbook ... 1988*, vol. II (Part Two), pp. 33 *et seq.*

[182] See article 11 (Prevention and mitigation of hazards) proposed by Mr. Schwebel in his third report, document A/CN.4/348 (footnote 16 above), para. 379; and article 26 (Control and prevention of water-related hazards) proposed by Mr. Evensen in his first report, document A/CN.4/367 (footnote 16 above), para. 177.

[183] See, for example, the 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin, under which Canada is required to provide specified amounts of water storage capacity for flood control purposes and to operate storage dams in accordance with plans made in the Treaty. The United States is to compensate Canada, in the form of both downstream power benefits and money, for providing this protection (arts. IV-VI).

(4) Both article 8 as provisionally adopted at the fortieth session and the present article would apply to the harmful effects of water upon activities not directly related to the watercourse.[184] Examples of such effects are flood damage, siltation of river beds and ports and water-related diseases.[185]

(5) The use of the word "include" in *paragraph 2* is intended to indicate that the list of steps specified is not an exhaustive one. Additional measures or forms of collaborative action may be necessary in some instances in order for watercourse States to fulfil their obligations under paragraph 1.

(6) *Paragraph 3* is a combination of the formulations found in article 194, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea, and in article 8 as provisionally adopted at the fortieth session. While it may be sufficient for the purposes of the present draft articles to refer to activities conducted in the "territory" of watercourse States, rather than those under their "jurisdiction or control", it is submitted that the meaning of the latter expression in the present context is sufficiently clear that it is juridically preferable. Furthermore, it is conceivable that the term "territory" might be under-inclusive in some cases and over-inclusive in others. Paragraph 3 would apply, for example, to uses of land or water which lead to such problems as flooding, siltation, erosion or flow obstructions in other watercourse States. As noted earlier in the present report, it is the view of the Special Rapporteur that this obligation is nothing more than a concrete application of article 8 (Obligation not to cause appreciable harm). The problem has been addressed by, *inter alia*, the International Law Association in its 1980 draft articles on the relationship between water, other natural resources and the environment, article 1 of which provides:

Article 1

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.[186]

Paragraph 3, as proposed above, is somewhat broader than this provision, since the harm against which it is intended to protect would not be confined to "injury to . . . water resources".

[184] Cf. article 1 of the draft articles on the relationship between water, other natural resources and the environment adopted by the International Law Association at its fifty-ninth Conference, in 1980:

"*Article 1*

"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 injury to the environment of other States or of areas beyond the limits of national jurisdiction; . . .

". . ."

(ILA, *Report of the Fifty-ninth Conference, Belgrade, 1980* (London, 1982), pp. 374-375.)

[185] Examples of such diseases are schistosomiasis (bilharziasis), river blindness, malaria and leptospirosis.

[186] See footnote 184 above.

Article 23. Water-related dangers and emergency situations

1. A watercourse State shall, without delay and by the most expeditious means available, notify other, potentially affected States and relevant intergovernmental organizations of any water-related danger or emergency situation originating in its territory, or of which it has knowledge. The expression "water-related danger or emergency situation" includes those that are primarily natural, such as floods, and those that result from human activities, such as toxic chemical spills and other dangerous pollution incidents.

2. A watercourse State within whose territory a water-related danger or emergency situation originates shall immediately take all practical measures to prevent, neutralize or mitigate the danger or damage to other watercourse States resulting from the danger or emergency.

3. States in the area affected by a water-related danger or emergency situation, and the competent international organizations, shall co-operate in eliminating the causes and effects of the danger or situation and in preventing or minimizing harm therefrom, to the extent practicable under the circumstances.

4. In order to fulfil effectively their obligations under paragraph 3 of this article, watercourse States, together with other potentially affected States, shall jointly develop, promote and implement contingency plans for responding to water-related dangers or emergency situations.

Comments

(1) The present article incorporates draft article 18 [19], entitled "Pollution or environmental emergencies", submitted in the fourth report.[187] As the first paragraph makes clear, it is intended to apply both to natural situations and to those resulting from human activities. In either event, the situation or danger will normally take the form of a sudden incident or event. The Commission may wish, at the appropriate time, to include a definition of "water-related dangers or emergency situations" in article 1 of the draft articles.

(2) *Paragraph 1* requires that immediate notification be given of a danger or situation originating in the territory of a watercourse State or of which that State has knowledge. "Notification" in this context includes the provision of both a warning and any information necessary to enable potentially affected States to deal with the situation. It will be noted that the States to be notified are not limited to watercourse States, but include any States that may be affected (such as coastal States that may be affected by a large oil spill into a watercourse).

(3) *Paragraph 2* applies principally to dangers and situations that result from human activities. The chief obligation with respect to those that are of natural origin is that of prompt notification, provision of information and the like.

(4) *Paragraphs 3 and 4* are derived largely from article 199 of the 1982 United Nations Convention on the Law of the Sea. The obligations contained in these paragraphs

[187] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), chap. III, sect. C.

also received support both in the Commission and in the Sixth Committee of the General Assembly.[188] The expressions "States in the area affected" and "other potentially affected States" are intended to include non-watercourse States that may, however, be harmed by a danger or situation covered by the article.

(5) A suggestion was made in the Sixth Committee that States benefiting from protective or other measures should be required to compensate third States for the measures taken.[189] The Special Rapporteur perceives no difficulties, in principle, with such an obligation, so long as the benefited State were required to contribute only on an equitable basis. This point deserves consideration by the Commission.

(6) A final point that the Commission may wish to consider is whether article 23 should include a provision requiring a State affected by a disaster to accept proffered assistance and not to regard offers thereof as an interference in its internal affairs. It will be recalled that several authors have highlighted this issue.

[188] With regard to comment in the Sixth Committee, see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly" (A/CN.4/L.431), sect. C, paras. 144-146.

[189] *Ibid.*, para. 146.

CHAPTER II

Relationship between non-navigational and navigational uses

(Part VII of the draft articles)

A. Introduction

120. While the present topic is chiefly concerned with the non-navigational uses of international watercourses, it is undeniable that such uses interact with navigational ones, to the extent that the latter exist. Navigation may affect or even foreclose non-navigational uses, and vice versa. For example, it may be necessary to restrict or even halt irrigation in order to maintain water levels sufficient for navigation; conversely, a dam would render a river impassable in the absence of some special provision for shipping.[190] Mr. Schwebel has noted that, as a practical matter, those responsible for overall management of water resources cannot ignore these interactions:

> . . . 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. . . .[191]

B. Navigation and the scope of the draft articles

121. The Commission has recognized the interrelationship between navigational and non-navigational uses in article 2, which it provisionally adopted as its thirty-ninth session.[192] Paragraph 2 of that article provides as follows:

Article 2. Scope of the present article

. . .

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

Comment in the Commission and in the Sixth Committee on this provision and on article 1 as provisionally adopted at the thirty-second session[193] indicates a general understanding and acceptance of the necessity of addressing the question of the relationship between navigational and non-navigational uses. Since the focus of the draft articles is upon non-navigational uses, however, treatment of navigation should be limited to that which is necessary to preserve the integrity of the draft's provisions concerning those uses. This approach is emphasized by the negative formulation of article 2, paragraph 2.

C. Resolving conflicts between navigational and non-navigational uses

122. If a watercourse is used for navigation as well as for other purposes, it may happen that the two types of use conflict, or even become incompatible (see para. 120 above). The question would then arise whether there is

[190] In his first report, Mr. Schwebel made the following observations concerning the relationship between navigational and non-navigational uses:

> ". . . 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 passages through and around barriers in the watercourse. . . ." (*Yearbook . . . 1979*, vol. II (Part One), pp. 158-159, document A/CN.4/320, para. 61.)

[191] *Ibid.*

[192] *Yearbook . . . 1987*, vol. II (Part Two), p. 25.

[193] Paragraph 2 of article 2 is nearly identical to paragraph 2 of article 1 as provisionally adopted in 1980 (*Yearbook . . . 1980*, vol. II (Part Two), p. 110).

some inherent priority or preference as between them. Earlier in this century it might have been correct to state that navigational uses enjoyed such a priority. Illustrative of this position is the 1921 Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern; article 10 of the Statute provides as follows:

Article 10

1. 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.

. . .[194]

123. As other kinds of uses began to rival navigation in economic and social importance, however, States in effect recognized that a general assignment of absolute priority to any one use frustrated the achievement of optimum utilization of the watercourse. A resolution adopted by the Inter-American Economic and Social Council in 1966, which emphasizes a number of objectives of sound drainage-basin development, exemplifies this shift in attitude. It refers to the

. . . control and economic utilization of the hydrographic basins and streams . . . 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 . . . floods.[195]

124. The increasing importance of non-navigational uses, relative to navigation, and the resulting trend in State practice enabled Mr. Schwebel to conclude in his third report that "[t]here seems little doubt but that, today, navigation has been deprived of its preferential status".[196] Support for this position is found in article VI of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at its fifty-second Conference, in 1966:[197]

Article VI

A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

ILA offered the following explanation of this rule in its commentary to article VI:

. . . 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. . . .[198]

125. If the expansion and intensification of non-navigational uses have indeed dethroned navigation as the pre-eminent fluvial use, how is a conflict between navigational and other uses to be resolved under contemporary international law? It would seem that the answer follows clearly from the spirit, if not the letter, of the articles already adopted. Such a problem would be resolved in the same way as would a conflict between competing non-navigational uses: by considering all relevant factors, as provided in article 7 of the present draft, with a view to arriving at an equitable allocation of the uses and benefits of the international watercourse system in question. This applies not only to the question whether water levels sufficient for navigation must be maintained but also to other potential impacts of navigational uses, such as pollution of a watercourse. It must be remembered, however, that the régime resulting from this weighing process would be subject to the requirement of article 8 of the present draft that no appreciable harm be caused to a watercourse State[199] in the absence of agreement to accept such a consequence, perhaps in exchange for compensation or other concessions.

126. Since in each individual case all relevant factors must be considered to determine whether a particular use (for example, domestic consumption) is to receive priority over another use or uses (for example, industrial use), it seems inescapable that no one use can be accorded priority over others as a general rule.[200] To take any other approach in a framework instrument such as the present draft articles would be to foreclose the possibility of multi-purpose utilization and development of international watercourses. Watercourse States may wish, of course, to give priority to certain uses in watercourse agreements tailored to their needs and the characteristics of the international watercourse system in question. While this was not an uncommon feature of older agreements,[201] it is not an approach that is followed in most modern instruments.

D. The proposed article

127. In the light of the foregoing discussion, the Special Rapporteur submits the following draft article 24 for the Commission's consideration. The article would constitute part VII of the draft articles.

[194] See also, for example, article 5 of the Declaration of Montevideo, concerning the industrial and agricultural use of international rivers, adopted in 1933 by the Seventh International Conference of American States (reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A); rule II.4 (on which art. 5 of the Montevideo Declaration was based) of the resolution on "International regulations regarding the use of international watercourses" adopted by the Institute of International Law at its Madrid session, in 1911 (*Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24, p. 366); and article 5 of the 1965 revised draft convention on the industrial and agricultural uses of international rivers and lakes prepared by the Inter-American Juridical Committee of OAS, (reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 350, document A/CN.4/274, para. 379).

[195] Resolution 24-M/66, on control and economic utilization of hydrographic basins and streams in Latin America (reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 351, document A/CN.4/274, para. 380).

[196] Document A/CN.4/348 (see footnote 16 above), para. 444. It goes without saying that, as Mr. Schwebel points out, "[s]ystem States may still establish any priority of uses by agreement . . ." (*ibid.*).

[197] ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*, at p. 491.

[198] *Ibid.*, p. 491, first paragraph of the commentary.

[199] In the commentary to article 8, the Commission indicated that, while article 6 (Equitable and reasonable utilization) and article 8 (Obligation not to cause appreciable harm) should be regarded as being complementary, a use that caused appreciable harm would not, at least *prima facie*, be equitable (*Yearbook . . . 1988*, vol. II (Part Two), p. 36, para. 2 of the commentary).

[200] This position is supported by article VI of the Helsinki Rules and the commentary thereto (see para. 124 above).

[201] See, for example, the 1909 Treaty relating to boundary waters between Canada and the United States of America.

PART VII

RELATIONSHIP TO NAVIGATIONAL USES AND ABSENCE OF PRIORITY AMONG USES

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

1. In the absence of agreement to the contrary, neither navigation nor any other use enjoys an inherent priority over other uses.

2. In the event that uses of an international watercourse [system] conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof in accordance with articles 6 and 7 of these articles.

Comments

(1) The draft article serves two purposes. First, it provides that, as a general matter, no one use is to be accorded automatic priority over other uses. Secondly, it expressly states that navigation is no different from other uses in this regard. While, strictly speaking, the article could be confined to the former point (since navigation would presumably be included by implication), the Special Rapporteur agrees with his predecessors that the article should include an express reference to navigation. If navigation were not singled out, the title of the topic might give the impression that the draft articles were entirely without prejudice to that particular use, notwithstanding paragraph 2 of article 2. What is perhaps more important, the fact that navigation was in the past accorded preferential status militates in favour of a clear statement that such is not the case under the present draft articles.

(2) The opening clause of *paragraph 1* preserves any agreements that accord priority to navigation or to any other use. This clause is not strictly necessary, of course, but was included in recognition of the deference accorded navigation in certain treaties. The expression "watercourse agreements" was consciously avoided since it is conceivable that navigation could be referred to in other kinds of agreement, such as general treaties of amity.[202]

(3) *Paragraph 2* provides that any conflict between uses of an international watercourse [system] is to be resolved through a balancing of all relevant considerations, as called for by articles 6 and 7. For the sake of brevity, the full expression "international watercourse [system]" was not repeated.

[202] Indeed, the very title, "Friendship, commerce and navigation", which many of these agreements bear suggests this possibility. Of course, such an agreement would not bind non-party watercourse States (see art. 34 of the 1969 Vienna Convention on the Law of Treaties). Under article 5 of the present draft articles, however, a watercourse State could be entitled to participate in the negotiation of, and become a party to, such an agreement between other watercourse States if the agreement were negotiated and concluded after the entry into force of the present draft.

CHAPTER III

Regulation of international watercourses

(Part VIII of the draft articles)

A. Introduction

128. The outline of the topic contained in the fourth report[203] set forth a catalogue of "other matters" to be considered for inclusion in the draft articles. It was explained in that report that these were subjects suitable for treatment in the Commission's draft, or in annexes thereto, and that their inclusion would afford watercourse States needed guidance in connection with their efforts to develop international watercourse systems with a view to the optimal utilization of international water resources. With a view to the orderly consideration by the Commission of that material, the Special Rapporteur proposed that the first of these matters, regulation of international watercourses, be dealt with in 1989,[204] and it is accordingly taken up in the present chapter. The remaining material relating to the topic will be dealt with in the next report.

129. As used in the context of the present topic, the expression "regulation of international watercourses" has a specific meaning—namely, the control of the water in a watercourse, by works or other measures, in order both to prevent harmful effects (such as floods and erosion) and to maximize the benefits that may be obtained from the watercourse.[205] The present subtopic is

[203] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 7.

[204] *Ibid.*, para. 8.

[205] See also the definition contained in article 1 of the draft articles on the regulation of the flow of water of international watercourses adopted by the International Law Association at its fifty-ninth Conference, held at Belgrade in 1980. In the comment on that article, ILA referred to regulation as "moderating, increasing or otherwise modifying the flow of waters in a watercourse" (see the second report of the Committee on International Water Resources Law (Chairman/Rapporteur: E. J. Manner) on regulation of the flow of water of international watercourses, ILA, *Report of the Fifty-ninth Conference,*

(Continued on next page.)

thus broader than that dealt with in chapter I above, since the measures involved here include not only those designed to prevent harmful effects of water[206] but also those intended to create and enhance the many kinds of benefit water can provide. For example, regulation of the flow of water allows watercourse States to derive maximum beneficial use of the watercourse throughout the year, through storage of water during the wet season and its release in dry periods.

130. Regulation by one watercourse State of the waters of an international watercourse will often operate to the advantage of other watercourse States. For example, making the flow of water more consistent can prevent both floods and droughts, extend periods during which irrigation is possible, permit or enhance hydropower generation, alleviate siltation, dilute pollutants, prevent the formation of stagnant pools in which the malarial mosquito may breed, and sustain fisheries. However, regulation may also have adverse effects upon other watercourse States. For example, works carried out by an upstream State may reduce flow below that which is necessary to provide adequate scouring of the river bed in a downstream State. On the other hand, measures taken by a downstream State, such as the construction of a dam, may result in flooding damage in an upstream State, such as harm to agricultural lands and habitats.

131. The fact that river regulation is at once necessary for optimum utilization and potentially harmful makes co-operation between watercourse States essential. The numerous treaty provisions on the subject testify to States' realization of the importance of working together in this respect.

B. State practice as reflected in international agreements

132. The 1959 Agreement between the USSR, Norway and Finland concerning the regulation of Lake Inari contains detailed provisions that are instructive for present purposes. The Agreement authorized the USSR to regulate the lake by means of the Kaitakoski hydroelectric power station and dam within the limits of specified water levels.[207] The USSR undertook to ensure that the Kaitakoski hydroelectric power station and dam and the course of the Paatsjoki river between Lake Inari and the power station were in such condition that the discharge of water from Lake Inari could proceed at all times in accordance with regulations annexed to the Agreement (art. 2). According to these regulations, the flow of water from Lake Inari is to be continuous within specific limits of a daily mean discharge.[208] In order to prepare the lake to receive spring floods, so as to prevent it from rising above the maximum permissible water level, and to limit the volume of flood discharge and flood levels on the Paatsjoki river below the hydroelectric power station, the flow of water from Lake Inari is to be regulated on the basis of forecasts and recommendations drawn up by Finland in accordance with certain conditions.[209]

133. In the 1944 Treaty relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande (Rio Bravo), the United States of America and Mexico agreed upon the joint construction of the following works for the regulation of those watercourses:

Article 5

...

I. The dams required for the conservation, storage and regulation of the greatest quantity of the annual flow of the [Rio Grande (Rio Bravo)] river in a way to ensure the continuance of existing uses and the development of the greatest number of feasible projects, within the limits imposed by the water allotments specified.

II. The dam and other joint works required for the diversion of the flow of the Rio Grande (Rio Bravo).

...

134. The 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters provides, in article 2, for Egypt to construct the Sudd el Aali at Aswan as the first link of a series of projects on the Nile for over-year storage (para. 1), and for the Sudan to construct the Roseires Dam on the Blue Nile in order to permit utilization of that country's share of the waters (para. 2).

135. The 1971 Agreement between Finland and Sweden concerning frontier rivers contains, in its chapter 4, "Special provisions concerning water regulation". Article 1 of chapter 4 in particular provides that:

Article 1

Permission to regulate the flow of water from a lake or in a watercourse may be granted to any person wishing to achieve 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.

The appropriate provisions of chapter 3 shall apply to projects falling within the scope of the first paragraph.

136. One of the main objectives of the 1969 Treaty of the River Plate Basin between Brazil, Argentina, Bolivia, Paraguay and Uruguay is "[t]he rational utilization of water resources, in particular by the regulation of watercourses and their multipurpose and equitable development" (art. I, subpara. (*b*)). The 1960 Indus Waters Treaty between India and Pakistan deals in detail in its

(*Footnote 205 continued.*)

Belgrade, 1980 (London, 1982), p. 363, para. 2 of the comment). To the same effect is the definition of "international river improvements" in article 2 of the Canadian International River Improvements Act of 1955 (*Revised Statutes of Canada, 1970* (Ottawa), vol. IV, chap. I-22, quoted in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 16 above), para. 381).

[206] These effects were described in chapter I. As noted by the ILA Committee on International Water Resources Law, in its first report on regulation of the flow of water of international watercourses, submitted to ILA at its fifty-eighth Conference, too much water flow, if not regulated, may result in considerable damage to agricultural land as well as to the river bank itself. Too little flow, on the other hand, may intensify water pollution or interrupt such uses as navigation and timber floating. An uneven flow of water may also prevent the proper operation of hydroelectric power plants by making it necessary for them to be shut down during periods of insufficient water. (ILA, *Report of the Fifty-eighth Conference, Manila, 1978* (London, 1980), p. 221.)

[207] Article 1 of the Agreement gives a minimum level of 115.67 metres above sea level and a maximum of 118.03 metres above sea level.

[208] See para. 2 of the regulations, in annex 3 to the Agreement.

[209] *Ibid.*

annexure E with the question of storage of waters by India on the Western Rivers and with the construction and operation of storage works. The 1955 Convention between Italy and Switzerland concerns the regulation of Lake Lugano.

137. Protocol No. 1 to the 1946 Treaty of friendship and neighbourly relations between Iraq and Turkey relates to the regulation of the waters of the Tigris and Euphrates and of their tributaries. In the preamble to Protocol No. 1, the parties recognize the importance of the construction of conservation works "in order to ensure the maintenance of a regular water supply and the regulation of the water-flow of the two rivers with a view to avoiding the danger of floods during the annual periods of high-water"; illustrating a recognition of the importance of multiple uses, the parties also accepted the principle that such works "should, as far as possible, and in the interests of both countries be adapted to purposes of irrigation and the production of hydroelectric power".

138. The following are additional examples of treaties that include provisions dealing with regulation of international watercourses: the 1928 Treaty between Austria and Czechoslovakia regarding the settlement of legal questions connected with the frontier, especially article 19; the 1960 Frontier Treaty between the Netherlands and the Federal Republic of Germany, annex B of which concerns the regulation of streams and resultant future changes in the course of the frontier; the 1954 Agreement between Czechoslovakia and Hungary concerning the settlement of technical and economic questions relating to frontier watercourses, especially articles 2-7, 10 and 18; the 1950 Convention between the USSR 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, especially articles 1-8; 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, article 1; and 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 carried out on both banks, especially article 20.

C. Work of the International Law Association

139. As in the case of flood prevention and control, the only major effort at formulating general legal rules and recommendations relating to river regulation, apart from those of previous Special Rapporteurs, was made by the International Law Association. At its fifty-ninth Conference, held at Belgrade in 1980, ILA adopted nine articles on the regulation of the flow of water of international watercourses.[210] These articles read as follows:

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.

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.

Article 9

The application of these articles to regulation for controlling floods is without prejudice to the application of the relevant articles on flood control adopted by the International Law Association in 1972.

While the above articles cover areas dealt with in other chapters of the present draft articles, they illustrate the manner in which the present subtopic interacts with others.

D. The proposed article

140. The extensive treatment of river and lake regulation in international agreements reflects the importance

[210] See the second report of the Committee on International Water Resources Law on regulation of the flow of water of international watercourses, *loc. cit.* (footnote 205 above), pp. 362 *et seq.*

States attach to the subject. In recognition of the important role played by regulation of international watercourses, the Special Rapporteur submits the following article for the consideration of the Commission.

PART VIII

REGULATION OF INTERNATIONAL WATERCOURSES

Article 25. Regulation of international watercourses

1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.

2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly.

Comments

(1) *Paragraph 1* represents a concrete application of the general obligation of co-operation contained in article 9 of the draft articles. In requiring watercourse States to work together in this regard, the paragraph recognizes the essential role that regulation plays in the development of international watercourses.

(2) *Paragraph 2* is proposed as a residual rule concerning cases in which watercourse States have agreed to undertake regulation works but have not provided for the sharing of the burden of such projects. The expression "participate on an equitable basis" is an application of article 6 of the draft articles and would mean in practice that watercourse States receiving benefits from a particular project should contribute proportionately to its construction and maintenance. In the view of the Special Rapporteur, the term "equitable" also means that such contributions would be required only to the extent that the watercourse State in question was in a financial position to make them.[211]

(3) The Commission may wish to consider whether a definition of the term "regulation" should eventually be included in article 1 of the draft articles. Possible models include the definition contained in article 1 of the articles adopted by ILA (see para. 139 above) and the following text proposed by Mr. Schwebel in his third report:

> "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.[212]

[211] There would often be a role to be played in such cases by multilateral development banks.

[212] Document A/CN.4/348 (see footnote 16 above), para. 389, para. 3 of draft article 12 (Regulation of international watercourses).

Concluding remarks

141. The present report has covered the three subtopics scheduled for submission in 1989: water-related hazards and dangers; the relationship between non-navigational and navigational uses; and regulation of international watercourses. The Special Rapporteur intends to deal with the remaining aspects of the topic in his sixth report, to be submitted in 1990. The schedule having thus been maintained, the Commission should be in a good position to complete the first reading of the complete set of draft articles by the end of the current term of office of its members, in 1991.

ANNEX

Treaties cited in the present report*

ABBREVIATIONS

BFSP	*British and Foreign State Papers*
Legislative Texts	United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4).
A/5409	"Legal problems relating to the utilization and use of international rivers", report by the Secretary-General, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 33.
A/CN.4/274	"Legal problems relating to the non-navigational uses of international watercourses", supplementary report by the Secretary-General, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 265.

*The instruments are listed in chronological order, by continent.

AFRICA

	Source
Union of South Africa and Portugal: Agreement regulating the use of the waters of the Kunene River for the purposes of generating hydraulic power and of inundation and irrigation in the Mandated Territory of South West Africa (Cape Town, 1 July 1926)	League of Nations, *Treaty Series*, vol. LXX, p. 315; summarized in A/5409, paras. 96-99.
United Arab Republic and Sudan: Agreement for the full utilization of the Nile waters (Cairo, 8 November 1959) *and* Protocol concerning the establishment of the Permanent Joint Technical Commission (Cairo, 17 January 1960)	United Nations, *Treaty Series*, vol. 453, p. 51; summarized in A/5409, paras. 108-113. *Legislative Texts*, p. 148.
Upper Volta, Mali, Mauritania, Niger, Senegal and Chad: Convention establishing the Permanent Inter-State Committee on Drought Control in the Sahel (Ouagadougou, Upper Volta, 12 September 1973)	A/9178.
Benin, Cameroon, Ivory Coast, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad: Convention creating the Niger Basin Authority (Faranah, Guinea, 21 November 1980)	United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 56.

AMERICA

Great Britain and United States of America: Treaty relating to boundary waters and questions concerning the boundary between Canada and the United States (Washington, D.C., 11 January 1909)	*BFSP, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260; summarized in A/5409, paras. 154-167.
United States of America and Mexico: Treaty relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (Washington, D.C., 3 February 1944), *and* supplementary Protocol (14 November 1944)	United Nations, *Treaty Series*, vol. 3, p. 313; summarized in A/5409, paras. 211-216.
Canada and United States of America: Treaty relating to co-operative development of the water resources of the Columbia River Basin (Washington, D.C., 17 January 1961)	United Nations, *Treaty Series*, vol. 542, p. 245; summarized in A/5409, paras. 188-200.
United States of America and Canada: Agreement concerning the establishment of an international arbitral tribunal to dispose of United States claims relating to Gut Dam (Ottawa, 25 March 1965)	United Nations, *Treaty Series*, vol. 607, p. 141; summarized in A/CN.4/274, paras. 78-82.
Brazil, Argentina, Bolivia, Paraguay and Uruguay: Treaty of the River Plate Basin (Brasilia, 23 April 1969)	United Nations, *Treaty Series*, vol. 875, p. 3; summarized in A/CN.4/274, paras. 60-64.

ASIA

Iraq and Turkey: Treaty of friendship and neighbourly relations *and* Protocol No. 1 relative to the regulation of the waters of the Tigris and Euphrates and of their tributaries (Ankara, 29 March 1946)	United Nations, *Treaty Series*, vol. 37, p. 226; summarized in A/5409, paras. 341-346.
USSR and People's Republic of China: Agreement on joint research operations to determine the natural resources of the Amur River Basin and the prospects for development of its productive potentialities and on planning and survey operations to prepare a scheme for the multi-purpose exploitation of the Argun River and the Upper Amur River (Beijing, 18 August 1956)	*Legislative Texts*, p. 280, No. 87; summarized in A/5409, paras. 318-320.
USSR and Iran: Treaty concerning the régime of the Soviet-Iranian frontier and the procedure for the settlement of frontier disputes and incidents (Moscow, 14 May 1957)	United Nations, *Treaty Series*, vol. 457, p. 161.
USSR and Afghanistan: Treaty concerning the régime of the Soviet-Afghan State frontier (Moscow, 18 January 1958)	United Nations, *Treaty Series*, vol. 321, p. 77; summarized in A/5409, paras. 386-398.

	Source
Nepal and India: Agreement on the Gandak River irrigation and power project (Kathmandu, 4 December 1959)	*Legislative Texts*, p. 295, No. 96; summarized in A/5409, paras. 347-354.
India, Pakistan and IBRD: Indus Waters Treaty 1960 (Karachi, 19 September 1960)	United Nations, *Treaty Series*, vol. 419, p. 125; summarized in A/5409, paras. 356-361.

EUROPE

Belgium and Netherlands: Convention on regulation of the drainage of the Flanders waters (Ghent, 20 May 1843)	*Legislative Texts*, p. 541, No. 155; summarized in A/5409, paras. 701-706.
Switzerland and Austria-Hungary: 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 (Vienna, 30 December 1892)	*BFSP, 1891-1892*, vol. 84, p. 690; *Legislative Texts*, p. 489, No. 141; summarized in A/5409, paras. 810-817.
Netherlands and Prussia: Convention concerning the Dinkel and Vechte Rivers (Berlin, 17 October 1905)	*Legislative Texts*, p. 752, No. 210; summarized in A/5409, paras. 647-652.
Germany and Poland: Agreement regarding the administration of the section of the Warta forming the frontier, and traffic on that section (Poznan, 16 February 1927)	League of Nations, *Treaty Series*, vol. LXXI, p. 369.
Austria and Czechoslovakia: Treaty regarding the settlement of legal questions connected with the frontier described in article 27, paragraph 6, of the Treaty of Peace between the Allied and Associated Powers and Austria, signed at Saint-Germain-en-Laye on 10 September 1919 (Prague, 12 December 1928)	League of Nations, *Treaty Series*, vol. CVIII, p. 9; summarized in A/5409, paras. 891-892.
Poland and USSR: Agreement concerning the régime on the Soviet-Polish State frontier (Moscow, 8 July 1948)	United Nations, *Treaty Series*, vol. 37, p. 25; summarized in A/5409, para. 953.
USSR and Hungary: Treaty concerning the régime of the Soviet-Hungarian State frontier (Moscow, 24 February 1950)	*Legislative Texts*, p. 823, No. 226; summarized in A/5409, paras. 597-606.
USSR and Hungary: Convention concerning measures to prevent floods and to regulate the water régime on the Soviet-Hungarian frontier in the area of the frontier river Tisza (Uzhgorod, 9 June 1950)	*Legislative Texts*, p. 827, No. 227; summarized in A/5409, paras. 866-870.
Poland and German Democratic Republic: Agreement concerning navigation in frontier waters and the use and maintenance of frontier waters (Berlin, 6 February 1952)	United Nations, *Treaty Series*, vol. 304, p. 131; summarized in A/5409, paras. 907-914.
USSR and Romania: Convention concerning measures to prevent floods and to regulate the water régime of the River Prut (Kishinev, 25 December 1952)	*Legislative Texts*, p. 923, No. 251; summarized in A/5409, para. 791.
Czechoslovakia and Hungary: Agreement concerning the settlement of technical and economic questions relating to frontier watercourses (Prague, 16 April 1954)	United Nations, *Treaty Series*, vol. 504, p. 231; summarized in A/5409, paras. 536-542.
Yugoslavia and Romania: Agreement concerning questions of water control on water control systems and watercourses on or intersected by the State frontier, together with the statute of the Yugoslav-Romanian Water Control Commission (Bucharest, 7 April 1955)	*Legislative Texts*, p. 928, No. 253; summarized in A/5409, paras. 548-555.
Yugoslavia and Hungary: Agreement concerning water economy questions, together with the statute of the Yugoslav-Hungarian Water Economy Commission (Belgrade, 8 August 1955)	*Legislative Texts*, p. 830, No. 228; summarized in A/5409, para. 543.

	Source
Italy and Switzerland: Convention concerning the regulation of Lake Lugano (Lugano, 17 September 1955)	United Nations, *Treaty Series*, vol. 291, p. 213; summarized in A/5409, paras. 721-729.
Hungary and Austria: Treaty concerning the regulation of water economy questions in the frontier region (Vienna, 9 April 1956)	United Nations, *Treaty Series*, vol. 438, p. 123; summarized in A/5409, paras. 566-581.
France and Federal Republic of Germany: Treaty concerning the settlement of the Saar question (Luxembourg, 27 October 1956)	*Legislative Texts*, p. 658, No. 179; summarized in A/5409, paras. 996-1001.
USSR and Czechoslovakia: Agreement concerning the régime of the Soviet-Czechoslovak frontier and the procedure for the settlement of frontier incidents (Moscow, 30 November 1956)	United Nations, *Treaty Series*, vol. 266, p. 244; summarized in A/5409, paras. 1013-1019.
Yugoslavia and Albania: Agreement concerning water economy questions, together with the statute of the Yugoslav-Albanian Water Economy Commission and with the Protocol concerning fishing in frontier lakes and rivers (Belgrade, 5 December 1956)	*Legislative Texts*, p. 441, No. 128; summarized in A/5409, paras. 498-502.
USSR and Romania: Agreement extending the provisions of the 1952 Convention, 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 (Bucharest, 31 July 1957)	Summarized in A/CN.4/274, para. 156.
Czechoslovakia and Poland: Agreement concerning the use of water resources in frontier waters (Prague, 21 March 1958)	United Nations, *Treaty Series*, vol. 538, p. 89; summarized in A/CN.4/274, paras. 157-163.
Yugoslavia and Bulgaria: Agreement concerning water economy questions (Sofia, 4 April 1958)	United Nations, *Treaty Series*, vol. 367, p. 89; summarized in A/5409, paras. 511-518.
USSR, Norway and Finland: Agreement concerning the regulation of Lake Inari by means of the Kaitakoski hydroelectric power station and dam (Moscow, 29 April 1959)	United Nations, *Treaty Series*, vol. 346, p. 167; summarized in A/5409, paras. 447-452.
Netherlands and Federal Republic of Germany: Treaty concerning the course of the common frontier, the boundary waters, real property situated near the frontier, traffic crossing the frontier on land and via inland waters, and other frontier questions (Frontier Treaty) (The Hague, 8 April 1960)	United Nations, *Treaty Series*, vol. 508, p. 15; summarized in A/5409, paras. 915-927.
Belgium and Netherlands: Treaty concerning the improvement of the Terneuzen and Ghent Canal and the settlement of various related matters (Brussels, 20 June 1960)	United Nations, *Treaty Series*, vol. 423, p. 19; summarized in A/5409, paras. 1009-1012.
Finland and USSR: Agreement concerning the régime of the Finnish-Soviet State frontier and the procedure for the settlement of frontier incidents (Helsinki, 23 June 1960)	United Nations, *Treaty Series*, vol. 379, p. 277; summarized in A/5409, para. 944.
USSR and Poland: Treaty concerning the régime of the Soviet-Polish State frontier and co-operation and mutual assistance in frontier matters (Moscow, 15 February 1961)	United Nations, *Treaty Series*, vol. 420, p. 161; summarized in A/CN.4/274, paras. 178-193.
Greece and Turkey: Protocol concerning the final elimination of differences concerning the execution of hydraulic operations for the improvement of the bed of the River Meriç-Evros carried out on both banks (Ankara, 19 January 1963)	Summarized in A/CN.4/274, paras. 206-210.
Hungary and Romania: Treaty concerning the régime of the Hungarian-Romanian State frontier and co-operation in frontier matters (Budapest, 13 June 1963)	United Nations, *Treaty Series*, vol. 576, p. 275; summarized in A/CN.4/274, paras. 216-227.

	Source
Bulgaria and Greece: Agreement on co-operation in the utilization of the waters of the rivers crossing the two countries (Athens, 9 July 1964)	Summarized in A/CN.4/274, paras. 269-272.
Poland and USSR: Agreement concerning the use of water resources in frontier waters (Warsaw, 17 July 1964)	United Nations, *Treaty Series*, vol. 552, p. 175; summarized in A/CN.4/274, paras. 273-278.
Austria and Czechoslovakia: Treaty concerning the regulation of water management questions relating to frontier waters (Vienna, 7 December 1967)	United Nations, *Treaty Series*, vol. 728, p. 313; summarized in A/CN.4/274, paras. 282-296.
France and Federal Republic of Germany: Convention concerning development of the Rhine between Strasbourg/Kehl and Lauterbourg/Neuburgweier (Paris, 4 July 1969)	United Nations, *Treaty Series*, vol. 760, p. 305.
Finland and Sweden: Agreement concerning frontier rivers (Stockholm, 16 September 1971)	United Nations, *Treaty Series*, vol. 825, p. 191; summarized in A/CN.4/274, paras. 307-321.

General conventions

Convention and Statute on the Régime of Navigable Waterways of International Concern (Barcelona, 20 April 1921)	League of Nations, *Treaty Series*, vol. VII, p. 35.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	United Nations, *Treaty Series*, vol. 1155, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

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

[Agenda item 7]

DOCUMENT A/CN.4/423*

Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[*Original: English, French, Spanish*]
[*25 April 1989*]

CONTENTS

*Incorporating documents A/CN.4/423/Corr.1 and 2.

I. Introduction

A. Preliminary considerations

1. The debates on the present topic at the last session of the International Law Commission[1] and in the Sixth Committee at the forty-third session of the General Assembly[2] were extremely fruitful. The Special Rapporteur believes that, following these two important debates, it will be possible for the Commission to move in the right direction.

B. The concept of risk

2. In the fourth report of the present Special Rapporteur,[3] the concept of "risk" was proposed as a means of limiting the scope of the draft. It is logical to try to establish limits because otherwise the subject might become fragmented into a number of parts to which it would be difficult to apply a single method.

3. A legal text can, nevertheless, mix two different types of liability, provided that the limits of each are clear. This often occurs in domestic law, where two different types of liability may apply to the same conduct, depending on the legal course chosen. In the area of industrial accidents, for instance, some domestic legal systems usually provide for a kind of causal liability on the part of the employer so that, in the event of an accident, the employer must pay a certain maximum amount whether or not he is at fault. Such compensation is sometimes considerably less than the actual harm suffered by the employee, with the result that, if the latter thinks he has sufficient evidence to demonstrate that the employer is at fault, he may opt for the usual legal course and claim larger amounts of money. In that case, he would be subject to the burden of proof under common law.

4. The limitation imposed by the concept of "risk" could establish limits which would, in particular, prevent kinds of "absolute" liability from being incurred, in which any and all transboundary harm would have to be compensated. The Special Rapporteur believed, and continues to believe, that this would require a degree of solidarity found only in societies far more integrated than the present-day community of nations.

5. Let us take a closer look at the foregoing. In the area of liability, in the final instance the law faces an inexorable choice: who is to be held responsible for the harm that has occurred? A first answer would be to find out who is to blame, in the broadest sense. That person must pay compensation. Now, if no one is to blame for the specific act which caused the harm, the person who undertook the activity of which that act forms a part must pay compensation, normally because it is he that benefits from the results of that activity, or else the person who owns the dangerous thing must provide compensation because he created the danger. This is the basis for the theory of "risk", where, as the present Special Rapporteur sees it, there is a kind of "original fault"—"original sin" he called it in one of his reports[4]—because this "fault" or "sin" is *ab initio*, in other words it lies at the origin of the activity. According to this theory, the operator assumes responsibility for compensating for accidents in which the risk he created materializes. This has been called "conditional fault" because the fault exists in theory all the time but is only triggered in practice if an accident occurs: the operator is "at fault" because he is responsible for the existence of the activity, even though he is in no way to blame for the actual episode in question.

[1] For a summary of the debate in the Commission at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 9 *et seq.*, paras. 21-102.

[2] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly" (A/CN.4/L.431), sect. B.

[3] *Yearbook . . . 1988*, vol. II (Part One), p. 251, document A/CN.4/413.

[4] In order to avoid using the concept of "fault", which might complicate matters in the area of international liability. See the Special Rapporteur's third report, *Yearbook . . . 1987*, vol. II (Part One), p. 50, document A/CN.4/405, para. 16.

6. There is a third instance, however: the moment comes when the distinction between the two kinds of fault cannot be made, as would be the case with harm caused not by an activity but by an isolated act beyond the control of the perpetrator or by a thing which is not normally dangerous. In the earlier instance, fault (real or otherwise) in respect of an act is linked to an activity: here there is not even that link.

7. Some domestic legal systems, however, seek to prevent the innocent victim, the person who did absolutely nothing to deserve the harm, from suffering. One possible solution is to hold liable either the person responsible for the act, even if he acted without fault, or the owner of the thing that caused the harm, even if this thing is not normally dangerous. No matter how tenuous the distinction, and even though it might not be measurable in terms of fault, if it can be made, then liability can be attributed. It is this last kind of liability, which could be called "absolute", that the Special Rapporteur sought to avoid by introducing the concept of "activities involving risk" in his fourth report.

8. Now this kind of limitation based on risk involved an unknown quantity: did it or did it not include in the topic activities which cause appreciable transboundary harm by pollution, the effects of which are normally cumulative? The Special Rapporteur dealt with this question in his fourth report,[5] to which the reader is referred.

9. The difficulty with these kinds of activities is that their polluting effect and thus the harm they cause is normally foreseeable: it is an inevitable consequence of the activity itself. If an industry uses certain ingredients which are known to be pollutants and if certain conditions exist that are also known, transboundary harm is bound to occur. Since the element of contingency of the harm is lacking, it is difficult to speak of risk.

10. However, in his fourth report the Special Rapporteur advocated including these kinds of activities in the scope of the topic, for if activities involving risk, or contingent harm, are included, then it is all the more logical that those which are bound to cause harm should be included. That was the logic underlying their inclusion, assisted by the broad wording of the topic ("activities not prohibited . . .") which lent itself to including them even though they might not strictly involve "risk"; it was also thought that general international law did not impose a prohibition which might exclude them from the topic.[6]

11. The Commission and the Sixth Committee were, however, reluctant to accept the concept of "risk" in the form in which it was used in the fourth report.[7] That concept was retained for prevention, however, since, if an activity does not have dangerous characteristics, a State can hardly be asked to take precautionary measures against it.

12. The present Special Rapporteur cannot in this case disregard the important body of opinion in the Commission which prefers not to use the concept of "risk" as a limiting factor, and believes that such thinking can be incorporated in the draft articles. He also believes that not all harm would be compensable under this draft (although it might be under another instrument), nor would the dreaded "absolute liability" be incurred if certain concepts existing in the draft articles were adhered to, for example the concept of "activity" as opposed to "act". Already in connection with the second report of the present Special Rapporteur,[8] the Commission had shown a preference for adopting the terminology of the French version of the title of the topic and referring to "activities" instead of "acts".[9]

13. This attitude is important for limiting the scope of the draft because, in one of its meanings, liability refers to the consequences of certain conduct.[10] According to this meaning, "liability" relates only to acts, to which legal consequences can be attributed, and not to activities, because causality originates in specific acts, not activities. A certain result in the physical world which amounts to harm in the legal world can be traced back along the chain of causality to a specific human act which gave rise to it.[11] It cannot, however, be attributed quite so

---

[5] Document A/CN.4/413 (see footnote 3 above), paras. 8-15.

[6] *Ibid.*, para. 10.

[7] The view expressed by the representative of Austria in the Sixth Committee is illustrative of this reluctance:

". . . It should also be borne in mind that the concept of liability for acts not prohibited by international law related to fundamentally different situations requiring different approaches. One situation had to do with hazardous activities which carried with them the risk of disastrous consequences in the event of an accident, but which, in their normal operation, did not have an adverse impact on other States or on the international community as a whole. Thus it was only in the event of an accident that the question of liability would arise. By its very nature, such liability must be absolute and strict, permitting no exceptions.

"However, the task of the Commission also related to a fundamentally different situation, namely transboundary and long-range impacts on the environment. In that case, the risk of accident was only one minor aspect of the problem. It was through their normal operation that some industrial or energy-producing activities harmed the environment of other States. Moreover, such harm was not caused by a single, identifiable source as in the case of hazardous activities. For a long time, such emissions had been generally accepted because every State was producing them and their nefarious consequences were neither well known nor obvious. The growing awareness of their harmful influence had, however, reduced the level of tolerance. In that regard, liability had two distinct functions: as with hazardous activities, it should, on the one hand, cover the risk of an accident; on the other, it must also cover, and that was its essential function, significant harm caused in the territory of other States through a normal operation. Liability for risk must thus be combined with liability for a harmful activity." (*Official Records of the General Assembly, Forty-third Session, Sixth Committee*, 27th meeting, paras. 37 and 38).

[8] *Yearbook . . . 1986*, vol. II (Part One), p. 145, document A/CN.4/402.

[9] *Yearbook . . . 1986*, vol. II (Part Two), p. 58, para. 216.

[10] Either a breach of an obligation (wrongfulness) or fulfilment of the condition specifically triggering liability (harm in causal liability).

[11] In his second report, the present Special Rapporteur stated:

". . . So we return to the complexities of the title of the topic and to the distinction between 'acts' and 'activities'. The Special Rapporteur believes, as stated earlier . . . , that the French version is the right one and that it gives the topic its real scope. According to the terms of reference given it by the General Assembly, the Commission must deal with injurious consequences arising out of activities not prohibited by international law. Activities are shaped by complex and varied components which are so interrelated that they are almost indistinguishable from one another. . . ." (Document A/CN.4/402 (see footnote 8 above), para. 68.) Within a lawful activity there are lawful acts which might give rise to harm and certain consequences, and there may also be wrongful acts which give rise to a breach of obligations, as could happen with lawful acts or activities which breach obligations of prevention. This is another story, however.

strictly to an "activity", which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction.

14. This reference to consequences reflects the traditional meaning of the word "liability".[12] But when one speaks of liability for activities one refers to something very different from the consequences of acts.[13] Liability is linked to the nature of the activity, and the isolated acts referred to in the third instance above (para. 6) would thus not be included in the scope of the topic. In order for the régime of the present articles to apply to certain acts, those acts must be inseparably linked to an activity which, as we shall see, has to involve risk or have harmful effects (art. 1). Harm caused by isolated acts is not covered by the draft, and the dreaded absolute liability described in the third instance is thus avoided.

15. The title of the topic, then, means: "obligations with regard to the injurious consequences of activities not prohibited by international law" and covers both meanings of the word "liability". For their continuation, such activities require that agreement be reached on a régime establishing, between States of origin and affected States, obligations and guarantees designed to strike a balance between the interests at stake. In the absence of a specific régime for a specific activity, a general régime would be required which would be that contained in the present articles, which establishes obligations to inform, notify, negotiate a régime and negotiate with a view to possible reparation, according to certain criteria, for the harm caused.

[12] What is more, one allegedly strict approach classifies under the heading "liability" only that chapter of the law which is concerned with the consequences of breaches of obligations, and prefers to describe as the "guarantees" given by enterprises the obligations imposed by law on their activities involving risk. The Special Rapporteur believes that this is what prompted some members of the Commission in the past to say that liability related only to wrongfulness. If this were so, however, all chapters of the domestic law of innumerable countries dealing with liability for risk, causal liability, objective liability, strict or absolute liability, etc., would be gross errors. They would not in fact be dealing with liability, despite their title, because of course there is no breach of obligation giving rise to such liability.

[13] There is another meaning of the word "responsibility" which is vital to the present topic. In discussing its various meanings, Goldie says:

"The term responsibility thus includes the attribution of the consequences of conduct in terms of the duties of a man in society. Secondly, it can denote the role of the defendant, 'as the party responsible' for causing a harm. . . ." (Extract cited in the Special Rapporteur's second report, document A/CN.4/402 (see footnote 8 above), footnote 10.)

Both these meanings are used for the word "responsibility" in article 139, paragraphs 1 and 2, of the 1982 United Nations Convention on the Law of the Sea. There, the English term "responsibility" was used in parallel with the French *responsabilité* in the expression *responsabilités et obligations qui en découlent*, while "liability" was used for *obligation de réparer*. The expression "responsibility and liability" was used in parallel with the French: *obligation de veiller au respect de la Convention et responsabilité en cas de dommages*. See the preliminary report of the previous Special Rapporteur, R. Q. Quentin-Baxter, *Yearbook . . . 1980*, vol. II (Part One), pp. 250-251, document A/CN.4/334 and Add.1 and 2, footnote 17.

The first meaning refers to all the primary obligations governing an activity. It is not surprising therefore that in the area of "causal" liability it should be preferable to take as the unit of reference the activity rather than the act, in order to endow it with regulations permitting its continuation. The latter is done by establishing primary obligations for the person carrying out the activity. These primary obligations come into play, as has been seen repeatedly, when harm is caused.

II. Revised articles proposed for chapter I (General provisions) and chapter II (Principles) of the draft

16. The Special Rapporteur therefore proposes, as an alternative to the first 10 articles referred to the Drafting Committee,[14] other articles which incorporate what he believes were the most important comments made during the above-mentioned debates in the Commission and in the Sixth Committee (see para. 1).

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles shall apply with respect to activities carried on in the territory of a State or in other places under its jurisdiction as recognized by international law or, in the absence of such jurisdiction, under its control, when the physical consequences of such activities cause, or create an appreciable risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(*a*) (i) "Risk" means the risk occasioned by the use of things whose physical properties, considered either intrinsically or in relation to the place, environment or way in which they are used, make them likely to cause transboundary harm throughout the process, notwithstanding any precautions which might be taken in their regard;

(ii) "Appreciable risk" means the risk which may be identified through a simple examination of the activity and the things involved, in relation to the place, environment or way in which they are used, and includes both the low probability of very considerable [disastrous] transboundary harm and the high probability of minor appreciable harm;

[14] See *Yearbook . . . 1988*, vol. II (Part Two), p. 9, para. 22.

(*b*) "Activities involving risk" means the activities referred to in subparagraph (*a*), in which harm is contingent, and "activities with harmful effects" means those causing appreciable transboundary harm throughout the process;

(*c*) "Transboundary harm" means the effect which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in places under the jurisdiction or control of another State, is appreciably detrimental to persons or objects, to the use or enjoyment of areas or to the environment, whether or not the States concerned have a common border. Under the régime of the present articles, "transboundary harm" always refers to "appreciable harm";

(*d*) "State of origin" means the State in whose territory or in places under whose jurisdiction or control the activities referred to in article 1 take place;

(*e*) "Affected State" means the State in whose territory or under whose jurisdiction persons or objects, the use or enjoyment of areas, or the environment are or may be appreciably harmed.

Article 3. Assignment of obligations

1. The State of origin shall have the obligations established by the present articles provided that it knew or had means of knowing that an activity referred to in article 1 was being, or was about to be, carried on in its territory or in other places under its jurisdiction or control.

2. Unless there is evidence to the contrary, it shall be presumed that the State of origin has the knowledge or the means of knowing referred to in paragraph 1.

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

Where States Parties to the present articles are also parties to another international agreement concerning activities referred to in article 1, in relations between such States the present articles shall apply subject to that other international agreement.

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

ALTERNATIVE A

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

ALTERNATIVE B

The present articles are without prejudice to the operation of any other rule of international law establishing liability for transboundary harm resulting from a wrongful act.

CHAPTER II

PRINCIPLES

Article 6. Freedom of action and the limits thereto

The sovereign freedom of States to carry on or permit human activities in their territory or in other places under their jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other States.

Article 7. Co-operation

States shall co-operate in good faith among themselves, and request the assistance of any international organizations that might be able to help them, in trying to prevent any activities referred to in article 1 carried on in their territory or in other places under their jurisdiction or control from causing transboundary harm. If such harm occurs, the State of origin shall co-operate with the affected State in minimizing its effects. In the event of harm caused by an accident, the affected State shall, if possible, also co-operate with the State of origin with regard to any harmful effects which may have arisen in the territory of the State of origin or in other places under its jurisdiction or control.

Article 8. Prevention

States of origin shall take appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm. To that end they shall, in so far as they are able, use the best practicable, available means with regard to activities referred to in article 1.

Article 9. Reparation

To the extent compatible with the present articles, the State of origin shall make reparation for appreciable harm caused by an activity referred to in article 1. Such reparation shall be decided by negotiation between the State of origin and the affected State or States and shall be guided, in principle, by the criteria set forth in the present articles, bearing in mind in particular that reparation should seek to restore the balance of interests affected by the harm.

III. Comments on the revised articles proposed for chapters I and II

17. The main purpose of the comments on the articles reproduced above is to explain the changes that have been made.

A. Article 1 (Scope of the present articles)

18. The words "in the territory of a State" indicate a

return to the concept of territory, with the addition of the concept of jurisdiction and control. This is not strictly necessary because if an activity occurs in the territory of a State it will normally be under its jurisdiction. It may, however, be useful for emphasizing that the concept of "jurisdiction" used in the articles refers also to other places outside the territory of the State.

19. The expression "jurisdiction as recognized by international law" was adopted to accommodate the position that jurisdiction in the territory is not "vested" by international law but is a result of the original sovereignty of the State. Although the view was expressed that it was unneccessary to state specifically that jurisdiction must be in conformity with international law, the Special Rapporteur prefers to retain this expression in order to make a clear distinction between this case and one in which, in the absence of lawful jurisdiction, all or part of the territory of a State is under the control of another State.

20. The word "places" has been substituted for the original word "spheres" primarily because "spheres" is not a usual expression. "Places" may be closer to the real meaning and in any case is sufficiently broad to include small areas such as a boat, aircraft or spaceship from which an activity can cause transboundary harm.

21. The word "effective" was deleted before the word "control" because it was felt that unless control was effective it was not control.

22. The words "throughout the process", which previously appeared only in article 2 (*a*) in connection with risk, have been introduced into this article because they are consistent with the idea of liability for activities rather than acts. In the case of activities involving risk, there is virtual certainty that some appreciable harm may occur within a given period, and in the case of activities with harmful effects, the expression used gives the desired meaning of harm which may begin at the beginning and continue, or be cumulative and arise not immediately but "throughout the process" of the activity.

23. The words "cause, or create an appreciable risk of causing, transboundary harm" represent an attempt to cover activities involving risk and activities with harmful effects. The idea of "appreciable risk", which is accepted in international practice, is retained.[15] It is difficult to understand the demand for prevention if the risk is not "appreciable" as defined in article 1. Moreover, in the case of activities which normally have harmful effects, it is understood that such effects are easily foreseeable.

24. It should be pointed out that, in activities involving risk, the "appreciable risk" mentioned must be that of causing "appreciable harm" if prevention is to be demanded. While we cannot be overly strict in dealing with the question of appreciable risk and appreciable harm, the limits of which are somewhat blurred, in principle the adjective "appreciable" must be applied to both concepts.

25. The concept of "appreciable harm", the only one which has significance for this draft, is introduced as early as article 1. It had become clear that any lesser harm was not relevant to the topic. The word "appreciable" is used to describe both risk and harm because it seems to denote an appropriate threshold of tolerance, although there can obviously be no certainty as to its exact limits. With the same proviso, the words "significant", "important" or "substantial", which give an idea of higher thresholds, might be preferred; while the Special Rapporteur feels that such higher thresholds might not be desirable, it is of course up to the Commission to choose.

26. The word "appreciable" is also used to qualify the term "harm" in the draft articles on the law of the non-navigational uses of international watercourses[16] (hereinafter, "draft articles on international watercourses") and, while uniformity is not obligatory, the Special Rapporteur believes that the similarities between the two topics justify the view that the terms used should be harmonized.

B. Article 2 (Use of terms)

27. In subparagraph (*a*) (i), the phrase "notwithstanding any precautions which might be taken in their regard" seeks to describe the basic characteristic of liability for risk, namely the absence of fault and the irrelevance of "due diligence" in such cases. The comments made in the debates to the effect that activities with a low probability of causing disastrous injury should be included are accommodated in subparagraph (*a*) (ii) on "appreciable risk". The expression "minor appreciable harm" is used to indicate that harm, although minor, must also be appreciable. The Special Rapporteur has an open mind as to whether major harm should be described as "very considerable", "disastrous" or even "catastrophic", provided that the term used conveys the idea of harm of great magnitude. It should also be mentioned that there are activities, such as nuclear activities, which offer both possibilities: a high risk of ongoing harm during their normal operation and a low risk of disastrous accidents.

28. Subparagraph (*b*) introduces the qualification "with harmful effects" for certain activities, such as polluting activities, which cause harm. Such activities may not be totally harmful: they are permitted because their usefulness outweighs the harm they cause.

29. A number of clarifications are also required with regard to subparagraph (*c*).

30. "Transboundary harm" is the injury suffered by a State as a physical consequence of activities referred to in article 1. The expression "is appreciably detrimental" conveys the idea that the only harm relevant to the present topic is that exceeding the threshold of tolerance established by the word "appreciable".

31. The word "places" is used again in subparagraph (*c*) to indicate that transboundary harm may affect not only the territory of a State but also other areas—which may be small, as stated earlier (para. 20)—where this

[15] This idea is developed somewhat more fully in the Special Rapporteur's fourth report, document A/CN.4/413 (see footnote 3 above), paras. 24-31 and footnote 9.

[16] See article 8 (Obligation not to cause appreciable harm), adopted provisionally by the Commission at its fortieth session (*Yearbook ... 1988*, vol. II (Part Two), p. 34).

State exercises jurisdiction as recognized by international law. In the exclusive economic zone, for instance, a rig or artificial island or the actual vessels of the coastal State could be damaged as a result of an activity carried out by vessels of another State or from land (from the territory of another State, of course) or from an aircraft registered in another State, etc. One apparently tenuous but none the less valid case of transboundary harm would be that of a vessel of one State whose activity causes harm to the vessel of another State while the two vessels are on the high seas. The important element here is the "interjurisdictional" one.

32. The case of the place or territory "under the control" of another State presents certain difficulties. One initial reaction would be to deny the status of affected State to the State that is exercising control over that territory in violation of international law, in order to prevent such control from being equated with legal jurisdiction. The result, however, would be to leave the inhabitants of the territory without international protection in the event of harm to their health, their heritage, the use and enjoyment of certain regions, or their environment. Two courses are possible here: either to accord the status of affected State to the State exercising control over the territory only in so far as it is responsible for fulfilling certain international duties towards the population, for instance protecting their human rights, or to accord this status to the entity which has legal jurisdiction over the territory—either the State lawfully entitled to the territory or the body appointed to represent it, as with the United Nations Council for Namibia in the case of the former Territory of South West Africa.

33. A reference to "the environment" has been added after the "persons or objects" and "the use or enjoyment of areas" to which harm may be caused. Although it could be considered covered by the earlier definition, it is felt that the environment has become such a major concern that it must be included in the definition of harm in order to leave no room for doubt that the draft seeks also to protect the environment.

34. Subparagraph (*d*) attributes liability not only to the State of the territory but also to the State exercising jurisdiction or, in its absence, control over another place. This is only natural since the State which is at fault cannot, by very reason of its fault, be excluded from liability.

C. Article 3 (Assignment of obligations)

35. The title of article 3 has been changed from "Attribution" to "Assignment of obligations". It was observed that to use the word "attribution" here would be to equate it with the attribution made in the draft articles on State responsibility, and that a distinction must be made between the two.

36. The observation may be correct. The word "attribution" is used in part 1 of the draft articles on State responsibility[17] to refer to the attribution of an act to a State. In part 2, where the protagonist is the affected State and it is to that State that certain rights and powers are attributed, the word "attribution" is not used. That being so and since "attribution" simply means "imputation of acts", it would be inappropriate to use the term in the present topic because it is not exactly an activity, much less an act, that is being imputed or attributed to a State, but rather certain obligations deriving from the fact that a given activity is being carried on in its territory or in places under its jurisdiction or control. Moreover, these obligations are primary, unlike the secondary obligations in part 1 of the draft on State responsibility.

37. Paragraph 2 provides for the presumption that a State has knowledge or means of knowing that an activity referred to in article 1 is being carried on in its territory or in places under its jurisdiction or control, and that the burden of proof to the contrary rests with that State. Although in procedural law it is very difficult to prove that a certain act did not take place or that a certain thing or quality does not exist, in this case it is not so difficult: a State has only to show, for instance, how many and what kind of vessels and aircraft it has in relation to the areas which it must monitor in order for one to judge whether these are sufficient to disprove the presumption to the contrary. It must not be forgotten, after all, that attributing to a State knowledge of everything that goes on in its territory is itself only a presumption.

D. Article 4 (Relationship between the present articles and other international agreements)

38. Article 4 is one of the original five articles drawn up by the previous Special Rapporteur, the late R. Q. Quentin-Baxter.[18] It aroused no major objections and refers to the relationship between the framework convention under consideration and conventions regulating specific activities, which are governed by principles very similar to those on which the present articles are based. The formulation "subject to that other international agreement" is based on paragraph 2 of article 30 of the 1969 Vienna Convention on the Law of Treaties,[19] concerning the application of successive treaties relating to the same subject-matter.

E. Article 5 (Absence of effect upon other rules of international law)

1. Preliminary considerations

39. Article 5, which was also drawn up by the previous Special Rapporteur, has elicited no major comment. However, the wording suggested by a member of the Commission at the fortieth session[20] would seem to

[17] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[18] *Yearbook ... 1984*, vol. II (Part Two), p. 77, para. 237.

[19] United Nations, *Treaty Series*, vol. 1155, p. 331.

[20] *Yearbook ... 1988*, vol. I, p. 33, 2048th meeting, para. 8 (Mr. Eiriksson).

express the same idea more clearly and the Special Rapporteur thought it appropriate to submit that text, as alternative B of article 5, to the Commission for consideration. In any event, the relationship between causal liability and responsibility for wrongful acts warrants closer consideration, especially in the light of the interesting debate that took place in 1988 on international watercourses, referred to below (para. 41).

2. Applicability of the two régimes of causal liability and responsibility for wrongfulness

40. It has already been shown that the coexistence of a régime of responsibility for wrongfulness with one of causal liability within one and the same system is perfectly conceivable. Aside from the example of industrial accidents already referred to (para. 3), mention may be made of the *Trail Smelter* case,[21] in which the arbitral tribunal imposed on Canada a twofold régime of responsibility and liability. On the one hand, the tribunal established certain preventive measures which the Smelter must take and which the tribunal presumed would be sufficient to prevent further injury caused by fumes in the State of Washington; on the other, it determined that, should appreciable injury occur even though Canada took such measures, Canada would have to provide compensation.

41. During its consideration at the fortieth session of the draft articles on international watercourses, the Commission discussed at length article 16 [17] on pollution.[22] Paragraph 2 of that article read:

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

This wording prompted a debate on the question whether what was involved was in fact causal, or strict, liability and the comment that in any case the dividing line in law between the two régimes was not clearly defined.[23]

42. The Special Rapporteur does not agree. Although the dividing line between the two régimes is sometimes a fine one, it is still clearly distinguishable: one has simply to consider the concepts underlying the two régimes, which are clearly different. In the present case, there is an obligation to prevent a given event as defined in article 23 of part 1 of the draft articles on State responsibility.[24] According to the same article, there is a breach of that obligation only "if, by the conduct adopted, the State does not achieve that result". Of course, if the event (namely, appreciable harm as a result of pollution of a watercourse) does not occur, no one will go and check whether the means used to prevent it were or were not adequate. If the result (prevention of the event in question) is achieved, there is no breach of the obligation and thus no review of the means used or the conduct adopted.

43. If the event is not prevented and appreciable harm is caused, however, what happens? And here we have the fine but firm dividing line between the two régimes. In this case—and according to the commentary to article 23 referred to above—in order to be able to determine whether there has been a breach of the obligation and thus a wrongful act, the means used to prevent the event in question will have to be considered. If it is found that the State, had it acted differently, could have prevented the event, then there is a breach of the obligation. Otherwise, there is not. According to the Commission,

> . . . The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. . . .[25]

44. This is fundamental, and it is here that the difference between responsibility for wrongful acts and causal liability lies: under the latter régime, no matter what the degree of diligence used, even maximum diligence, compensation is the inevitable consequence of the harm caused. That is why Anglo-Saxon law calls it "strict" or "absolute" liability (although there are, of course, subtle differences between these two terms). And even though it is very dangerous to talk of "fault" in this field, domestic legal systems also tend to call this régime of liability "no fault" (*lato sensu*) liability. In other words, the attribution of liability is the same whether or not the party liable acted in accordance with the rules of prevention.

45. What would happen if there were watercourse States which were parties to the corresponding convention and also parties to the present articles? If harm occurred, then it would be necessary to see whether the means normally covered by the term "due diligence" had been used. If such means had not been used, there would have been a breach of the obligation and thus a wrongful act. Reparation would therefore be required.

46. On the other hand, if the best means available to the State were used, there is no breach of obligation and thus no wrongful act. Causal liability might then apply and, since under that régime compensation depends on the nature of the cost-allocation rather than on *restitutio in integrum*, the amount payable would have to be reduced bearing in mind, in particular, the cost incurred. In the present draft, these matters can be decided by negotiation, the mechanism provided for such situations.

47. In fact, in normal cases of pollution the defence of "due diligence" is virtually unthinkable; it would be very rare for a result that was clearly attributable to a given activity whose existence was known to the State of origin to occur as a result of ignorance of the causes giving rise to the harm. Normally, we know that certain elements used in certain ways cause pollution. As a result, two possibilities would exist in practice in cases such as these involving watercourses: either (*a*) the due diligence that would keep the polluting effects of an activity below the

---

[21] United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

[22] This article was referred to the Drafting Committee in 1988; for the text, see *Yearbook . . . 1988*, vol. II (Part Two), p. 26, footnote 73.

[23] *Ibid.*, p. 29, para. 160.

[24] For the text of article 23 (Breach of an international obligation to prevent a given event) and the commentary thereto, see *Yearbook . . . 1978*, vol. II (Part Two), pp. 81 *et seq.*

[25] *Ibid.*, pp. 82-83, para. (6) of the commentary to article 23.

threshold of tolerance is not used (appreciable harm), in which case there would be a breach of the obligation and thus wrongfulness; or (*b*) all advisable means are used to prevent harm but an accident, and hence appreciable harm detrimental to an affected State or States on the watercourse [system], nevertheless occurs, in which case there would be causal liability and the corresponding compensation.

48. This may be illustrative of what would happen with the proposed convention on the present topic, in the absence of another convention imposing responsibility for wrongfulness in certain cases, depending on the form given to the obligation of prevention under article 8. If the obligation is one of result, the effect would be similar to that of the existence of two conventions, except that the two régimes (one of responsibility for wrongfulness and the other of causal liability) would coexist in the same instrument. The result would be that, if harm occurred as a result of a breach of obligations of prevention, responsibility for wrongfulness, with all that this involves, would apply, while if those obligations were fulfilled and harm nevertheless occurred, causal liability, also with all its attendant laws, would apply.

49. It was pointed out that there was an inconsistency here with the Commission's mandate of dealing with liability for acts "not prohibited". Aside from the indifference shown by many members to this apparent contradiction, it can be argued that this reasoning is applicable to a topic which deals with "acts", not "activities": the mandate involves dealing with the consequences of certain wrongful acts which are inextricably linked to an activity which is not prohibited. The activity would continue to be allowed and only the injurious "act" would have to cease.

50. Paradoxically, the least harsh solution for the State of origin would be the existence of a single régime: that of causal or strict liability. Such a régime would function as follows: prevention would not be required as a separate obligation but would simply arise from the deterrent effect of reparation under the régime of strict liability. Article 8 would simply be an appendix to the obligation to co-operate and would be without consequences in the event of a breach (except that, if harm occurred, compliance with obligations of prevention would entitle the State of origin to pay reduced compensation). It would also offer the following advantages: (*a*) State conduct would not be qualified as wrongful; (*b*) an easy mechanism for assigning obligations would be established; (*c*) reparation would be required which sought only to restore the balance of interests, instead of being guided by the principle of total restitution; and (*d*) lastly, the act would not have to cease, although its effects would be the subject of reparation, and this could sometimes produce a more flexible solution.

51. Although this last advantage might appear to give the State of origin licence to continue to cause injury in return for the payment of a certain amount of money, it must be borne in mind, first, that the obligation to compensate is going to impose certain restrictions on the State and, secondly, that the present articles also provide for a system of consultations and the creation of a specific régime for the activity in question which may eventually lead to prohibition of the activity based on the balance-of-interests test.

52. If, instead of an obligation of "due diligence", which seems to be what is envisaged in article 16 [17] of the draft articles on international watercourses (see para. 41 above), an obligation of conduct had been imposed, it is conceivable that accepted international standards would have been required, if such standards existed, or that the introduction of certain toxic elements, for example through industrial waste, into a watercourse system would have been regulated, as happens with other issues in a number of international instruments.[26]

53. Although practice might point to a different situation with regard to consequences, in theory at least the breach of that obligation of conduct would entail, even before harm was caused, all the consequences of wrongfulness and, therefore, cessation of the act giving rise to it, elimination of its consequences, restoration of the situation existing prior to the event and, lastly, all the conditions required by article 6 of part 2 of the draft articles on State responsibility.[27]

54. It is also possible that affected States might use certain measures to force compliance with the obligation of conduct—before, of course, any material harm is caused. Nor would the imposition of such a régime be incompatible with one of strict liability, which could be applicable if accidents occurred despite compliance with accepted international standards.

F. Article 6 (Freedom of action and the limits thereto)

55. A way was sought of simply referring in article 6 to the freedom of the State to permit the activities mentioned in the article rather than actually enunciating that freedom, since some members thought that that would be stating the obvious. The reference only to territory in the previous draft article has been expanded to include "places" under the jurisdiction or control of the State, although in the fourth report this understanding was implicit in the drafting of such a general principle. The second part of the article remains unchanged.

56. Article 6 is based on Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),[28] except that a broader form was sought which was not tied to the concept of the exploitation of natural resources. Basically, Principle 21 enunciates a certain freedom and its limits. Article 6 does the same and thus gives expression to the two sides of sovereignty: on the one hand, the freedom of a State to do as it wishes within its own territory; and, on the other, the inviolability of its territory with regard to effects originating outside it. The key

[26] For example, the Montreal Protocol on Substances that Deplete the Ozone Layer, of 16 September 1987 (Nairobi, UNEP, 1987).

[27] *Yearbook ... 1985*, vol. II (Part Two), p. 20, footnote 66.

[28] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-6 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

element here is that the two must be compatible. In other words, there is neither absolute freedom nor absolute inviolability: the two must be balanced and compatible.

57. This is the basis for the minimum threshold below which harm must be tolerated; it represents a concession to States' freedom of action within their territory, at the expense of the inviolability of that territory, but this freedom must not exceed the limit fixed by the nature of a mere nuisance or insignificant harm. This is one way of making these concepts compatible.

58. The obligations imposed on the State of origin are another way of making the same elements compatible: the freedom to carry on or permit activities in the territory must be balanced by certain obligations of prevention and reparation.

59. It is also understood that the rights emanating from the sovereignty of States include those of the integrity of persons and objects, the use or enjoyment of areas, and the environment of the territory.

G. Article 7 (Co-operation)

60. Article 7 seeks to enunciate, in a more specific manner than the text proposed in the fourth report, the obligations emanating from the principle of co-operation: there is an obligation to co-operate in preventing harmful effects and in controlling and minimizing such effects once they have occurred. There is no mention of the obligation to make reparation, because this does not arise from the obligation to co-operate but from the obligation to restore the balance of interests that has been upset.

61. Article 7 refers to both types of activities referred to in article 1. In the case of activities involving risk, co-operation must be aimed at minimizing the risk in order to try to prevent the accident which would give rise to harm. In the case of activities with harmful effects, co-operation must be aimed at keeping those effects below the threshold of appreciable harm. A text enunciating the principle of co-operation would be incomplete without a reference to international organizations, whose main purpose is to promote co-operation among States for the purposes for which they were established. It is well known that a number of such organizations, or programmes within them, would be particularly well equipped to assist States on matters within their sphere of competence. There are many organizations, such as IMO, IAEA, WHO, WMO and UNEP within the United Nations system and others, such as OECD, whose co-operation it should be compulsory for the source State to request. Of course, such an obligation would not be automatic in all cases, but only in those that required it. That is why the Special Rapporteur preferred to introduce this reference into a broad principle such as co-operation rather than into more specific obligations.

62. In short, a State of origin could not be considered to have complied with its obligation to co-operate in seeking to prevent the occurrence of appreciable harm if, in a particular case in which the assistance of a given organization might have been useful, it did not request such assistance. Co-operation will also have to be aimed at mitigating the effects of appreciable harm once it has occurred. Wherever possible, such co-operation will have to be extended by the State of origin to the affected State and vice versa. This means that if the affected State has the means to do so, for instance if it has more advanced technology, it will also have to help the State of origin to mitigate the harmful effects in its territory. It is understood that, as indicated in the fourth report,[29] such co-operation will not necessarily be provided free of charge. The important thing is not to deny the State of origin, simply because it is the State of origin, the means to remedy or minimize the harm caused by the accident in its own territory. Of course, such co-operation also means not using the occasion to seek political advantage or to air rivalries of any kind.

63. The first part of the article lays the basis for the obligations to inform, notify and consult the affected State. As stated earlier, these obligations serve the purpose of prevention, for the participation of the affected State will mean that the two parties will co-ordinate their efforts to that effect. However, they also, and perhaps more so, serve the purpose of creating a possible régime for the activity in question. Informing and notifying means involving the presumed affected State in a joint assessment of the nature of the activity and its effects. This in turn will make it possible to determine whether a régime is needed to restore the balance of interests. These are obligations "towards" a régime, should such a régime be needed to prevent one party from being harmed and the other from benefiting from the transfer (externalization) of the "internal" costs of an enterprise, i.e. the cost of preventing harm.

H. Article 8 (Prevention)

64. Article 8 (formerly article 9) enunciates the principle of prevention.[30] The previous version said that States must take "all reasonable preventive measures to prevent or minimize injury . . .". The present wording requires the State to take "appropriate measures to prevent or, where necessary, minimize the risk of transboundary harm".

65. This duty is not absolute, for the next sentence reads: "To that end they shall, in so far as they are able, use the best practicable, available means . . .". Those who will have to use the best available means are those carrying on the activity, whether they are private individuals or the State. This sentence replaces the phrase "reasonable preventive measures", which was considered vague or not sufficiently demanding.

---

[29] Document A/CN.4/413 (see footnote 3 above), para. 100.

[30] Similar language is used in article 194, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122); in article 2, paragraph 1, of the 1985 Vienna Convention for the Protection of the Ozone Layer (Nairobi, UNEP, 1985); and in article 3 of the draft Aix-les-Bains Convention on Transboundary Pollution, drawn up in May 1988 by the Institut international de gestion et de génie de l'environnement (mimeographed).

66. States will also have to enact the necessary laws and administrative regulations to incorporate this obligation into their domestic law, and will have to enforce those domestic norms. In other words, if an activity is carried on by the State or one of its agencies or enterprises, it is the State or its enterprises that will have to take the corresponding preventive measures. If these activities are carried on by private individuals or corporations, however, it is not the State but those private individuals or corporations that will have to institute the actual means of prevention, and the State will have to impose and enforce the corresponding obligation under its domestic law.

67. Last, but not least, account must be taken of the special situation of developing countries, who so far have suffered most from and contributed least to the global pollution of the planet. That is why, in referring to the means to be used, the article says that States shall use them "in so far as they are able" and that such means must be "available" to those States.

68. As indicated above in connection with article 5, the draft offers three possibilities with regard to prevention. If an approach based exclusively on strict liability is adopted, obligations of prevention will be subsumed in those of reparation. In that case, article 8 would have to remain as a form of co-operation, without a breach of such obligations implying any right of jurisdictional protection.

I. Article 9 (Reparation)

69. Article 9 reproduces the content of the previous article 10. Though the meaning has not been altered, the statement that "injury . . . must not affect the innocent victim alone" has been dropped. The appropriateness of this phrase was questioned, since it gave the impression that the innocent victim must bear the major burden of the harm. Of course, that was not what it meant. What it sought to convey was the notion that reparation did not strictly follow the principle of *restitutio in integrum* which applies in responsibility for wrongfulness, or at least did not follow it with regard to harm considered in isolation in each case.

70. This is because, first of all, harm is not the result of a wrongful act but the expected result of a lawful activity, the assessment of which involves complex criteria. One such criterion is the benefit which the affected State itself may derive from this activity in particular or in general. Another criterion is the interdependence of the modern world which makes us all victims and perpetrators. Yet another criterion is the cost of prevention which the State of origin may have incurred. Lastly, we have all the factors enumerated, although not exhaustively, in section 6 of the schematic outline,[31] which might perhaps require further elaboration. In these articles, reparation appears to be governed by the nature of the "costs allocation" designed to prevent a State from benefiting unduly by "externalizing" the cost of an activity of which it is the main beneficiary and making that cost fall on the innocent victim.

71. Reparation will have to be the subject of negotiation in which all these factors are weighed and agreement is then reached on the sum of money that the State of origin is to pay the affected State or the measures that it is to take for the latter's benefit. It may be found that it is correct to say that reparation should "seek to restore the balance of interests affected by the harm", because this may be the most accurate definition of harm in the present topic: a certain effect which, being inordinately detrimental to the affected State, upsets the balance of interests involved in the activity which caused it, with the result that reparation, without necessarily being equivalent to all the harm considered in isolation in each case, must be such as to restore the balance of interests involved.

[31] *Yearbook . . . 1982*, vol. II (Part Two), pp. 83 *et seq.*, para. 109.

IV. Articles 10 to 12 proposed for chapter III (notification, information and warning by the affected State) of the draft

First stage of the procedure towards prevention and the formulation of a régime

72. The Special Rapporteur proposes the following as the first three articles of chapter III:

CHAPTER III

NOTIFICATION, INFORMATION AND WARNING BY THE AFFECTED STATE

Article 10. Assessment, notification and information

If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on in its territory or in other places under its jurisdiction or control, it shall:

(*a*) review that activity to assess its potential transboundary effects and, if it finds that the activity may cause, or create the risk of causing, transboundary harm, determine the nature of the harm or risk to which it gives rise;

(*b*) give the affected State or States timely notification of the conclusions of the aforesaid review;

(*c*) accompany such notification by available technical data and information in order to enable the notified States to assess the potential effects of the activity in question;

(*d*) inform them of the measures which it is attempting to take to comply with article 8 and, if it deems it appropriate, those which might serve as a basis for a legal régime between the parties governing such activity.

Article 11. Procedure for protecting national security or industrial secrets

If the State of origin invokes reasons of national security or the protection of industrial secrets in order not to reveal some information which it would otherwise have had to transmit to the affected State:

(*a*) it shall inform the affected State that it is withholding some information and shall indicate which of the two reasons mentioned above it is invoking for that purpose;

(*b*) if possible, it shall transmit to the affected State any information which does not affect the areas of reservation invoked, especially information on the type of risk or harm it considers foreseeable and the measures it proposes for establishing a régime to govern the activity in question.

Article 12. Warning by the presumed affected State

If a State has serious reason to believe that it is, or may be, affected by an activity referred to in article 1 and that that activity is being carried on in the territory or in other places under the jurisdiction or control of another State, it may request that State to apply the provisions of article 10. The request shall be accompanied by a documented technical explanation setting forth the reasons for such belief.

V. General comments on articles 10 to 12 of chapter III

A. General considerations

73. It is clear that the kind of procedure under consideration here involves three functions that are closely linked, no one of which can be divorced from the other two. They are assessment, notification and information concerning an activity referred to in article 1. In some cases, one of the functions is implicitly assumed. How, for example, can a State be notified of certain risks or the harmful effects of an activity unless the State of origin has first made an assessment of the activity's potential effects in other jurisdictions? How can information on the activity be provided without at the same time notifying or without having previously notified the affected State about what is involved? How can one notify someone of certain dangers without providing any information which one may have about them?

74. Furthermore, consultation with affected States is also linked to these three functions. What is the use of assessment, notification and information if the opinion of the affected State is not to be consulted? As already noted, there are limits to the freedom which a State of origin has with respect to activities referred to in article 1, and the limit is to be found at the point where appreciable harm occurs to the rights emanating from the sovereignty of other States, specifically affected States. To the extent that those rights are, or may be, infringed, affected States have some say in respect of activities such as those referred to in article 1. Moreover, what consultations would be possible unless the preceding steps were taken first?

75. Similar considerations apply to negotiation, which is frequently confused with consultations. The case law, treaty provisions, resolutions of international organizations, etc., which are cited as a basis for the obligation to negotiate also confirm the obligations to assess, notify, inform and consult. This point should be taken into account in assessing to what extent the proposed articles have a basis in practice.

76. It would seem from the foregoing that one of the basic principles, perhaps the most important, on which the obligations in question rest is the obligation to co-operate laid down in article 7, especially in relation to participation. From the duty to co-operate flows, in the first place, a duty for the State to ascertain whether an activity which appears to have features that may involve risks or produce harmful effects actually causes such risks or effects. This means that the activity must be subjected to sufficiently close scrutiny to allow for definite conclusions to be reached. If, on the other hand, the activity does not appear to be of such a nature, or if, judging from appearances, there is no "appreciable" risk that the activity may cause transboundary harm and no warnings to that effect are received from other States, and—needless to say—it is not known from any other source that such risk may exist, then the activity would be below the threshold at which the provisions of the draft with regard to prevention come into play.

77. The Special Rapporteur considers that notification flows from the general obligation to co-operate because in some cases there is a need for joint action by both the State of origin and the affected State if prevention is to be effective. Perhaps some measures taken from the territory of the affected State can provide protection and prevent effects produced in the State of origin from being transmitted to its own territory. Or perhaps the co-operation of the other State is helpful for the exchange of information that may take place between the parties, especially if the other State possesses technology that is relevant to the problem at hand. Perhaps it is because a joint investigation is usually more productive than individual efforts. What this means then is that the participation of the affected State is necessary if prevention is to be genuine and effective and, consequently, it may be argued that the obligations of the State of origin, according to which it must accept such participation, have the same purpose.

78. The duty to co-operate is one basic principle,

therefore; the other is expressed in the general rule emerging from the international case law frequently cited in this connection, namely that the conscious use by a State of its territory to cause harm to another State is impermissible under international law. It may be recalled, first, that in the *Trail Smelter* case the arbitral tribunal stated:

> . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein . . .[32]

And in the *Corfu Channel* case (Merits), the ICJ referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[33]

B. International practice

79. It would take up too much space to list here the many multilateral and bilateral agreements which, in circumstances similar to those obtaining in connection with the topic under consideration, lay down the obligations of assessment, notification and information established in article 10. A number of specific precedents may be cited in this connection.

80. With regard to assessment, the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution[34] provides in article XI:

> *Article XI. Environmental assessment*
>
> (*a*) Each Contracting State shall endeavour to include an assessment of the potential environmental effects in any planning activity entailing projects within its territory, particularly in the coastal areas, which may cause significant risks of pollution in the Sea Area.
>
> . . .

81. The 1979 Convention on Long-Range Transboundary Air Pollution,[35] in article 8, provides that:

> *Article 8*
>
> The Contracting Parties, within the framework of the Executive Body referred to in article 10 and bilaterally, shall, in their common interests, exchange available information on:
>
> . . .
>
> (*b*) Major changes in national policies and in general industrial development, and their potential impact, which would be likely to cause significant changes in long-range transboundary air pollution;
>
> . . .

82. The 1982 United Nations Convention on the Law of the Sea[36] provides in article 200:

> *Article 200. Studies, research programmes and exchange of information and data*
>
> States . . . shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

83. The 1983 Agreement between the United States of America and Mexico on co-operation for the protection and improvement of the environment in the border area[37] states, in article 7:

> *Article 7*
>
> The Parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects.

84. As regards notification and information, it should be pointed out that there are numerous instruments embodying the obligations of notification, information and consultation concerning new uses of international watercourses which are applicable, *mutatis mutandis*, to the present topic; some of these are referred to in Mr. McCaffrey's third report on international watercourses.[38] Attention should be drawn to two cases mentioned in that report which do not relate specifically to watercourses but are broader in scope.

85. Particularly noteworthy is recommendation C(74)224 of the OECD Council,[39] the annex to which contains a "Principle of information and consultation" reading as follows:

> 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.

86. The reference to "significant risk" in paragraphs 6 and 8 of the above principle, which supports the Special Rapporteur's use of the similar concept of "appreciable risk", should also be noted in passing.

87. The other case of special interest is that 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" drawn up in 1978 by the Intergovernmental Working Group of Experts on Natural

---

[32] United Nations, *Reports of International Arbitral Awards*, vol. III, (Sales No. 1949.V.2), p. 1965.

[33] *I.C.J. Reports 1949*, p. 22.

[34] United Nations, *Treaty Series*, vol. 1140, p. 133.

[35] E/ECE/1010. Will appear in United Nations, *Treaty Series*, as No. 21823.

[36] See footnote 30 above.

[37] *International Legal Materials* (Washington, D.C.), vol. XXII, No. 5 (1983), p. 1025.

[38] *Yearbook . . . 1987*, vol. II (Part One), pp. 23 *et seq.*, document A/CN.4/406 and Add.1 and 2, chap. III.

[39] Recommendation on "Principles concerning transfrontier pollution", adopted by the Council of OECD on 14 November 1974 (*ibid.*, para. 79).

Resources Shared by Two or More States.[40] As Mr. McCaffrey recalls in his report, the draft principles were approved by the Governing Council of UNEP, which referred them to the General Assembly for adoption. They were then submitted by the Secretary-General to Member States for comment, after which they were discussed in the Second Committee. In its resolution 34/186, adopted without a vote on 18 December 1979, the General Assembly took note of the report of the Intergovernmental Working Group of Experts and of the draft principles and requested all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good neighbourliness.

88. Principle 6 is especially relevant:

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 subparagraph (*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.

89. Principle 7 relates to timeliness in complying with principle 6 and the spirit in which it should be fulfilled. It reads as follows:

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.

90. Apart from these precedents cited by Mr. McCaffrey in his third report, there are others relating to the obligation to consult, which obviously implies some form of notification and information, without which there can be no consultation.

91. One of these precedents is article 5 of the 1979 Convention on Long-Range Transboundary Air Pollution,[41] which provides:

Article 5

Consultations shall be held, upon request, at an early stage between, on the one hand, Contracting Parties which are actually affected by or exposed to a significant risk of long-range transboundary air pollution and, on the other hand, Contracting Parties within which and subject to whose jurisdiction a significant contribution to long-range transboundary air pollution originates, or could originate, in connection with activities carried on or contemplated therein.

It may be noted that this text, too, uses the concept of "significant risk", which is in line with the "appreciable risk" used by the Special Rapporteur in other articles.

92. Another precedent is article 9, paragraph 1, of the 1974 Convention for the Prevention of Marine Pollution from Land-based Sources,[42] which reads as follows:

Article 9

1. When pollution from land-based sources originating from the territory of a Contracting Party by substances not listed in Part I of Annex A of the present Convention is likely to prejudice the interests of one or more of the other Parties to the present Convention, the Contracting Parties concerned undertake to enter into consultation, at the request of any one of them, with a view to negotiating a co-operation agreement.

93. Article 142, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea,[43] which relates to the exploitation by a State of mineral deposits of the sea-bed across limits of national jurisdiction of a coastal State, and to that State's obligations *vis-à-vis* the coastal State, provides:

Article 142. Rights and legitimate interests of coastal States

. . .

2. Consultations, including a system of prior notification, shall be maintained with the State concerned, with a view to avoiding infringement of such rights and interests. In cases where activities in the Area may result in the exploitation of resources lying within national jurisdiction, the prior consent of the coastal State concerned shall be required.

94. Also worthy of note is article III of the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,[44] which reads as follows:

Article III

When a coastal State is exercising the right to take measures in accordance with article I, the following provisions shall apply:

(*a*) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

(*b*) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit.

. . .

95. Mention may also be made of articles IV and V of the 1975 Agreement between the United States of America and Canada relating to the exchange of infor-

[40] *Ibid.*, para. 87. The final text of these principles appears in UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).

[41] See footnote 35 above.

[42] UNEP, *Selected Multilateral Treaties in the Field of the Environment*, UNEP Reference Series 3 (Nairobi, 1982), p. 431.

[43] See footnote 30 above.

[44] United Nations, *Treaty Series*, vol. 970, p. 211.

mation on weather modification activities,[45] which read as follows:

Article IV

In addition to the exchange of information pursuant to article II of this Agreement, each Party agrees to notify and to fully inform the other concerning any weather modification activities of mutual interest conducted by it prior to the commencement of such activities. Every effort shall be made to provide such notice as far in advance of such activities as may be possible, bearing in mind the provisions of article V of this Agreement.

Article V

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 communication. Consultations shall be carried out in light of the Parties' laws, regulations, and administrative practices regarding weather modification.

[45] *Ibid.*, vol. 977, p. 385.

VI. Specific comments on articles 10 to 12 of chapter III

A. Article 10 (Assessment, notification and information)

96. Article 10 deals with the case of a State which realizes that an activity referred to in article 1 is about to be carried on in its territory or in other areas under its jurisdiction or control.

1. Subparagraphs (*a*), (*b*) and (*c*)

97. As stated earlier, there is hardly any need to establish the basis for the obligation of a presumed State of origin to review such an activity. This is because States normally scrutinize such activities as a precaution for the protection of their own inhabitants, and, as a rule, activities of the kind under consideration require authorization.

98. Where, as a result of its review of the activity, the State of origin comes to the conclusion that the activity may give rise to transboundary harm, the obligation to notify the affected State or States of this circumstance and the obligation to accompany such notification by any information which it may have on the activity involving risk follow from the basic principles to which reference was made earlier (co-operation, and the requirement that a State refrain from knowingly causing injury to another State from its own territory). It will be noted that the words "available technical data and information" are used, the intention being to indicate that the State of origin will not be required to conduct any further investigation or make a more thorough review than it has already done in assessing the effects of the activity in question.

2. Subparagraph (*d*)

99. As already noted, the obligation of notification also serves other purposes, such as to invite a potentially affected State to participate in working out a régime for the activity in question. The expression "legal régime" should not be taken to mean that this will be a complex legal instrument in every case. When the situation is straightforward, it may be enough for the State of origin to propose certain measures which either minimize the risk (in the case of activities involving risk) or reduce the transboundary harm to below the level of "appreciable harm". The State of origin may, of course, also propose some legal measures, for instance the principle that it is prepared to compensate for any harm which may be caused. Such proposed measures and their acceptance by the affected State may give shape to a legal régime between the parties to govern the activity in question.

100. The first step towards a régime has been taken, therefore, with notification and the proposal of the measures to which reference has just been made. The participation of the affected State in this process is also desirable from the standpoint of the State of origin, which presumably has an interest in finding a legal régime to govern an activity involving risk or harmful transboundary effects for which it is responsible. In any event, the State of origin would have such an interest if the current uncertainty of general international law were to give way to the certainty that any transboundary harm that occurs must be compensated for.

101. The purpose of the régime towards which we are moving with the obligation of notification would be not only to prevent accidents but also to strike a balance between the interests of the parties by introducing order into a whole array of factors. For example, a decision could be taken on preventive measures which weighed their cost against the cost of accidents and the benefits of the activity, the magnitude of the risks involved in the activity, the economic and social importance of the activity, possible sharing by each of the States of the cost of the operations (where there is agreement that certain expenses are to be shared), the objections that might be raised to these obligations, etc.

B. Article 11 (Procedure for protecting national security or industrial secrets)

102. Provision should be made for cases where, for reasons of national security or the protection of industrial secrets, transmitting all the information it has to the affected State would create a situation detrimental to the State of origin. This is a problem of balance of interests typical of this subject-matter. It does not seem fair to force a State to divulge industrial processes which may have cost it a great deal to acquire so that the com-

petition can benefit from them free of charge. In other cases, national security may dictate that some information not be provided. But how far can one go in affording legal protection to such interests? The answer, no doubt, is: up to the point where upholding those interests causes harm to third States. Where such harm occurs, it will be necessary to restore the balance by taking a weight from one side of the scale and putting it on the other.

103. Another question is how to prevent the pretext of industrial secrecy or national security from being used as a cover for bad faith or some expedient other than national security or industrial secrecy, or simply for the desire to avoid the participation of the affected State in the control which that entails.

104. Therefore, while respecting the right of the State of origin in such cases not to provide all the information that it normally should, the duty of that State to provide the affected State with any information not affecting its national security or the industrial secrets involved must be maintained.

105. In cases where, owing to lack of information about the source of the harm, it is difficult to trace the causes of the harm that has occurred, the affected State should be allowed to draw on presumptions and circumstantial evidence to show that the harm was caused by the activity in question. This rule is based, moreover, on grounds similar to those of the judgment in the *Corfu Channel* case,[46] where the affected State was allowed to resort to such procedures to demonstrate that the State of origin knew what was going on in its territory that caused injury to the affected State.

[46] *I.C.J. Reports 1949*, p. 18.

C. Article 12 (Warning by the presumed affected State)

106. Article 12 contains provisions that complement the situation covered by article 10. It is possible that a State may not have realized that, in the circumstances envisaged in article 1, an activity involving risk or with harmful effects is being carried on. It is also possible that when it began the State of origin may have underestimated these characteristics of the activity. Whatever the reason, if a State becomes aware of the danger posed to its own territory by a given activity in another State, it has the right to alert that State, accompanying such warning by a detailed technical explanation setting forth the reasons on which it is based. In short, the provision in question gives the affected State the right to request the State of origin to comply with the obligations set out in article 10, i.e. that it (*a*) review the activity to assess its effects; (*b*) transmit its conclusions to the affected State; and (*c*) furnish the relevant technical data. Likewise, if the State of origin finds that the activity is indeed an activity covered by article 1, it must inform the affected State of any unilateral measures it plans to take in pursuance of article 8 and, where appropriate, of any measures which might serve as a basis for a legal régime between the parties to govern the activity in question.

VII. Articles 13 to 17 proposed for chapter III of the draft

Steps following notification

107. The Special Rapporteur proposes the following five further articles for chapter III:

Article 13. Period for reply to notification. Obligation of the State of origin

Unless otherwise agreed, the notifying State shall allow the notified State or States a period of six months within which to study and evaluate the potential effects of the activity and to communicate their findings to it. During such period, the notifying State shall co-operate with the notified State or States by providing them, on request, with any additional data and information that is available and necessary for a better evaluation of the effects of the activity.

Article 14. Reply to notification

The State which has been notified shall communicate its findings to the notifying State as early as possible, informing the notifying State whether it accepts the measures proposed by that State and transmitting to that State any measures which it might itself propose in order to supplement or replace such proposed measures, together with a documented technical explanation setting forth the reasons for such findings.

Article 15. Absence of reply to notification

1. If, within the period referred to in article 13, the notifying State receives no communication under article 14, it may consider that the preventive measures and, where appropriate, the legal régime which it proposed at the time of the notification are acceptable for the activity in question.

2. If the notifying State did not propose any measure for the establishment of a legal régime, the régime laid down in the present articles shall apply.

Article 16. Obligation to negotiate

1. If the notifying State and the notified State or States disagree on:

(*a*) the nature of the activity or its effects; or

(*b*) the legal régime for such activity,

ALTERNATIVE A

they shall hold consultations without delay with a view to establishing the facts with certainty in the case of (*a*) above, and with a view to reaching agreement on the matter in question in the case of (*b*) above.

ALTERNATIVE B

they shall, unless otherwise agreed, establish fact-finding machinery, in accordance with the provisions laid down in the annex to the present articles, to determine the likely transboundary effects of the activity. The report of the fact-finding machinery shall be of an advisory nature

and shall not be binding on the States concerned. Once the report has been completed, the States concerned shall hold consultations with a view to negotiating a suitable legal régime for the activity.

2. Such consultations and negotiations shall be conducted on the basis of the principle of good faith and the principle that each State must show reasonable regard for the rights and legitimate interests of the other State or States.

Article 17. Absence of reply to the notification under article 12

If the State notified under the provisions of article 12 does not give any reply within six months of receiving the warning, the presumed affected State may consider that the activity referred to in the notification has the characteristics attributed to it therein, in which case the activity shall be subject to the régime laid down in the present articles.

VIII. General comments on articles 13 to 17 of chapter III

A. General considerations

108. So far, the draft articles have been dealing with a clear-cut situation, with considerable support from legal theory and international practice. The problems start at this point, and there are essentially two of them:

(*a*) Should the State of origin postpone initiation of the activity until a satisfactory agreement has been reached with the affected State or States?

(*b*) What is the situation regarding activities that have already been in existence for some time? What would the situation be regarding certain types of industrial waste, the use of certain fertilizers in agriculture, exhaust emissions from motor vehicles, domestic heating, etc., which have harmful effects but have so far been tolerated?

B. Postponement or non-postponement of the initiation of the new activity

109. As to the postponement or non-postponement of the activity, first of all a comparison may be drawn with the similar, but not always identical, situation of planned new works dealt with in articles 11 *et seq.* of the draft on international watercourses.[47]

110. There are some similarities between the present topic and that of watercourses. An activity may call for considerable investment, as usually happens in the case of planned works involving watercourses. It is only natural to have to await the corresponding authorization before embarking upon works that are often on quite a large scale, since it might be necessary to make changes in the plans or in other major, costly technical aspects of a given project. The same would be true, in the context of the present topic, of a new production technique requiring, for example, the adaptation of existing plant, the construction of new plant, or changes in production processes. Once the expenditure in question has been made, it is more difficult to prohibit the initiation of an activity or to prescribe methods for it that could have been adopted with fewer problems if they had been foreseen from the outset. Likewise, if any harm may be caused by the execution of the new works or by the carrying on of the new activity, in principle it is better to wait until the affected State's consent is obtained before starting.

111. However, the similarity becomes somewhat less obvious when account is taken of the fact that, although there is a variety of activities that can involve watercourses, there is not an infinite variety, and such activities are well defined. A riparian State may accept the restriction in question without its freedom of action in its own territory being unduly affected. It is an entirely different matter, however, to subject the changing and complex flow of human activities to the Procrustean bed of an international authorization, to say nothing of the fact that, as already indicated, in most cases the transboundary effect will begin to have an impact on the population of the State of origin, and that activities involving risk or having harmful effects must normally be scrutinized before being authorized by the national authorities.[48]

112. It would therefore appear to be necessary to consider the matter in greater depth before proposing a solution such as the one provisionally adopted in the case of watercourses, namely postponement of the initiation of the planned new works. In short, it is a question of bringing to bear in a balanced fashion the principle laid down in article 6, concerning a State's freedom of action in its own territory and the limits to such freedom.

113. The postponement of the activity would be based on an interpretation of article 6 which emphasized limitation; the activity does not begin until the restriction constituted by the rights emanating from the sovereignty of the affected State is lifted. The advantage of this interpretation is that it creates an ideal situation where an activity involving risk or harmful effects is not carried out until agreement has been reached on all aspects relating to the balance of the interests at stake, or until the maximum preventive measures have been taken, which, as we have seen, will occur only if the affected State participates.

114. The other solution, namely to start the activity without waiting for the affected State's consent, gives priority to freedom of action. Obviously, in this case the State of origin would have to assume responsibility immediately for any harm that it might cause. In short, the articles would represent an interim régime under which

[47] See articles 11-21 of part III (Planned measures) of that draft and the commentary thereto, in *Yearbook ... 1988*, vol. II (Part Two), pp. 45 *et seq.*

[48] On the other hand, it could be argued that a potentially affected State is not obliged to rely on another State's assessment of risks for and harm to its own population, since each State may take a different attitude towards the treatment of its own nationals, as is proved by the variety of attitudes towards the applicability and implementation of human rights, for example. In any event, the argument is not without weight and must be considered on its merits.

the activity could continue; freedom and responsibility would go hand in hand, as in other spheres of life.

115. This solution sanctions the *ex post facto* effects. If the State of origin had good reason to believe that it was in the right and if there are no appreciable effects on the other State, the States concerned will be able to negotiate the most appropriate régime at their leisure. If, on the other hand, the State of origin was wrong, it would pay for its error, which would prompt it to be cautious and not to stand in the way of the early formulation of a specific régime for the activity. All these factors will be considered, then, when the chapter on reparation is examined.

116. The Special Rapporteur believes that, if initiation of the activity in question were permitted, the process of determining the period within which the procedure must be completed might prove less vexing, since it would be in the interest of both States to seek a negotiated solution as soon as possible.

C. Existing activities

117. It is obvious that there are certain activities that have harmful effects and are none the less tolerated at present. This situation is perhaps attributable, for example, to the fact that the harm caused by such activities is common to all States, that the precise origin of the harmful effects cannot be identified, or that the effects have increased gradually and were only noticed when it was already very difficult suddenly to impose a direct ban on them.

118. It is also clear that most of the activities in question are scrutinized and reviewed and are the subject of international negotiations aimed at mitigating their effects, finding substitutes for some particularly injurious materials used therein and, ultimately, progressively freeing the world of their deleterious effects. This may be the major concern of the present day, and it seems somewhat redundant to discuss it in great detail here.

119. The current draft, including the general guidelines given in the schematic outline for the parts that have yet to be developed, would appear to be appropriate for a transitional period, if due account is taken of the fact that its chief advantage is that it lays down an obligation to negotiate: to negotiate an appropriate régime for activities that call for it, and to negotiate reparation in the event of injury. At a later stage in its consideration of this delicate subject, the Commission may decide that some minor changes should be made in the procedure laid down in these articles so as to cover activities long in existence; the Special Rapporteur has therefore deemed it appropriate to include this paragraph in the present report, in the hope that the members of the Commission will express views on the matter that may be useful.

120. It also seems reasonable that if, as a result of scientific and technological progress, substitute materials and techniques become available for use in certain activities, affected States should be entitled to inform States of origin accordingly and to summon them to the negotiating table in order to agree on possible ways of introducing such materials and techniques so that a balance can be maintained among the interests at stake. Naturally, in that entire process account should be taken of the special situation of the developing countries, which so far have contributed least by their activities to the exacerbation of the problem and yet have suffered most from its consequences.

121. The Special Rapporteur hopes to be able to tackle this difficult problem at a later stage, but he would be particularly grateful to the members of the Commission for any views they might express on the subject with a view to facilitating his task.

IX. Specific comments on articles 13 to 17 of chapter III

A. Article 13 (Period for reply to notification. Obligation of the State of origin)

122. Article 13 is based *mutatis mutandis* on articles 13 and 14 of the draft on international watercourses.[49] It should be pointed out here also that preference was given to a specific period of time rather than a "reasonable" period, since certainty as to the period would be advantageous both for the notifying State and for the notified State. As in the case of article 13 of the draft on watercourses, the expression "Unless otherwise agreed" indicates that States can and must grant, in each specific case, a period appropriate to the situation. The six-month period is therefore of a suppletory nature. In most cases, it might be desirable for both parties to expedite the procedure, since a specific régime is better suited to the particular circumstances of the activity that is the subject of negotiation than a general régime intended to be only of a suppletory and interim nature.

123. The second sentence of article 13 is based on article 14 of the draft on watercourses and lays down an obligation for the State of origin to co-operate, namely to provide, at the notified State's request, any information that it has on the new activity. The State of origin is not required to conduct subsequent investigations but, rather, to supplement the information already provided with any information "that is available" and necessary for a better evaluation of the effects of the planned activity.

[49] See footnote 47 above.

B. Article 14 (Reply to notification)

124. The notified State must reply "as early as possible". In other words, if it reaches its conclusions on the content of the notification before the six-month period is up, it must inform the notifying State accordingly. Although in this case there is not the same urgency as in the equivalent case under the watercourses topic, since the presumed State of origin has already begun the activity, the proposed wording is advisable since, for reasons of general expediency, these measures should be completed within a short period. Of course, if the notified State disagrees with the notifying State's assessment of the nature of the activity or its effects and does not accept the measures proposed for giving it a legal framework, it must provide an adequate technical explanation of its position.

C. Article 15 (Absence of reply to notification)

125. Article 15 deals with the case of the absence of a reply within the period of time envisaged, if, of course, the period in question has not been extended. The absence of a reply is an indication of agreement, and the notifying State is authorized to take it as such since the notified State had an obligation to give a reply, whether positive or negative, concerning the content of the notification and what is being proposed to it. The notifying State may then proceed with the activity, provided that it implements the proposed measures for preventing harm and risk. If there are lacunae and omissions in the proposals put forward by the State of origin, the provisions of the present articles will be applied on a supplettory basis. If no legal régime has been proposed, the present articles will directly govern the relationship between the parties.

D. Article 16 (Obligation to negotiate)

126. As has been seen, the first step under the procedure was to assess the nature and the effects of an activity and the second step was to notify and inform (as a duty to prevent and minimize harm and also as a duty to cooperate). At this point, if the affected State agrees with the assessment of the nature and effects of the activity made by the State of origin and accepts the corresponding proposals put forward by that State, agreement has been reached on the régime that is to govern the activity. In this case, the two States should formalize their consensus in an agreement.

127. Another possibility is that the presumed affected State notifies the State of origin that an activity that can be described as an activity referred to in article 1 is being carried on in its territory. In this case, one of two things may happen: either the State of origin accepts this assessment and makes the corresponding proposals, or it does not accept the assessment and therefore does not put forward any proposals.

128. If the State of origin accepts the assessment and makes the corresponding proposals, the affected State may accept the proposals or it may consider them inadequate. In short, if the parties fail to agree, either on the characteristics and effects of the activity or on the proposals put forward with a view to providing the activity with a legal framework, the first disagreement arises.

129. This, then, is where the obligation to negotiate arises in its pure state for the first time, because although notification and information are essential steps prior to negotiation, they do not represent negotiation proper. Much has been said about this obligation in the Commission, in the Sixth Committee and in innumerable academic forums. The subject has been considered under the present topic, but the obligation to negotiate was considered earlier and in depth under the topic of international watercourses.[50]

130. The present Special Rapporteur believes that the task before the Commission here is not to attempt to approach the subject *ex novo*, which would involve a pointless duplication of effort, but rather to consider whether the many precedents that exist concerning the obligation to negotiate apply to the field under consideration, in other words whether the rules applicable in such cases as the *Railway Traffic between Lithuania and Poland, Lake Lanoux*[51] and *North Sea Continental Shelf* cases and the *Fisheries Jurisdiction* case between the United Kingdom and Iceland are applicable to the topic of injurious consequences arising out of acts not prohibited by international law.

131. However, although there is a wide variety of international practice in this connection, judicial and arbitral settlements, multilateral and bilateral agreements laying down the obligation to negotiate in cases similar to those dealt with in such settlements, and all the resolutions of international organizations and all the recommendations of scientific institutions have a lowest common denominator: they all refer to situations where there is a clash of interests.

132. In short, negotiation is the first way of tackling any international dispute. It may be useful to recall the oft-cited paragraph of the judgment delivered by the ICJ on 20 February 1969 in the *North Sea Continental Shelf* cases:

> ... the Court would recall ... that the obligation to negotiate ... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. There is no need to insist upon the fundamental character of this method of settlement, except to point out that it is emphasized by the observable fact that judicial or arbitral settlement is not universally accepted.[52]

133. It is true that Article 33 of the Charter of the United Nations refers to disputes likely to endanger international peace and security, but the Charter does not provide an adequate basis for establishing an obligation to negotiate only in connection with such disputes. To start with, the principle of the sovereign equality of

---

[50] See the commentary to article 3 adopted by the Commission at its thirty-second session (*Yearbook ... 1980*, vol. II (Part Two), pp. 114 *et seq.*, paras. (17)-(35)).

[51] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281.

[52] *I.C.J. Reports 1969*, p. 47, para. 86.

States, upon which the Organization is based (Article 2, paragraph 1), requires that if a State considers that its rights have been violated, or if its interests have been harmed as a result of action taken by another State, the latter must heed its complaints and seek in good faith a way of restoring equality, if equality has genuinely been impaired. Moreover, the principle laid down in Article 2, paragraph 3, of the Charter establishes the obligation to settle international disputes in such a manner that not only international peace and security but also justice are not endangered.

134. This obligation to negotiate, which thus seems applicable to any clash of interests, is particularly applicable to injurious consequences arising out of acts not prohibited by international law, if account is taken of the views expressed by the ICJ in the *Fisheries Jurisdiction* cases.[53] The Court states the following:

> . . . Neither right is an absolute one: the preferential rights of a coastal State are limited . . . by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation.[54]

And a little further on:

> The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case. This also corresponds to the principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes. . . .[55]

The Court then quotes the paragraph of its judgment in the *North Sea Continental Shelf* cases reproduced above (see para. 132).

135. This description given by the Court in the *Fisheries Jurisdiction* cases seems applicable, almost word for word, to the situations arising in connection with the present topic. The obligation to negotiate emanates from the very nature of the parties' respective rights: on the one hand, the right of the State of origin—derived from its territorial sovereignty—freely to use its territory; on the other hand, the affected State's right, also based on its territorial sovereignty, to use and enjoy its territory without impairment.

136. Since, in the past, technological applications were such that they resulted in transboundary harm only in very exceptional circumstances, there was no need for any regulation; this was so in the case of fisheries until fishing activities were intensified. However, once scientific progress placed at our disposal techniques that did have the potential to cause transboundary harm, a situation of interdependence developed which calls for certain restrictions to be placed on the rights of all States. Thus, as the Court indicates, there is now an "obligation to take account of the rights of other States and the needs of conservation". The phrase concerning conservation is admirably suited to all obligations concerning the environment. However, it should be borne in mind that not all obligations under the present draft articles concern the environment, even though a great number of them do.

137. In order not to run the risk of being misinterpreted, the Special Rapporteur wishes to make it clear that he by no means believes that rights of territorial sovereignty are "preferential rights". They are not, but neither are they absolute rights, as is demonstrated by the very existence of international law, whose application would be impossible—as any form of civilized coexistence would be—if States were to attempt to put the concept of absolute sovereignty into practice. It is in the topic under consideration, let it be stated once again, that the rights of territorial sovereignty of the State of origin clash with the rights emanating from the territorial sovereignty of the affected State, which have equal status.

138. It would perhaps be helpful, in order to gain a better understanding of the nature of the obligation to negotiate, to digress briefly in order to describe what appear to be two of its obvious limits. It is clear that the obligation to negotiate does indeed have limits, and they seem to be good faith and reasonableness. They are the two major guides in the area in question, and—as is usually the case where they are concerned—we all know what they are but it is very difficult to describe or quantify them as they occur in practice.

139. Does State A have an obligation to negotiate if State B suddenly, after many years, interprets a border agreement between them in a capricious manner, with the result that a region that has always been recognized as belonging to State B is suddenly claimed as belonging to State A? The Special Rapporteur thinks not, because that situation would be based neither on reasonableness nor, probably, on good faith. This is so because the obligation to negotiate is not only an obligation to heed the other party; it is not only an obligation "to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements", as indicated in the advisory opinion of 15 October 1931 of the PCIJ in the *Railway Traffic between Lithuania and Poland* case.[56] Nobody can be obliged to pursue negotiations if the other party's position is not reasonable and is not based on good faith.

140. A perfect example of the above is provided by the judgment of the ICJ in the *North Sea Continental Shelf* cases.[57] There were two sets of negotiations held between the same parties—the first in 1965 and 1966 and the second following the instruction to hold negotiations given in the judgment.

141. In the Court's view, the first negotiations were not genuine negotiations, since Denmark and the Netherlands acted in the conviction that "the equidistance principle alone was applicable, in consequence of a rule binding upon the Federal Republic".[58] The countries in

[53] United Kingdom v. Iceland and Federal Republic of Germany v. Iceland, judgments of 25 July 1974 (*I.C.J. Reports 1974*, p. 3 and p. 175).

[54] *Ibid.*, p. 31, para. 73, and p. 200, para. 63.

[55] *Ibid.*, p. 32, para. 75, and p. 201, para. 67.

[56] *P.C.I.J., Series A/B*, No. 42, p. 108; see also p. 116.

[57] Which, in passing, in this respect follows the advisory opinion just quoted, since it indicates that the parties "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports, 1969*, p. 47, para. 85(*a*)).

[58] *Ibid.*, p. 48, para. 87.

question certainly saw no reason to depart from the rule of equidistance. It is therefore possible to believe that they entered into the talks with the Federal Republic of Germany without deeply committing themselves to genuine negotiations, owing to their belief that the content of the complaint was unreasonable as it was not in accordance with the law.

142. On the other hand, the second set of negotiations was genuine. Once the Court had clarified the relevant point of law and determined that under international law equidistance was not the only method of determining borders such as the ones in question, the parties engaged in genuine negotiations until they reached a settlement.

143. The Special Rapporteur does not believe that it is of any importance for the purposes of his analysis that the Court provided some elements as a guide for negotiation, such as the reference to the principles of equity and the unity of the deposit. That is part of the particular nature of the case in question; the genuinely general aspects of the case are the basis for and the limits to the obligation to negotiate.

144. The Special Rapporteur is therefore of the view that there is in the field under consideration an obligation to negotiate, because there is here a clash of various interests that must be reconciled if they are essentially reasonable, and that paragraph 2 of article 16 takes account of the two important parameters to which reference is made, namely reasonableness and good faith.

145. There may be disagreement on two different aspects: on the nature of the activity or its effects, and on the measures that are to make up the legal régime for the activity.

146. In the first instance, there is a disagreement on facts, which would best be resolved by establishing a fact-finding body of experts. The other possibility offered (alternative A) is that the facts should be established by means of negotiation between the parties, without experts being involved, since experience has revealed a clear reluctance on the part of States to accept the involvement of third parties in their disputes. Perhaps it would be easier to accept fact-finding machinery—the appointment of whose members and other details would be dealt with in a possible annex—if the opinion of such a body were not binding on the parties. That is the solution suggested by the previous Special Rapporteur in the schematic outline[59] (sect. 2, para. 6). According to the outline, the obligation to negotiate would arise only if (*a*) it does not prove possible within a reasonable time to agree upon the establishment and terms of reference of fact-finding machinery; (*b*) any State concerned is not satisfied with the findings, or believes that other matters should be taken into consideration; and (*c*) the report of the fact-finding machinery so recommends.

147. The solution put forward in the schematic outline is actually a rational one, since it is first of all necessary for the parties to hold the same view on the nature and effects of the activity in order to be able to agree on the necessary preventive measures and the legal régime that would be most applicable. Moreover, although it is easier to begin by holding a round of consultations than to set about appointing a body of experts and wait until the experts reach agreement, account should be taken of the fact that, on the one hand, the presumed State of origin can begin the activity without awaiting the outcome of the deliberations in question and, on the other hand, the temporary liability régime laid down in the articles gives the presumed affected State a certain amount of assurance that compensation will be given for any harm. In principle, there would be no vexing haste.

E. Article 17 (Absence of reply to the notification under article 12)

148. Under article 17, the notified State's silence may militate against it, since that State has a duty to express its views in accordance with the obligation to negotiate, which means that if the presumed State of origin has not given any reply within six months of having been warned, the conclusion will be that it accepts the nature attributed to the activity in question by the other State, and the activity will thus be subject to the régime laid down in the present articles, as if it were an activity referred to in article 1.

[59] See footnote 31 above.

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS (SECOND PART OF THE TOPIC)

[Agenda item 8]

DOCUMENT A/CN.4/424*

Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur

[*Original: English/Spanish*]
[*24 April 1989*]

CONTENTS

NOTE

Multilateral conventions cited in the present report:

	Source
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, *Treaty Series*, vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	*Ibid.*, vol. 33, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	*Ibid.*, vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	*Ibid.*, vol. 596, p. 261.

*Incorporating document A/CN.4/424/Corr.1.

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, p. 331.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (hereinafter "1975 Vienna Convention on the Representation of States")	United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87.

I. Introduction

1. The Special Rapporteur submitted his third report on "Relations between States and international organizations (second part of the topic)"[1] to the International Law Commission at its thirty-eighth session, in 1986.

2. The Commission considered the third report at its thirty-ninth session, from the 2023rd to 2027th meetings and at the 2029th meeting.[2]

3. In his third report, the Special Rapporteur analysed the debates on the topic in the Sixth Committee at the fortieth session of the General Assembly and in the Commission at its thirty-seventh session and drew a number of conclusions from those debates. Similarly, he set out a number of considerations regarding the scope of the topic and submitted to the Commission, in compliance with its request, an outline of the subject-matter to be covered by the draft articles the Special Rapporteur intended to prepare on the topic.

4. After hearing the Special Rapporteur's introduction, the Commission held an exchange of views on various aspects of the topic, such as the scope of the future draft, the relevance of the outline submitted by the Special Rapporteur and the methodology to be followed in the future.

5. Further to the exchange of views, the Commission decided to request the Special Rapporteur to continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the opinions expressed on the topic during the debate at the Commission's thirty-ninth session.

[1] *Yearbook ... 1986*, vol. II (Part One), p. 163, document A/CN.4/401.

[2] See *Yearbook ... 1987*, vol. I, pp. 187 *et seq.*

II. Discussion of the topic in the Sixth Committee at the forty-second session of the General Assembly

6. During the forty-second session of the General Assembly, the Sixth Committee discussed the Commission's work on the topic.[3] A first remark that should be made is that several representatives, stressing the role played by international organizations, emphasized the relevance and importance of the topic. They welcomed the work of the Commission thereon and approved of the Commission's request that the Special Rapporteur should continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the exchange of views in the Commission. These representatives generally found the outline approved by the Commission to be a good beginning and an adequate basis for further work.

7. As regards the general approach to be adopted, the remark was made that the future draft, instead of being confined to the existing legal régime, should endeavour to remedy the shortcomings of that régime, thus providing a better basis for the privileges and immunities of international organizations and the guarantees given to their officials, and that the outline provided by the Special Rapporteur should be expanded so as to include the capacity of and means at the disposal of international organizations for defending their officials' immunities, in accordance with the relevant jurisprudence of the ICJ. It was pointed out in this connection that the draft under consideration should include the duty of the host country to ensure legal protection and respect for the status, privileges and immunities of the organizations and their officials so as to make it impossible for the host country to take restrictive measures of a discriminatory nature against officials of an international organization, as had been the case in certain States.

8. Support was expressed for the methodology adopted by the Commission, which combined the codification of existing rules and practice with the identification of lacunae. Both were viewed as useful undertakings which should be seen as complementary rather than mutually exclusive.

9. With regard to the scope of the topic in terms of the organizations to be covered, the general view was that only international organizations of a universal character

[3] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-second session of the General Assembly" (A/CN.4/L.420), sect. E.

should be included. Regional organizations could be dealt with at a later stage.

10. On the concept of an international organization, it was stated that, while no useful purpose would be served by embarking on a new definition, since the definition contained in the 1975 Vienna Convention on the Representation of States was still adequate, the Commission should consider the question of the international personality of international organizations. In this connection, the view was expressed that draft article 1, presented by the Special Rapporteur in his second report,[4] was somewhat narrowly conceived: it was said in particular that the words "to the extent compatible with the instrument establishing them" appeared to be restrictive and that subparagraphs (*a*), (*b*) and (*c*) of paragraph 1 gave the impression that international organizations could have no other attributes than the ones mentioned in those subparagraphs. The words "under the internal law of their member States" were queried on the ground that such internal law was hardly relevant. On the other hand, support was voiced for the Special Rapporteur's proposal that paragraph 2 of the draft article should be made a separate article, subject to the addition of the words "and by international law" at the end of the paragraph.

11. The General Assembly, on the basis of the report of the Sixth Committee, adopted resolution 42/156 of 7 December 1987, in paragraph 3 of which it recommended that the Commission should continue its work on the topics in its current programme. That recommendation was reiterated by the Assembly at its forty-third session, in resolution 43/169 of 9 December 1988.

[4] *Yearbook ... 1985*, vol. II (Part One), pp. 112-113, document A/CN.4/391 and Add.1, para. 74.

III. Notion of an international organization

12. The Special Rapporteur dealt with the question of the notion of an international organization in his second report;[5] accordingly, he will refer to what was said in that report on the subject.

13. The Special Rapporteur noted in his second report that virtually all the members of the Commission who had spoken during the debate on his preliminary report had taken the view that it did not seem appropriate to try to work out and propose a precise definition of what an international organization was, particularly since the Commission's task was not to draw up a treaty on such organizations. The Special Rapporteur was asked "to avoid protracted discussions of a doctrinaire, theoretical nature".[6]

14. Following a series of comments, he reached the conclusion that he should continue to follow the pragmatic approach adopted during the discussion of three of the drafts formulated by the Commission, each of which is now a convention, namely the drafts on the topics "Law of treaties", "Representation of States in their relations with international organizations of a universal character" (the first part of the topic now under consideration) and "Treaties concluded between States and international organizations or between international organizations".

15. Article 2, paragraph 1 (*i*), of the draft articles on treaties concluded between States and international organizations or between international organizations gives the term "international organization" a definition identical with that in article 2, paragraph 1 (*i*), of the 1969 Vienna Convention on the Law of Treaties. It simply identifies an international organization as an intergovernmental organization. In paragraph (14) of the commentary to article 2 of the draft articles on the law of treaties, the Commission stated that the term "international organization" was defined in paragraph 1 (*i*) as an intergovernmental organization "in order to make it clear that the rules of non-governmental organizations are excluded".[7]

16. In paragraphs (7), (8) and (9) of the commentary to article 2 (adopted on first reading) of the draft articles on treaties concluded between States and international organizations or between international organizations, the Commission also stated, with regard to paragraph 1 (*i*):

> (7) ... This definition should be understood in the sense given to it in practice: that is to say, as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connexion, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO.
>
> (8) It should, however, be emphasized that the adoption of the same definition of the term "international organization" as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.
>
> (9) In the present draft, this very elastic definition is not meant to prejudge the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is—and we shall revert to this point in the commentary to article 6—that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.[8]

[5] *Ibid.*, pp. 105-107, paras. 15-30.

[6] *Ibid.*, para. 15.

[7] *Yearbook ... 1966*, vol. II, p. 190, document A/6309/Rev.1, part II, chap. II.

[8] *Yearbook ... 1974*, vol. II (Part One), pp. 295-296, document A/9610/Rev.1, chap. IV, sect. B; previously cited in the Special Rapporteur's second report (*Yearbook ... 1985*, vol. II (Part One), p. 106, document A/CN.4/391 and Add.1), para. 25.

17. The Special Rapporteur therefore believes that, for the purposes of the present draft articles, the Commission should maintain its position that an "international organization" means an intergovernmental or inter-State organization.

18. Further, in accordance with the views expressed in the discussions in both the Commission and the Sixth Committee of the General Assembly, we should, for the time being, confine ourselves to organizations of a universal character, taking account of the reservations expressed during those discussions and indicated in the Special Rapporteur's second report.

IV. Part I of the draft articles: articles 1 to 4 submitted by the Special Rapporteur

19. Part I of the draft articles would read as follows:

PART I.

INTRODUCTION

Article 1. Terms used

1. For the purposes of the present articles:

(*a*) "international organization" means an intergovernmental organization of a universal character;

(*b*) "relevant rules of the organization" means, in particular, the constituent instruments of the organization, its decisions and resolutions adopted in accordance therewith and its established practice;

(*c*) "organization of a univeral character" means the United Nations, the specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are of a world-wide character;

(*d*) "organization" means the international organization in question;

(*e*) "host State" means the State in whose territory:

(i) the organization has its seat or an office; or

(ii) a meeting of one of its organs or a conference convened by it is held.

2. The provisions of paragraph 1 of this article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Article 2. Scope of the present articles

1. The present articles apply to international organizations of a universal character in their relations with States when the latter have accepted them.

2. The fact that the present articles do not apply to other international organizations is without prejudice to the application of any of the rules set forth in the articles which would be applicable under international law independently of the present articles [Convention].

3. Nothing in the present articles [Convention] shall preclude the conclusion of agreements between States or between international organizations making the article[s] [Convention] applicable in whole or in part to international organizations other than those referred to in paragraph 1 of this article.

Article 3. Relationship between the present articles [Convention] and the relevant rules of international organizations

The provisions of the present articles [Convention] are without prejudice to any relevant rules of the organization.

Article 4. Relationship between the present articles [Convention] and other international agreements

The provisions of the present articles [Convention]:

(*a*) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character; and

(*b*) shall not preclude the conclusion of other international agreements regarding the privileges and immunities of international organizations of a universal character.

20. Two earlier comments need to be repeated here. First, the Commission, it will be recalled, reached the conclusion that, for the purposes of its initial work on the second part of the topic, it should adopt a broad outlook, inasmuch as the study should include regional organizations, and that the final decision on whether to include such organizations in a future codification could be taken only when the study was completed.[9] Secondly, as has been pointed out, the other terms that may be used in the draft articles will be defined when work on the topic has been concluded.

21. Finally, it is worth noting that the 1975 Vienna Convention on the Representation of States, which dealt with the first part of the present topic, was confined to international organizations of a universal character, but a reservation was made, in article 2, paragraph 2, of the Convention, to the effect that the limitation of the scope of the Convention to the representation of States in their relations with international organizations of a universal character did not preclude the application to the relations of States with other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

[9] *Yearbook . . . 1983*, vol. II (Part Two), p. 80, para. 277 (*c*).

V. Legal capacity of international organizations

22. The Special Rapporteur dealt in his second report with the legal capacity of international organizations and presented a draft article 1, which was later divided into draft articles 1 and 2.[10] The discussion in both the Commission and the Sixth Committee indicated a widespread feeling that paragraph 2 of the proposed article 1 should be made a separate article, with the addition, at the end, of the words "and by international law". It seems unnecessary to add anything else to what was said in the second report.

[10] See footnote 4 above.

VI. Part II of the draft articles: articles 5 and 6 submitted by the Special Rapporteur

23. Part II of the draft articles would read:

PART II.

LEGAL PERSONALITY

Article 5

International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(*a*) contract;

(*b*) acquire and dispose of movable and immovable property; and

(*c*) institute legal proceedings.

Article 6

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization and by international law.

VII. Privileges and immunities accorded to international organizations

A. Immunity from legal process: basis

24. It is undeniable that, in order to guarantee the autonomy, independence and functional effectiveness of international organizations and protect them against abuse of any kind, and because national courts are not always the most appropriate forum for dealing with lawsuits to which international organizations may be parties, some degree of immunity from legal process in respect of the operational base of each organization must be granted.

25. The arguments put forward in support of the immunity of States from legal process, which are similar, by and large, to those cited in the case of international organizations, might suggest that the rules applicable to States can also be applied to international organizations.

26. A substantial number of authors consider that too rigid a parallel between the jurisdictional immunities of States and those of international organizations is not warranted, since the reasons advanced for granting immunity are not the same in the two cases. It is not clear, to begin with, that the immunities which States need and the immunities which international organizations need have to be of equal scope. The Special Rapporteur believes that the right approach is to consider what degree of immunity from legal process ought to be

granted to a given international organization in the light of its functional requirements.[11]

27. If the raison d'être of an international organization is the functions and purposes for which it was set up, those functional requirements must be one of the main criteria, if not the only one, used in determining the extent and range of the privileges and immunities that are to be accorded to a given organization. The independence of the organization will thus be safeguarded to the extent necessary for it to perform its functions and accomplish its objectives.

28. Justification for the privileges and immunities granted to international organizations can also be found in the principle of equality among an organization's member States. As international organizations are the creation of States which are equal among themselves, those States must all be on an equal footing *vis-à-vis* the organization they have set up and belong to. In particular, no State should derive unwarranted fiscal advantages from the funds put at an organization's disposal.

29. Precedent has been a factor in defining the privileges and immunities of international organizations. For understandable practical reasons, the privileges granted in the past to a number of similar organizations have been a useful reference point in considering the question of what privileges and immunities to grant to a new organization.

30. As soon as the first international bodies were set up, it became apparent that there was a need to afford them some protection against local State authorities, particularly judges and executive officials, capable of interfering with their operation. International organizations, lacking territory of their own, have to be based in the territory of a State.

31. Originally, the privileges and immunities were granted to officials or representatives of such bodies, generally by assimilating them to diplomatic personnel. Very soon, given the rapid growth of international organizations, a new doctrine prevailed. This well founded doctrine provided a justification for granting privileges and immunities to international organizations which was independent of and different from that established in relation to States.

32. International organizations enjoy privileges and immunities *motu proprio*, being granted them in conventions, headquarters agreements, or possibly by custom, in their capacity as international legal persons, as subjects of international law. They are entitled to privileges and immunities and can require them of States. One basic difference in relation to States concerns reciprocity. The different nature of the parties precludes international organizations from offering equivalent benefits in exchange for the privileges and immunities accorded to them. As Christian Dominicé puts it:

> None of the conventions on the privileges and immunities of such organizations, the headquarters agreements especially, would make any sense if the organizations lacked international juridical personality. This is not to say, however, that immunities are a necessary attribute of such personality. They derive from the specific rules prescribing them . . .[12]

33. Being unable to enjoy the protection conferred by territorial sovereignty, as States can, international organizations have as their sole protection the immunities granted to them. The ample immunity afforded them is fully justified, in contrast to the increasingly restricted immunity of States, for the good reason that States are political entities pursuing their own interests while international organizations are service agencies operating on behalf of all their member States.[13]

B. Classification of international organizations

34. Before going further, the question should be considered, as it was in the case of the definition of an international organization, whether it is possible, and above all whether it is necessary and desirable, to embark on a classification of such organizations, in other words, whether it would be useful to divide international organizations into categories with a view to determining what privileges and immunities should be given to them in each case.

35. The classifications proposed by legal writers are very varied. In general, the sole purpose of such classifications is to facilitate the enumeration of existing organizations. This is readily understandable. As already stated,[14] each organization has its own characteristics according to the functions assigned to it by the legal instrument whereby it was created. While some international organizations have common features, they also have a variety of distinguishing features, depending on the purpose for which they were established by the will of States.

36. Given these circumstances, any attempt at classification can only result in the identification of types of international organizations, which is more of a systematization than a mere theoretical description. Given the wide variety of functions entrusted to international organizations, as has been observed, any classification will necessarily be inadequate.

37. The classification of international organizations most frequently used in legal doctrine is based on the following criteria: (*a*) composition; (*b*) purpose of activity; and (*c*) powers.[15]

38. In classifications made on the basis of composition,

---

[11] See, in particular, the report prepared for the Council of Europe in 1968 by the Sub-Committee on Privileges and Immunities of International Organisations and Persons connected with Them, as revised and completed by the European Committee of Legal Co-operation: Council of Europe, *Privileges and Immunities of International Organisations*, Resolution (69) 29 adopted by the Committee of Ministers of the Council of Europe on 26 September 1969 and explanatory report (Strasbourg, 1970), p. 23, para. 31.

[12] C. Dominicé, "L'immunité de juridiction et d'exécution des organisations internationales", *Collected Courses of The Hague Academy of International Law, 1984-IV* (Dordrecht, Martinus Nijhoff, 1985), vol. 187, p. 164.

[13] *Ibid.*, pp. 178 *et seq.*

[14] See the Special Rapporteur's second report (*Yearbook . . . 1985*, vol. II (Part One), p. 107, document A/CN.4/391 and Add.1), para. 32.

[15] See P. Reuter, *International Institutions* (New York, Rinehart, 1958), pp. 219 *et seq.*; M. Virally, "Definition and classification of international organizations: A legal approach", *in* G. Abi-Saab, ed., *The Concept of International Organization* (Paris, UNESCO, 1981), pp. 50 *et seq.*

a distinction is drawn between organizations which have a universal vocation and regional organizations. The first are difficult to define. None of the international organizations is totally universal. Because they are built on a voluntaristic basis, it is always possible for some States to refrain from membership in them. Even the phrase "which have a universal vocation", which emphasizes the fact that the universality is only virtual, is not entirely satisfactory. This is because it does not cover an organization such as the World Bank which, being founded on economic principles, cannot allow the States that reject those principles ever to become members. Regional organizations are easier to define in terms of composition. But there is a third category of international organizations which has no place in this dualistic classification: that of organizations which do not have a universal vocation and which are not established on a regional basis, such as, for instance, OPEC, OECD and the various councils and boards responsible for primary commodities.

39. In classifications made on the basis of the purpose of the activity, a distinction is frequently made between political organizations and technical organizations—or between general organizations and specialized organizations—depending on the organization's sphere of competence. Other authors go further and distinguish between political, economic, financial, social, cultural, administrative, military and other organizations. There is no limit to this purely descriptive list, which is, in fact, an enumeration rather than a real classification.

40. In classifications made on the basis of powers, a distinction is drawn between consultative, standard-setting and executing organizations, depending on whether or not they are empowered to take decisions that are binding on their members and whether or not they can themselves carry out their decisions. From a legal point of view, this is a more promising distinction. However, this, too, is not entirely satisfactory. Considered from the standpoint of the binding force of decisions taken, for example, the United Nations General Assembly would appear to be a consultative body, because its resolutions have the force merely of recommendations, whereas the Security Council would be deemed to be a standard-setting body, because it can take binding decisions.[16]

41. The best approach would be to try to establish a more systematic (or scientific) classification on the basis of a characteristic of international organizations that is as typical as possible but, at the same time, varies significantly from one organization to another.[17] As has already been pointed out, it is an organization's function that constitutes its true raison d'être. It is in order that it may perform this function that its member States have established it and take part in its operation, bearing the costs and accepting the constraints that inevitably derive therefrom. The organization's structure is itself subordinate to the requirements of its function.

42. Existing international organizations almost all conform to a single model operating at three levels:

(*a*) At the highest level, the plenary intergovernmental organ;

(*b*) At the lowest level, the administrative secretariat; and

(*c*) At the intermediary level, the plenary intergovernmental organ (in organizations composed of only a small number of States) or the limited intergovernmental organ (in the case of world-wide organizations).

43. This general pattern is complicated by a number of adjuncts that vary considerably according to the nature of the functions assigned to the organization in question, the circumstances with which it has to cope, the direction given to its activities and so forth. Obviously, it is extremely difficult, if not impossible, to reduce this multiplicity of institutional elements to a few well defined and significant types.

44. This having been said, and given the functional approach which the Commission has adopted as the principal basis for this study, the function of international organizations, as a principle of classification, can be considered principally from three points of view:

(*a*) According to the extent of the co-operation that it is the organization's mission to bring about;

(*b*) According to the scope of the field of action reserved for or assigned to such co-operation; and

(*c*) According to the means used to effect such co-operation and the type of relations instituted between the organization and its members and between the members themselves.

45. Using the first criterion, a distinction would be drawn between universal or world-wide, or even global, organizations and organizations whose membership is restricted. The aim of world-wide organizations is, of course, to bring about the unification of the international community by grouping within themselves all the States that make up that community and by seeking to solve the problems that arise at a planetary level. Organizations of limited membership seek to promote co-operation among a particular group of States only, restrictively defined on the basis of specific interests which they all share and which distinguish them from the rest of the international community. In a sense, it may be said that organizations of a universal character are founded on the principle of inclusion, whereas organizations of limited membership are founded on the principle of exclusion. The distinction between these two types of organization not only concerns the number of members and the rules relating to their admission but also entails a whole series of consequences in regard to the establishment of the system of organs, its relations with member States, the purpose of its work and the whole of its activities.

46. The second criterion would give rise to a distinction between general international organizations and sectoral international organizations. The first category is made up of international organizations established to allow organized co-operation in all fields in which such co-operation may appear useful, without any limitation, or excluding only certain clearly defined sectors (for example, national defence). These general international organizations may, like the United Nations, be set up on a world-wide basis, or, like OAS or OAU, on a regional basis. The second category is made up of international organizations which are assigned a function limited to a single

[16] See Reuter, *op. cit.*, pp. 219 *et seq.*; Virally, *loc. cit.*, pp. 58-59.

[17] See Virally, *loc. cit.*, pp. 59 *et seq.*

sector of activity, or at least to a set of strictly defined sectors.

47. In the case of the third criterion, the distinction would be between standard-setting international organizations and operational international organizations. Standard-setting organizations are principally concerned with orienting their members' attitudes to prevent their becoming conflictual (or, if that has already happened, to end the conflict) and with assisting the attainment of common objectives through the co-ordination of efforts. However, the methods used to achieve those ends may differ from one organization to another. Operational organizations take action themselves, using their own resources or resources made available to them by their members, but of which they determine the utilization and therefore have the operational management. It is true that, in most cases, the resources used by international organizations derive from their member States, but the situation differs considerably according to whether these resources have been definitively transferred to the organization (as in the case of financial contributions) or are simply supplied to it on an *ad hoc* basis (as in the case of military contingents).

48. The activities engaged in by some international organizations are almost entirely operational. This is true of the financial institutions and especially of the international banks such as the World Bank. The activities of others combine both standard-setting and operational elements, as in the case of the United Nations (whose activity remains primarily of a normative kind) and most of the specialized agencies (with the exception of the financial institutions).

49. In the light of the above, the only conclusion is that none of the proposed classifications can by itself provide a general criterion for determining what privileges and immunities should be accorded to international organizations. It is not possible to make a clear distinction between the various categories. At times these categories overlap. Finally, as stated earlier, it is more an enumeration than a classification as such. It is not possible to establish in a precise manner that from a simple classification drawn up on the basis of the criteria enumerated one can derive automatically and for each category of international organization specific and clear-cut legal consequences.

C. Scope of immunity from legal process

50. It would therefore seem that, aside from the difficulties involved in drawing up a list of the privileges and immunities that would be equally applicable to all international organizations, it would not be desirable to draw up such a list, since each international organization has its own characteristics, in accordance with the instrument establishing it, and, consequently, for the fulfilment of its aims and specific functions, a specific and well defined number of privileges and immunities, which do not have to be, and generally are not, the same as those required by another international organization with different aims and functions.

51. In view of the difficulty of defining the general principles or criteria on the basis of which it would be possible automatically to grant a particular international organization a specific set of privileges and immunities, any norm that is elaborated in this connection must contain general provisions capable of being supplemented or modified according to the specifics of each individual case, so that it may be adjusted to the true functional needs of the international organization concerned, in keeping with the legal instrument establishing the organization.

52. The general agreements on the privileges and immunities of international organizations (the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,[18] for example) are generally supplemented by a headquarters agreement or by a bilateral or multilateral agreement in which the privileges and immunities accorded to a specific international organization are defined, limited or expanded. This formula tends to harmonize the interests of the international organizations and those of States, irrespective of whether a State is host to one or more international organizations.

53. A look at the relevant conventions and at the headquarters agreements and other bilateral and multilateral legal instruments currently in effect shows that a number of criteria have been used, in a more or less general fashion, in granting privileges and immunities to existing international organizations. These criteria are as follows:

(*a*) The geographical area for which the international organization is responsible;

(*b*) The political character of the international organization;

(*c*) The type of functions assigned to the international organization: commercial, financial or even industrial;

(*d*) The size of the international organization; this is logical, since certain privileges and immunities which are necessary or essential in the case of a large international organization may be omitted without creating major difficulties in the case of a small international organization whose functions are limited.

54. Lastly, it should not be forgotten that there are certain international organizations to which it may not be necessary to grant privileges and immunities, even if they have been established by an agreement between States. This would be true of intergovernmental international organizations established in such a form that they can function exclusively as legal entities under the domestic law of the host State.

55. The United Nations General Assembly itself, in its resolution 22 D (I) of 13 February 1946, pursuant to which the 1947 Convention on the Privileges and Immunities of the Specialized Agencies was drawn up and adopted, included a paragraph reading as follows:

> While recognizing that not all specialized agencies require all the privileges and immunities which may be needed by others, and that certain of these may, by reason of their particular functions, require privileges of a special nature which are not required by the United Nations itself, the General Assembly considers that the privileges and immunities of the United Nations should be regarded, as a general rule, as a maximum within which the various specialized agencies should enjoy such privileges and immunities as the appropriate fulfilment of

[18] Hereinafter referred to as the "General Conventions of 1946 and 1947".

their respective functions may require, and that *no privileges and immunities which are not really necessary should be asked for**.

56. Thus the only criterion which is preponderant and appears in general form, both in legal doctrine and in legal instruments of a multilateral, bilateral or unilateral nature, and in the practice followed by the United Nations and other existing international organizations, is that of functional necessity. This, therefore, is the main criterion which the Commission adopted at the outset of this study.

57. In any event, it should be borne in mind that:

(*a*) Privileges and immunities constitute a right not a courtesy;

(*b*) They are intimately bound up with the functions of the international organization to which they are accorded;

(*c*) They should not be used to nullify the grounds on which they were granted and to challenge justice.

This point will be dealt with in connection with the privileges and immunities of international staff members.

58. According to most existing texts (conventions on privileges and immunities, headquarters agreements and so forth), international organizations cannot be judged by any court of ordinary law unless they expressly waive that privilege. Even if they do so, their waiver cannot be extended to measures of execution.

59. Although this exceptional situation may seem excessive, it is expressly limited by the obligation imposed on international organizations to institute a judicial system for the settlement of conflicts or disputes in which they may become involved. This obligation is enshrined in all the existing headquarters agreements, such as the Agreement between WHO and Switzerland[19] (art. 23) and the Agreement between UNESCO and France[20] (art. 28). The General Conventions of 1946 and 1947 contain similar provisions (art. VIII, sect. 29, and art. IX, sect. 31, respectively). A more explicit provision is to be found in the General Agreement on Privileges and Immunities of the Council of Europe,[21] which, in article 21, refers to arbitration.

60. In their replies to the questionnaire sent by the Legal Counsel of the United Nations to the specialized agencies and IAEA on 13 March 1978 and to the regional organizations on 5 January 1984, in accordance with decisions of the Commission,[22] most of the specialized agencies and IAEA stated—as had the United Nations—that their immunity from legal process had been fully respected and recognized by the competent national authorities.[23]

61. The inference from the replies was that the principle of immunity of international organizations from legal process had been strengthened. In that connection, it is of interest to quote the following from the summary of practice relating to the status, privileges and immunities of the United Nations:

(a) *Recognition of the immunity of the United Nations from legal process*

11. The United States of America became a party to the Convention on the Privileges and Immunities of the United Nations on 29 April 1970. This accession strengthened the legal position of the United Nations with regard to immunity from legal process in the United States, which until that time had been based on domestic legislation and general international law derived, in particular, from Articles 104 and 105 of the United Nations Charter. This action was all the more significant for the Organization as it came at a time when the doctrine of sovereign immunity was undergoing a rapid evolution. A more restrictive doctrine was being developed in many countries, culminating in the enactment of national legislation such as the United States Foreign Sovereign Immunities Act of 1976. Although not directly applicable to international organizations, the changing doctrine of sovereign immunity and in particular the more restrictive approach to the commercial activity of foreign sovereigns will inevitably have an impact on the way national courts view the activities of international organizations. The United Nations, however, has continued to enjoy unrestricted immunity from legal process and has experienced no particular difficulties in this regard, unlike other organizations which do not enjoy the same legal protection under agreements in force.[24]

62. Because a court situated in the host country of the United Nations, and hence important, is concerned, it is of particular interest to quote the decision of the New York County Supreme Court in the *Matter of Menon* (1973). The estranged wife of a non-resident United Nations employee was challenging the refusal of Family Court judges to order the United Nations to show cause why her husband's salary should not be sequestered to provide support for herself and her minor child. The application was dismissed by the Supreme Court, which declared that "the law specifically exempts *a sovereign** from the jurisdiction of [the United States] courts, unless the sovereign consents to submit itself". The Court further held that the United Nations "holds *sovereign** status and may extend that protection over its agents and employees" and that "the sovereign status of the United Nations, concerning its personnel and its financial agents, is beyond this or the Family Court authority to challenge".[25] The opportunity to comment on this decision will arise when the privileges and immunities of officials are discussed.

63. Lastly, another relevant example is the ruling in the case of *Manderlier* v. *United Nations and Belgian State* (1966), before a Brussels court of first instance. The plaintiff had instituted proceedings with a view to obtaining compensation from the United Nations or the Belgian Government, or from both jointly, for damage he claimed to have suffered "as the result of abuses committed by the United Nations troops in the Congo". The Court dismissed the proceedings in so far as they pertained to the United Nations on the ground that the Organization enjoyed immunity from every form of legal

[19] Agreement of 29 September 1955 (see Switzerland, *Recueil systématique du droit fédéral* (Berne, 1970), sect. 0.192.120.281).

[20] Agreement of 2 July 1954 (United Nations, *Treaty Series*, vol. 357, p. 3).

[21] Council of Europe, *The General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949* (Strasbourg [n.d.]).

[22] See *Yearbook ... 1977*, vol. II (Part Two), p. 127, para. 95; and *Yearbook ... 1983*, vol. II (Part Two), p. 81, para. 277 (*f*).

[23] See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat" (*Yearbook ... 1985*, vol. II (Part One/Add.1), p. 145, document A/CN.4/L.383 and Add.1-3).

[24] *Ibid.*, p. 161, part A, chap. II, sect. 7, para. 11.

[25] See United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 198; cited in document A/CN.4/L.383 and Add.1-3, part A, chap. II, sect. 7, para. 12.

process under section 2 of the 1946 Convention on the Privileges and Immunities of the United Nations.[26]

64. The specialized agencies and IAEA resort to arbitration to settle any dispute that may be submitted to them in respect of private individuals under ordinary law.[27] Purchase contracts with suppliers generally contain an arbitration clause.

65. In addition, the specialized agencies have established and are under the jurisdiction of an *ad hoc* administrative tribunal which has competence to judge disputes that may arise between them and their staff members.

66. Technical assistance contracts drawn up between the specialized agencies and States and co-operation agreements concluded between those agencies or between them and the United Nations generally contain an arbitration clause. The constituent instruments of those organizations provide for possible recourse to the ICJ for an advisory opinion should there be a dispute regarding the interpretation or application of one of the provisions of the aforementioned legal instruments.

67. Some international organizations of a financial character are willing to be sued before a national tribunal in certain circumstances. This is the case, as laid down in their articles of agreement, of IBRD (art. VII, sect. 3), IFC (art. VII, sect. 3) and IDA (art. VIII, sect. 3). However, no judicial action can be brought against them by member States or by persons acting for or deriving claims from such States. The property and assets of the three institutions, wherever they may be situated, are immune from all forms of seizure, attachment or execution in the absence of a final judgment.

68. The replies to the questionnaire sent out to the executive heads of the specialized agencies and IAEA by the United Nations Legal Counsel on 13 March 1978 indicate that the immunity of the majority of the specialized agencies and IAEA from legal process has been fully recognized by the competent national authorities.

69. In proceedings instituted against ILO and IMF, immunity from legal process has always been recognized.[28] Various actions have been brought against FAO despite the existence of international agreements granting FAO immunity from legal process. FAO contests the jurisdiction of local courts in actions brought against it. The judgments of the courts of the host country, Italy, do not recognize FAO's immunity even though the headquarters agreement[29] refers to "immunity from every form of legal process". The Italian courts endeavour to draw a distinction by claiming that FAO's immunity from legal process extends only to matters which relate to activities undertaken in carrying out the purpose and functions of the organization, i.e. acts *jure imperii*, and not to transactions of a private law nature which may arise out of other activities, i.e. *jure gestionis*. In any event, no measure of execution has been sought against FAO. Clearly, the FAO governing bodies disagree with that interpretation and maintain that the provisions of the headquarters agreement should be given their full literal meaning. Otherwise, both FAO and other international organizations would be open to litigation detrimental to effective implementation of their programmes.[30] Consideration may be given to the possibility of seeking an advisory opinion of the ICJ as to the interpretation of the relevant provisions of the headquarters agreement.

70. In other proceedings instituted against FAO, extrajudicial settlements have been reached. In some cases, execution of the judgment has not been sought.

71. IBRD, IDA and IFC do not enjoy general immunity from suit. Their immunity is limited to actions brought by member States or persons acting for or deriving claims from such States. Other persons may bring actions only in a court of competent jurisdiction in the territory of a member State in which the organization has an office, has appointed an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities. No cases have been reported by IBRD, IDA or IFC in which their limited immunity has not been recognized.

72. Regarding the application of immunity "from every form of legal process" under article III, section 4, of the 1947 Convention, most specialized agencies and IAEA reported no special difficulties over interpretation of that provision. IMF has taken the view that the term is to be interpreted broadly and thus extends to the exercise of all forms of judicial power.[31]

73. It is of interest to note that the United States *Foreign Sovereign Immunities Act of 1976* provides expressly that the property of international organizations designated by the President of the United States (IBRD, IDA and IFC are among the organizations designated) "shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign State as the result of an action brought in the courts of the United States or of the States".[32]

74. There have been no cases in which the question of immunity from measures of execution has been addressed. FAO reported, however, that the representative of the host country had made a declaration at the session of the FAO Council held in November 1984 on the agency's immunity from legal process and measures of execution in the host country.

75. In that declaration, the said representative drew the distinction alluded to earlier (see para. 69 above) which the Italian courts make between acts *jure imperii* and acts *jure gestionis* but stated that "if someone attempted to carry out measures of execution against FAO ... the organization would have to appear before the judge in

[26] See United Nations, *Juridical Yearbook 1966* (Sales No. E.68.V.6), p. 283; cited in document A/CN.4/L.383 and Add.1-3, part A, chap. II, sect. 7, para. 13.

[27] See document A/CN.4/L.383 and Add.1-3, part B, chap. I, sect. 1, para. 9.

[28] *Ibid.*, part B, chap. II, sect. 7, para. 43.

[29] Agreement of 31 October 1950 (see United Nations, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II (Sales No. 61.V.3), p. 187).

[30] See document A/CN.4/L.383 and Add.1-3, part B, chap. II, sect. 7, para. 48 (*b*).

[31] *Ibid.*, para. 52.

[32] *Ibid.*, para. 53.

order to point out the existence of its immunity under . . . the Headquarters Agreement".[33]

76. In view of that limitative interpretation of the words "every form of legal process" used in its headquarters agreement, FAO considers and maintains that those words also cover immunity from measures of execution.

D. Waiver of immunity from legal process

77. There have been a few cases of agencies waiving their immunity from legal process. Thus, for example, IMF has waived its immunity for the purpose of leases. Bearer notes associated with certain IMF borrowing agreements provide waiver by IMF of its immunity from judicial process and the submission to designated national courts with respect to both actions and execution. UPU has recognized the jurisdiction of Swiss tribunals when faced with litigation cases.[34]

78. Furthermore, as stated above (para. 64), most of the contracts entered into by the specialized agencies and IAEA provide for settlement of any disputes by arbitration.

E. Property, funds and assets

79. If we start from the principle that the international organizations possess juridical personality, it is readily apparent that the status or régime which is to be accorded to the property of an international organization may be viewed as a logical extension of the rights which that personality entails.

80. One of the prerequisites for the satisfactory performance by an international organization of the functions for which it was established is, as already stated, the enjoyment of absolute autonomy. However, it is difficult to conceive of such autonomy unless the international organization is recognized as having the right to dispose of its own resources.

81. Without an appropriate instrument for action, without the means to be able to act and without the necessary material support, the international organizations would be unable to perform the tasks conferred on them by their constituent and other legal instruments. The resources of the organization provide all of this. In the first place, the resources help to give permanency to the organization in its specific vocation of achieving a particular goal.

82. The resources of international organizations can be compared to the resources of public persons in the sense that they are assigned exclusively to the fulfilment of the organization's purposes, hence the principle of the intangibility and inalienability of the resources of international organizations.[35]

83. Clearly, these characteristics do not belong to international organizations alone; they are also to be found in public services of municipal or international law. The principles of inalienability of property and fiscal immunity have as their sole purpose the preservation of the resources of public entities so as to ensure that services are maintained on a continuous basis.[36]

84. According to Jean Duffar, assignment justifies in municipal law the non-diversion of the property of public institutions from their function; it explains above all the inalienability of the public domain.[37] The property of international organizations also benefits from a protective law by being assigned to a collective end. The general principle may even be adjusted to favour international organizations, since domain implies ownership, while the property of international organizations is protected even when it is not owned by them.

85. All the texts relating to the privileges and immunities of international organizations contain an express reference to premises and buildings. The 1961 Vienna Convention on Diplomatic Relations provides, in article 22, paragraph 3, that

> the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

The General Conventions of 1946 and 1947, the headquarters agreements between the United Nations and the United States of America[38] and between the United Nations and Switzerland,[39] among others, contain similar provisions.

86. This seems logical. Even when, without a shadow of a doubt, the premises and buildings of international organizations are governed by the general régime applicable to property, it is obvious that, without the premises and buildings, the activities of an organization would be not only impeded but almost impossible to carry out. Hence the enormous and particular importance accorded to them by means of a special legal régime.

87. The property of an international organization as a whole, according to the practice of States and the legal instruments relating to the various international organizations (constituent instruments, headquarters agreements, conventions, etc.), is considered outside the scope of ordinary property law. The permanent assignment of such property to institutional ends helps to prevent them from being put to a use other than the one intended. They are therefore granted a public law régime, which makes them immune from alienation and attachment.

F. Inviolability of property and premises

88. A most important privilege, and one which, in the practical life of international organizations, is essential to

[33] *Ibid.*, para. 54.

[34] *Ibid.*, para. 55.

[35] See J. Duffar, *Contribution à l'étude des privilèges et immunités des organisations internationales* (Paris, Librairie générale de droit et de jurisprudence, 1982), p. 235.

[36] *Ibid.*

[37] *Ibid.*, p. 237.

[38] Agreement of 26 June 1947 (United Nations, *Treaty Series*, vol. 11, p. 11).

[39] Interim Arrangement of 11 June and 1 July 1946 (*ibid.*, vol. 1, p. 163), amended by exchange of letters of 5 and 11 April 1963 (*ibid.*, vol. 509, p. 308).

their full functioning, is the privilege relating to the inviolability of an organization's premises. It is the principle which vouchsafes an international organization its autonomy, its independence and its privacy. The principle is, of course, embodied in almost all the legal instruments relating to the privileges and immunities of the international organizations, whether in the two General Conventions of 1946 and 1947 or in the headquarters agreements or other bilateral or multilateral agreements relating to existing international organizations.

89. The inviolability of the premises of international organizations in international law is, in respect of content, identical to the inviolability of diplomatic premises as expressed in article 22, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. However, the principles on which that content is based are different in the two cases. States respect the inviolability of diplomatic premises on the basis of the principle of sovereign equality and reciprocity. In the case of international organizations, one cannot speak of reciprocity; it does not exist. The basis must be sought in the fact that a national, subordinate legal order cannot demand submission of or coerce an international, higher legal order.[40]

90. In the case of the first international organizations to be established, mention was made of "exterritoriality" in justification of inviolability. Thus, for example, in the agreements concluded by the Swiss Federal Government with some of the international organizations which have their headquarters in Switzerland, that term was used. In such agreements, the Swiss Federal Council recognizes the exterritoriality of the grounds and buildings of the organization and of all buildings occupied by it in connection with meetings of its assemblies or any other meeting convened by it in Switzerland (art. 4 of the agreements signed with, among others, ILO, WHO and WMO).

91. This theory has been virtually abandoned. The inviolability of the premises of an international organization depends not on an assumed fiction of exterritoriality or extraterritoriality (which, as stated, is an obsolete doctrine) but on the right of every international organization to the respect and inviolability of its privacy. This is a right inherent in personality.[41]

92. The earliest agreements referred only to "premises of the Organization". The latest agreements clarified the term and, of course, the content of the privilege without, however, modifying its scope. Thus article 1 (*i*) of the 1961 Vienna Convention on Diplomatic Relations reflects the Commission's view, expressed during the elaboration of the Convention, that "the premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park".[42] The Vienna Convention states in effect: "The 'premises of the mission' are the buildings or parts of buildings and the land ancillary thereto . . . used for the purposes of the mission . . .".

93. When entering into an agreement with a host State regarding permanent installations, such as those in New York or Geneva or the headquarters of the regional economic commissions, the United Nations has sought to define, either in the headquarters agreement itself or in a supplementary agreement or annex, the precise limits of the area in which its premises are situated or over which it has control.[43]

94. Inviolability, as understood thus, in a broad and universal sense, is not always accepted. In particular, States in whose territory some international organizations have their headquarters tend to limit it. A report prepared in 1968 for the European Committee on Legal Co-operation recognized the principle that the premises of an international organization must be inviolable but pointed out that at first glance inviolability of the premises did not seem necessary in the case of international organizations that exercised purely administrative or technical functions and that, in certain cases, inviolability of archives might be sufficient. The said Committee agreed that premises should be understood as including "the land, buildings and parts of buildings, by whomsoever owned, used *exclusively for the exercise of the official functions of the organization**".[44]

95. This same limitation was discussed in the Commission at the tenth session, in 1958, when the draft articles on diplomatic intercourse and immunities (on which the 1961 Vienna Convention was based) were being discussed. At that time, one of the members of the Commission, Mr. Tunkin, opposed the addition of the word "official" since, in his view, "the mission's premises were the premises used for the functions of the mission"; the addition "would merely lead to confusion and might be interpreted as implying that only the offices of the mission were to be regarded as official premises".[45] Nevertheless, the 1963 Vienna Convention on Consular Relations adopted that wording in article 31, paragraph 2, which limits the inviolability to "that part of the consular premises which is used exclusively for the purpose of the work of the consular post".

96. Although the tendency to limit and differentiate inviolability has strong supporters, there is at least one case in which a court, the Court of Justice of the European Communities, confirmed the theory of universal and uniform inviolability when it ruled that the premises and buildings of the European Atomic Energy Community were not limited to the administrative premises alone and that therefore "an intervention . . . by a national administrative authority in the sphere of interest of a Community institution constitutes an administrative measure of constraint".[46]

---

[40] Duffar, *op. cit.*, p. 101.

[41] *Ibid.*, pp. 51 *et seq.*

[42] See *Yearbook . . . 1958*, vol. II, p. 95, document A/3859, chap. II, sect. II, para. (2) of the commentary to article 20 of the draft articles on diplomatic intercourse and immunities.

[43] See "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (*Yearbook . . . 1967*, vol. II, p. 229, document A/CN.4/L.118 and Add.1 and 2, part two, A, chap. II, para. 99).

[44] See Council of Europe, *op. cit.* (footnote 11 above), p. 27, paras. 44-45.

[45] See *Yearbook . . . 1958*, vol. I, p. 128, 455th meeting, para. 68.

[46] Case 2.68, *Ufficio Imposte di Consumo di Ispra* v. *Commission of the European Communities*, order of 17 December 1968, *Reports of Cases before the Court of Justice of the European Communities, 1968* (Luxembourg), p. 437; cited in Duffar, *op. cit.* (footnote 35 above), p. 102.

97. The 1961 Vienna Convention on Diplomatic Relations embodies, in article 1 (*i*), another of the basic characteristics of inviolability in international law, namely that inviolability protects, not ownership, but occupancy of the premises. Thus the words "irrespective of ownership" are used. Similar wording is to be found in the General Conventions of 1946 and 1947 (art. II, sect. 3, and art. III, sect. 5, respectively), which indicates that the same principles are applied to international organizations.[47]

98. In the first study prepared by the Secretariat, in 1967, there is the following very apt comment:

> While the Vienna Convention of course does not apply to international organizations, it is indicative of the fact that no distinction is made in the inviolability of those premises which are owned and those premises which are rented or otherwise held on a more temporary basis. In this respect it is declaratory of existing international law.[48]

99. Clearly, the principle as enunciated in the form adopted by the 1961 and 1963 Vienna Conventions, namely as protection of the occupancy, implies the existence of two precise moments: the moment from which inviolability is applicable and required and the moment at which it ceases to be so. The first moment is determined by the beginning of the effective occupation of the premises by the international organization. The second is determined, logically, by the vacation of the premises by the international organization which occupied them. The 1975 Vienna Convention on the Representation of States adopted this principle in article 70, concerning the protection of premises, property and archives, paragraph 1 of which provides: "When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are used by it . . .".

100. The legal literature is almost unanimous in recognizing that all the principles on diplomatic inviolability are applicable to the premises of international organizations. The practice followed by States confirms this. Such inviolability depends on the use of the premises for the purposes of the international organization and the effective occupancy of the premises by the international organization.

101. However, there seems to be a lacuna in relation to the precise determination of the two moments indicated above: the beginning and the end of inviolability. This is due to the absence in the majority of the legal instruments regulating relations between States and international organizations that are currently in force of a procedure establishing obligatory notification at both the moment of occupation and the moment of vacation of the premises or any other space occupied by an international organization. Such notification should of course be made to the competent authorities of the host State. The United Nations, for example, sends an official notification to the authorities of the host country when it occupies or vacates certain premises.

102. Such obligation has been provided for in article 3 of the Harvard Law School draft convention concerning diplomatic privileges and immunities. According to that draft, the inviolability of premises occupied or used by a mission should be respected and guaranteed by the host State, "provided that notification of such occupation or use had been previously given to the receiving State".[49] At the ninth session of the Commission, Mr. Ago, noting that it was the practice of the sending State to notify the receiving State concerning the premises it would occupy, suggested that inviolability might begin to operate from the date on which notification by the sending State reached the receiving State.[50] The Commission did not pronounce on that suggestion. The agreement concluded between the United Nations and the United States in 1966, following the acquisition by the United Nations of premises outside the Headquarters district as originally defined,[51] established the obligatory nature of notification both when the premises begin and when they cease to be occupied. Article II of that agreement states:

Article II

> The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately should any of the premises described in Article I, or any part of such premises, cease to be used for offices by the Secretariat of the United Nations. Such premises, or such part thereof, shall cease to be a part of the Headquarters District from the date of such notification.

Article III of the same agreement reaffirms the obligatory nature of the practice:

Article III

> The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately of the termination of any subleases of parts of the premises described in Article I and of the possession of such parts by the United Nations. Such parts of such premises shall become a part of the Headquarters District from the date of such occupation.

103. The European Committee on Legal Co-operation, in its report on the privileges and immunities of international organizations, was concerned solely with the precise limits of the premises, which were to be recorded in headquarters agreements and in agreements concerning the temporary occupation of premises.[52]

104. Generally speaking, therefore, it seems to be acknowledged that the premises of international organizations, like diplomatic premises, are inviolable. Inherent in that inviolability, as a natural consequence, is exemption from any form of search, requisition, attachment, confiscation, expropriation and any other form of coercion or interference, whether administrative, executive, judicial or legislative. No agent of the State's public authority may enter the premises of an international organization, as defined, unless intervention has been requested or authorized by officials of the organization empowered to make such request or grant such author-

---

[47] See P. Cahier, *Le droit diplomatique contemporain* (Genève, Droz, 1962), pp. 198-199.

[48] See document A/CN.4/L.118 and Add.1 and 2 (footnote 43 above), part two, A, chap. II, para. 91 *in fine*.

[49] Harvard Law School, *Research in International Law*. I. *Diplomatic Privileges and Immunities*, Supplement to *The American Journal of International Law* (Washington, D.C.), vol. 26 (1932), pp. 50-51; cited in Cahier, *op. cit.* (footnote 47 above), pp. 200 and 216, and in Duffar, *op. cit.* (footnote 35 above), p. 135.

[50] See *Yearbook . . . 1957*, vol. I, p. 53, 394th meeting, para. 25.

[51] See document A/CN.4/L.118 and Add.1 and 2 (footnote 4. above), part two, A, chap. II, para. 100.

[52] See footnote 44 above.

ization, or the relevant basic legal text waives the principle of inviolability.[53]

105. The practice of States, of the United Nations and of the specialized agencies and IAEA reflects the doctrine that inviolability not only means that States must refrain from entering the premises of an international organization but also implies the obligation of protecting them from any threat or disturbance from the outside that might affect them. The State is legally bound to extend special protection to the premises of international organizations, as it must to diplomatic premises. Inviolability of the premises obliges the State not only to abstain from certain acts but also to afford active protection of the premises. These principles have been recognized in many headquarters agreements or have been considered obligatory by States; thus, for example, the agreements concluded between the United Nations and the United States of America[54] (art. VI, sect. 16); the United Nations and France[55] (sect. II); ECAFE and Thailand[56] (art. III, sect. 5); ECA and Ethiopia[57] (art. III, sect. 4); FAO and Italy[58] (art. IV, sect. 8); FAO and Egypt[59] (art. II, sect. 4 (*c*)); FAO and Thailand[60] (art. V, sect. 7); UNESCO and Cuba[61] (sect. B); UNESCO and France[62] (art. 7).

106. For its part, the Swiss Federal Government has stated that the protection of the premises of an international organization represents an obligation for Switzerland, even when headquarters agreements concluded by the Confederation contain no particular provision to this effect.[63] The State must therefore take the necessary measures to protect the premises of the international organization on the outside and, where appropriate, on the inside. In the latter case, as we have said, intervention must be requested or authorized by an official of the organization concerned. Article 7 of the headquarters agreement between UNESCO and France[64] expressly states this principle.

107. When inviolability is being granted to the international organization in furtherance of the performance of its functions, it is logical that, in exchange, States should not allow premises occupied by an international organization to be transformed into territory of asylum. The headquarters agreement concluded between the United Nations and the United States[65] contains an express provision on this subject in article III, section 9 (*b*):

> (*b*) Without prejudice to the provisions of the General Convention or Article IV of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavoring to avoid service of legal process.

A similar provision is to be found in article 6, paragraph 3, of the headquarters agreement between UNESCO and France.

108. According to the replies to the questionnaire sent out by the Legal Counsel of the United Nations to the specialized agencies and IAEA, the inviolability of the premises of those organizations has, in general, been recognized. The same is true of the United Nations. The specialized agencies and IAEA have for the most part remained immune from search and from any other form of interference.[66]

109. It is clear, then, that most, if not all, of the currently existing international organizations, as defined, enjoy absolute immunity from legal process in respect of their property. The General Conventions of 1946 and 1947, in article II and article III, respectively, establish the immunity from legal process in respect of property and assets of the international organizations to which they relate. Those texts confer absolute immunity on the property and assets of the said organizations. The competence of the national judge depends on the express waiver of the organization, which cannot, in any event, be of a general nature or extend to any measure of execution.

110. Contrary to what occurs in the case of States (where the extension of immunity is in general determined by case-law), when it comes to international organizations, any limitations to which immunity is or has been made subject derive from a special provision, because immunity is an absolute principle. As shown above, the constituent instruments of organizations of an economic or financial character, such as IBRD, IDA and IFC, provide for the competence of the national judge, in accordance with the conditions established in those instruments. Provision has also been made for the competence of national judges, not without some reticence on the part of international organizations, in the case of lawsuits of lesser importance or accidents caused by vehicles belonging to an international organization.

111. The European Committee on Legal Co-operation has concluded that, even though a degree of immunity from legal process is necessary in the case of international organizations, such immunity should be subject to certain exceptions and guarantees. The Committee has enumerated a number of areas in which there should be such exceptions, as follows:

(*a*) Commercial or financial activities carried out by international organizations;

(*b*) The participation of international organizations in corporations, associations or other legal entities;

(*c*) Patents acquired by international organizations;

---

[53] See document A/CN.4/L.118 and Add.1 and 2 (footnote 43 above), part two, A, chap. II, para. 109.

[54] See footnote 38 above.

[55] Exchange of letters constituting the agreement of 17 August 1951 relating to the holding of the sixth session of the General Assembly in Paris (United Nations, *Treaty Series*, vol. 122, p. 191).

[56] Agreement of 26 May 1954 (*ibid.*, vol. 260, p. 35).

[57] Agreement of 18 June 1958 (*ibid.*, vol. 317, p. 101).

[58] See footnote 29 above.

[59] Agreement of 17 August 1952 (see United Nations, *Legislative Texts* ... (footnote 29 above), p. 212).

[60] Agreement of 6 February 1957 (*ibid.*, p. 220).

[61] Exchange of letters of 30 August and 9 September 1949 (*ibid.*, p. 230).

[62] See footnote 20 above.

[63] See *Annuaire suisse de droit international, 1969-1970* (Zurich), vol. 26, pp. 170-171; also P. Cahier, *Etude des accords de siège conclus entre les organisations internationales et les Etats où elles résident* (Milan, Giuffrè, 1959) (thesis), pp. 259-260.

[64] See footnote 20 above.

[65] See footnote 38 above.

[66] See document A/CN.4/L.383 and Add.1-3 (footnote 23 above), part B, chap. II, sect. 9, paras. 58 *et seq.*

(*d*) Rights *in rem* to buildings belonging to international organizations or claimed by them, or the use they make of such buildings;

(*e*) Successions, bequests and gifts benefiting international organizations;

(*f*) Damage resulting from an accident caused by a motor vehicle or other means of transport belonging to an international organization or being driven on its behalf; and

(*g*) Counter-claims arising out of the legal relationship or facts on which any claims of organizations may be based.[67]

112. The principle of the immunity of the property and assets used by an international organization to perform its functions and carry out its official activities is accepted, as we have seen, by authors of legal works and by State practice and is fully reflected in many bilateral, multilateral and even unilateral legal instruments currently in force. The principle implies immunity from search, requisition, confiscation, expropriation or any other form of administrative or judicial coercion or interference, even though such immunity may not appear essential in the case of all international organizations. Expropriation is, however, allowed as an exception to the principle of immunity, should it be necessary for purposes of public utility. In such a case, the organization should be warned and consulted before the measure is executed and should receive adequate and fair compensation.

113. The autonomy and independence of international organizations would be ineffectual if they were not empowered to manage and mobilize freely, without let or hindrance, the funds and assets placed at their disposal, so that they may perform satisfactorily the functions entrusted to them.

114. Some authors maintain that while in general the right of international organizations to transfer funds without being subjected to normal exchange controls is admissible, that right should nevertheless be limited to transfers between member States. On the other hand, there should be no restriction with regard to the currencies in which those funds can be held or transferred.

115. In short, both the legal literature and the practice of States in their relations with international organizations accept that international organizations should be authorized to hold and transfer funds and currencies, operate bank accounts in any currency and convert all currencies in their possession without being subjected to any form of financial control, regulation or moratorium. It is obvious that so considerable a privilege may not seem indispensable to international organizations whose budget is small and whose funds are mostly used in the headquarters country.

116. The General Conventions of 1946 and 1947, of course, both have provisions on this point. The 1947 Convention provides, in article III, section 7:

Section 7

Without being restricted by financial controls, regulations or moratoria of any kind:

(*a*) The specialized agencies may hold funds, gold or currency of any kind and operate accounts in any currency;

(*b*) The specialized agencies may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency.

A similar provision is generally found in the headquarters agreements, for example in the agreement between UNESCO and France (art. 17).[68] In all cases, there is a proviso concerning the exercise of the rights accorded, to the effect that the organization concerned is to pay due regard to any representations made by the Government of any member State "in so far as it considers that these can be complied with without prejudice to its own interests".

[67] Council of Europe, *op. cit.* (footnote 11 above), p. 24, para. 33.

[68] See footnote 20 above.

VIII. Part III of the draft articles: articles 7 to 11 submitted by the Special Rapporteur

117. As a corollary to what has been said up to now, the Special Rapporteur suggests that part III of the draft articles should read as follows:

PART III.

PROPERTY, FUNDS AND ASSETS

Article 7

International organizations, their property, funds and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or coercion.

Article 8

1. The premises of international organizations used solely for the performance of their official functions shall be inviolable. The property, funds and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference or coercion, whether by executive, administrative, judicial or legislative action.

2. International organizations shall notify the host State of the location and description of the premises and the date on which occupation begins. They shall also notify the host State of the vacation of premises and the date of such vacation.

3. The dates of the notification provided for in paragraph 2 of this article, except where otherwise agreed by the parties concerned, shall determine when the enjoyment of the inviolability of the premises, as provided for in paragraph 1 of this article, begins and ends.

Article 9

Without prejudice to the provisions of the present articles [Convention], international organizations shall not allow their headquarters to serve as a refuge for persons trying to evade arrest under the legal provisions of the host country, or sought by the authorities of that country with a view to the execution of a judicial decision, or wanted on account of *flagrans crimen*, or against whom a court order or deportation order has been issued by the authorities of the host country.

Article 10

Without being restricted by controls, inspections, regulations or moratoria of any kind:

(*a*) International organizations may hold funds, gold or currency of any kind and operate bank accounts in any currency;

(*b*) International organizations may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency;

(*c*) International organizations shall, in exercising their rights under subparagraphs (*a*) and (*b*) of this article, pay due regard to any representations made by the Government of any member State party to the present articles [Convention] in so far as it is considered that effect can be given to such representations without detriment to their own interests.

Article 11

Notwithstanding the provisions of article 10, subparagraphs (*a*) and (*b*), the scope of the rights accorded may be limited, in the light of the functional requirements of the organization in question, by mutual agreement of the parties concerned.

CHECK-LIST OF DOCUMENTS OF THE FORTY-FIRST SESSION

Document	*Title*	*Observations and references*
A/CN.4/418	Provisional agenda	Mimeographed. For the agenda as adopted, see *Yearbook . . . 1989*, vol. I (Part Two), chap. I, para. 7.
A/CN.4/419 [and Corr.1] and Add.1	Seventh report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in the present volume (p. 81).
A/CN.4/420	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: comments and observations received from Governments	*Idem* (p. 75).
A/CN.4/421 [and Corr.1, 2 and 4] and Add.1 and 2	Fifth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	*Idem* (p. 91).
A/CN.4/422 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Second report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	*Idem* (p. 59).
A/CN.4/423 [and Corr.1 and 2]	Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem* (p. 131).
A/CN.4/424 [and Corr.1]	Fourth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem* (p. 153).
A/CN.4/425 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur	*Idem* (p. 1).
A/CN.4/L.431	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-third session of the General Assembly	Mimeographed.
A/CN.4/L.432	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 32 and draft Optional Protocols One and Two	Texts reproduced in *Yearbook . . . 1989*, vol. I, summary records of the 2128th meeting (paras. 16 *et seq.*), 2129th meeting (paras. 1-103) and 2130th to 2132nd meetings.
A/CN.4/L.433	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 13, 14 and 15	*Idem*, summary records of the 2134th meeting (paras. 49 *et seq.*), 2135th meeting and 2136th meeting (paras. 1-41).
A/CN.4/L.434	Draft report of the International Law Commission on the work of its forty-first session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Forty-fourth Session, Supplement No. 10* (A/44/10). For the final text, see *Yearbook . . . 1989*, vol. II (Part Two).
A/CN.4/L.435 and Add.1-4 [and Add.4/Corr.1]	*Idem*: chapter II (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem*
A/CN.4/L.436 and Add.1-3	*Idem*: chapter III (Draft Code of Crimes against the Peace and Security of Mankind)	*Idem*
A/CN.4/L.437	*Idem*: chapter IV (State responsibility)	*Idem*
A/CN.4/L.438	*Idem:* chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem*
A/CN.4/L.439 and Add.1 and 2	*Idem*: chapter VI (Jurisdictional immunities of States and their property)	*Idem*

Document	*Title*	*Observations and references*
A/CN.4/L.440 [and Corr.1] and Add.1 and 2	*Idem*: chapter VII (The law of the non-navigational uses of international watercourses)	*Idem*
A/CN.4/L.441	*Idem*: chapter VIII (Relations between States and international organizations (second part of the topic))	*Idem*
A/CN.4/L.442	*Idem*: chapter IX (Other decisions and conclusions of the Commission)	*Idem*
A/CN.4/SR.2095-A/CN.4/SR.2148	Provisional summary records of the 2095th to 2148th meetings	Mimeographed. The final text appears in *Yearbook ... 1989*, vol. I.

كيفية الحصول على منشورات الامم المتحدة

يمكن الحصول على منشورات الامم المتحدة من المكتبات ودور التوزيع في جميع انحاء العالم . استعلم عنها من المكتبة التي تتعامل معها أو اكتب الى : الامم المتحدة ،قسم البيع في نيويورك او 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.

Printed at United Nations, Geneva
GE.91-62712
October 1992–2,830

United Nations publication
Sales No. E.91.V.5 (Part 1)

ISBN 92-1-133409-8
(complete set of two volumes)
ISBN 92-1-133406-3 (Vol. II, Part 1)
ISSN 0082-8289