A/CN.4/SER.A/1990/Add.1 (Part 1)

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1990

Volume II
Part One

Documents of the forty-second session

UNITED NATIONS

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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.

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The reports of the special rapporteurs and other documents considered by the Commission during its forty-second 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.

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ABBREVIATIONS

ECAFE	Economic Commission for Asia and the Far East (became ESCAP)
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America
ESCAP	Economic and Social Commission for Asia and the Pacific
ESCWA	Economic and Social Commission for Western Asia
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
ILA	International Law Association
IMO	International Maritime Organization
INTAL	Institute for Latin American Integration
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
World Bank	International Bank for Reconstruction and Development and International Development Association

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* *

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

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NOTE CONCERNING QUOTATIONS

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

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

FILLING OF A CASUAL VACANCY (ARTICLE 11 OF THE STATUTE)

[Agenda item 2]

DOCUMENT A/CN.4/433

Note by the Secretariat

[*Original: English*]
[*4 May 1990*]

1. Following the death of Mr. Paul Reuter on 29 April 1990, one seat has become vacant in the International Law Commission.

2. Article 11 of the statute of the Commission applies to the filling of such a vacancy. It provides:

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

Articles 2 and 8, to which article 11 refers, read as follows:

Article 2

> 1. The Commission shall consist of thirty-four members who shall be persons of recognized competence in international law.
>
> 2. No two members of the Commission shall be nationals of the same State.
>
> 3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 8

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

3. On 14 November 1986, the General Assembly elected the 34 members of the International Law Commission for a five-year term, beginning on 1 January 1987, in accordance with the Commission's statute and pursuant to paragraph 3 of General Assembly resolution 36/39 of 18 November 1981, in which the Assembly decided

> . . . that the thirty-four members of the International Law Commission shall be elected according to the following pattern:
>
> (*a*) Eight nationals from African States;
>
> (*b*) Seven nationals from Asian States;
>
> (*c*) Three nationals from Eastern European States;
>
> (*d*) Six nationals from Latin American States;
>
> (*e*) Eight nationals from Western European or other States;
>
> (*f*) One national from African States or Eastern European States in rotation, with the seat being allocated to a national of an African State in the first election held after the adoption of the present resolution;
>
> (*g*) One national from Asian States or Latin American States in rotation, with the seat being allocated to a national of an Asian State in the first election held after the adoption of the present resolution.

4. On 4 May 1990, the International Law Commission requested the Secretariat to issue a list of candidates on 25 May 1990.

5. On 4 May 1990, the Commission also decided that the election to fill the casual vacancy would be held on 30 May 1990.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 4]

DOCUMENT A/CN.4/431*

Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur

[*Original: English*]
[*11 April 1990*]

CONTENTS

* Incorporating document A/CN.4/431/Corr.1.

NOTE

Instruments relating to jurisdictional immunities of States and their property cited in the present report

Multilateral conventions

	Source
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).

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, 1996), 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.*
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, 1988 Edition*, vol. 12, title 27, chap. 97.

Introduction

1. The present report is the third submitted by the Special Rapporteur to the International Law Commission on the topic of jurisdictional immunities of States and their property.[1] Taking into account the views expressed by the members of the Commission at the last session,[2] the views expressed in the Sixth Committee at the forty-fourth session of the General Assembly[3] and the written comments and observations of Governments,[4] the Special Rapporteur has reviewed in the present report the whole set of draft articles on the topic which the Commission had adopted on first reading at its thirty-eighth session, in 1986.[5] The situation with regard to the second reading of the draft articles is as follows: articles 1 to 11 *bis*, with the proposals made by the Special Rapporteur and those formulated by some members in the plenary Commission, were referred to the Drafting Committee at the last session; articles 12 to 28 are to be considered further at the current session.

2. In the presentation of the draft articles, the text of each article as adopted on first reading is given first, followed by the text proposed by the Special Rapporteur for consideration, if there is one, and by comments, which include a summary of the views of Governments and of members of the Commission and the recommendations of the Special Rapporteur.

[1] The previous reports, submitted to the Commission at the fortieth and forty-first sessions respectively, were: (*a*) preliminary report, *Yearbook . . . 1988*, vol. II (Part One), p. 96, document A/CN.4/415; (*b*) second report, *Yearbook . . . 1989*, vol. II (Part One), p. 59, document A/CN.4/422 and Add.1.

[2] See *Yearbook . . . 1989*, vol. II (Part Two), pp. 97 *et seq.*, paras. 403–610.

[3] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly" (A/CN.4/L.443), sect. E.

[4] See *Yearbook . . . 1988*, vol. II (Part One), p. 45. document A/CN.4/410 and Add.1–5.

[5] See *Yearbook . . . 1986*, vol. II (Part Two), pp. 8 *et seq.*

Specific comments[6]

PART I. INTRODUCTION

Article 1. Scope of the present articles

Text adopted

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Text proposed

The present articles apply to the immunity of one State and its property from the jurisdiction and measures of constraint before the courts of another State.

Comments

(1) One Government suggested in its written comments that the principle of the immunity of a sovereign State contained in article 6 should be placed at the outset of the draft articles. One member of the Commission suggested that article 6 should be placed immediately after article 1. The Special Rapporteur is however of the view that article 1 was intended as an introductory clause to indicate the scope of the present articles. He also considers that article 6 should not be too far removed from articles 11 to 19, which set forth limitations on or exceptions to the principle of immunity contained in article 6. There appears to be general support in the Commission for maintaining the original placement of the article.

(2) The original text refers only to immunity from jurisdiction and not to immunity from measures of constraint. This is presumably a result of the fact that when article 1 was adopted on first reading it was still uncertain whether the present articles would cover the question of immunity from measures of constraint. The subject requires substantive and detailed discussion, but the general tendency might be to include some articles on immunity from measures of constraint in part IV of the draft. Accordingly, reference to immunity "from measures of constraint" has been added in the text proposed by the Special Rapporteur.

Articles 2 and 3

Texts adopted

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "commercial contract" means:

(i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

[6] The headings "Text adopted" and "Text proposed" refer respectively to the text adopted on first reading and to the text proposed by the Special Rapporteur. The words "original text" and "former article . . ." refer to the text adopted on first reading.

Provisions of the texts proposed by the Special Rapporteur that are identical with the corresponding ones of the text adopted on first reading are shown in italics.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(*a*) the State and its various organs of government;

(*b*) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(*c*) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(*d*) representatives of the State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

Text proposed

Article 2. Use of terms

1. *For the purposes of the present articles:*

(a) *"court" means any organ of a State, however named, entitled to exercise judicial functions*;

(*b*) "State" means:

(i) the State and its various organs of government;

(i *bis*) constituent States of a federal State, if the latter declares that its constituent States may invoke the provisions of the present articles applicable to a State and accept the corresponding obligations;

(ii) political subdivisions of the State, other than the federal State, which are entitled to perform acts in the exercise of sovereign authority of the State;[7]

(iii) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of sovereign authority of the State, provided that they do not include any entity established by the State for the purpose of performing commercial transactions which has an independent legal personality and is capable of suing or being sued;

(iv) representatives of the State acting in that capacity;

(*c*) "commercial transaction" means:

(i) any contract or transaction for the sale or purchase of goods or the supply of services;

(ii) any loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) *any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.*

2. In determining whether a transaction coming under paragraph 1 (*c*) of this article is commercial, reference should be made primarily to the nature of the transaction, but the courts of the forum State are not precluded from taking into account the governmental purpose of the transaction.

3. *The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.*

Comments

(1) The proposal to combine articles 2 and 3 was generally supported in the Commission, as well as in the Sixth Committee of the General Assembly.

(2) In paragraph 1 (*a*), the term "court" should be interpreted as including "appellate court".

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[7] Relevant national laws provide as follows:

(*a*) *Canada*: State Immunity Act, 1982:

"*Interpretation*

"2. In this Act,

". . .

"'foreign State' includes:

". . .

"(*b*) any government of the foreign State or of any political subdivision of the foreign State, including any of its departments, and any agency of the foreign State, and

"(*c*) any political subdivision of the foreign State;

". . .

"'political subdivision' means a province, state or other like political subdivision of a foreign State that is a federal State."

(*b*) *Australia*: Foreign States Immunities Act 1985:

"*Interpretation*

". . .

"(3) Unless the contrary intention appears, a reference in this Act to a foreign State includes a reference to—

"(*a*) a province, state, self-governing territory or other political subdivision (by whatever name known) of a foreign State;

". . ."

Political subdivisions or component units (e.g., the provinces of Canada, the Swiss cantons) are included in the definition of "foreign State". According to the Australian Law Reform Commission, the effect is to extend the immunities to these bodies, thus assisting Australian states to claim reciprocal treatment abroad.

(*c*) *United States of America*: Foreign Sovereign Immunities Act of 1976:

"*Section 1603. Definitions*

". . .

"(*a*) A 'foreign state' . . . includes a political subdivision of a foreign state . . .

". . ."

(*d*) *1972 European Convention on State Immunity*:

"*Article 28*

"1. Without prejudice to the provisions of article 27, the constituent States of a Federal State do not enjoy immunity.

"2. However, a Federal State Party to the present Convention may, by notification addressed to the Secretary General of the Council of Europe, declare that its constituent States may invoke the provisions of the Convention applicable to Contracting States, and have the same obligations.

". . ."

(3) Some Governments expressed the view, in their written comments as well as in their statements in the Sixth Committee, that the words "judicial functions" should be explained more fully in the draft article. However, the Special Rapporteur still tends to think that, since judicial functions vary under different constitutional and legal systems, it would be difficult to define the term in more detail in such a manner as to satisfy everyone. Nevertheless, he would be ready to discuss any concrete proposal on this point in the Drafting Committee.

(4) With respect to the definition of the term "State" in paragraph 1 (*b*), some members of the Commission considered that the constituent states of a federal State should be regarded as States for the purposes of the draft articles. The Special Rapporteur submits for consideration a formulation based on article 28, paragraph 2, of the 1972 European Convention on State Immunity (subpara. (*b*) (i *bis*)).[8]

(5) With respect to paragraph 1 (*b*) (iii), a proposal was made to the effect that State enterprises should be excluded from the category of agencies or instrumentalities. The same view was also expressed in the Sixth Committee, while some other delegations took an opposing view. In his proposal, the Special Rapporteur has inserted in paragraph 1 (*b*) (iii) the wording "do not include any entity established by the State" in order to exclude State enterprises from the agencies or instrumentalities of a State. Since the point is related to the substance of article 11 *bis*, it is recommended that it be discussed in conjunction with that article.

(6) In paragraph 1 (*c*), the use of the expression "commercial transaction" in place of "commercial contract", which was used in the text adopted on first reading, is suggested by the Special Rapporteur in response to the preference expressed by some members of the Commission and some representatives in the Sixth Committee for "commercial transaction". The definition of "commercial contract" in paragraph 1 (*b*) of the former article 2 appears to have been taken from the United Kingdom State Immunity Act 1978 (sect. 3(3)),[9] but whereas the United Kingdom Act uses the term "transaction", the Commission's draft uses the term "contract". The expression "commercial contract", which is also used in articles 11 and 19 of the text adopted on first reading and in article 11 *bis* proposed by the Special Rapporteur in his preliminary report,[10] could be changed to "commercial transaction" with little change in the substance of the present articles.

(7) With respect to paragraph 2, a number of Governments favoured the primacy of the nature test, while others insisted upon the necessity of giving the same weight to both the nature and the purpose tests. In this connection, those members who supported the primacy of the nature test criticized, in particular, the proviso contained in paragraph 2 of the former article 3 reading "if, in the practice of that State, that purpose is relevant" as being subjective and ambiguous. On the other hand, the compromise proposal submitted by the Special Rapporteur in his preliminary report,[11] which provided that purpose may be taken into account "if an international agreement . . . or a written contract . . . stipulates that the contract is for the public governmental purpose", was also criticized as being too rigid. A number of members, however, accepted this compromise.

(8) In view of the above situation the Special Rapporteur, taking into account a proposal made by one representative in the Sixth Committee, would like to suggest another compromise to the effect that, while the primary criterion for determining immunity should be the nature of the transaction, the court of a forum State should be free to take a governmental purpose into account also. Paragraph 2 of article 2 proposed by the Special Rapporteur contains such a formulation. It has been suggested that the necessity to take into account the public purpose of the transaction arises from the consideration to provide for the case of famine or similar unforeseen situations. The Special Rapporteur considers that, in view of criticisms of paragraph 2 of the former article 3, it might be more advantageous, for purposes of flexibility, to give the power of discretion to the court of the forum State rather than to specify the special circumstances involved.

Article 4. Privileges and immunities not affected by the present articles

Text adopted

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*.

Text proposed

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:

[8] See footnote 7 (*d*) above.

[9] The relevant part of the United Kingdom State Immunity Act 1978 reads as follows:

"3. (1) A State is not immune as respects proceedings relating to—

"(*a*) a commercial transaction entered into by the State; or

". . .

"(3) In this section 'commercial transaction' means—

"(*a*) any contract for the supply of goods or services;

"(*b*) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or any other financial obligation; and

"(*c*) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

". . ."

[10] Document A/CN.4/415 (see footnote 1 (*a*) above), para. 122.

[11] *Ibid.*, para. 29 (art. 2, para. 3).

(a) ***its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and***

(b) ***persons connected with them.***

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State, heads of Government and ministers for foreign affairs.

Comments

(1) The phrase "under international law" in the introductory clause of paragraph 1 has been inserted in accordance with the proposal of one Government in its written comments.

(2) Another Government proposed in its written comments that paragraph 2 should refer not only to heads of State but also to heads of Government, ministers for foreign affairs and persons of high rank. The same proposal was repeated in the Commission and in the Sixth Committee. The idea may have been taken from article 21 of the 1969 Convention on Special Missions,[12] which provides for privileges and immunities and other facilities to be accorded to heads of State, heads of Government, ministers for foreign affairs and persons of high rank when they take part in special missions. It is not very clear whether under customary rules of international law heads of Government and foreign ministers enjoy the same privileges and immunities as do heads of State. The Special Rapporteur is prepared to accept a majority view on this point. However, he hesitates to do so regarding "persons of high rank", since there are no generally accepted criteria for determining whether a person is of high or ordinary rank and as a result some difficulties might arise in the provision's application. Therefore, only the words "heads of Government and ministers for foreign affairs" have been added in paragraph 2.

[12] United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125.

Article 5. Non-retroactivity of the present articles

Text adopted

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

Comments

One Government proposed in its written comments the inclusion of an optional clause allowing the present articles to operate with regard to any cause of action arising within, say, six years preceding the entry into force of the articles between the parties concerned. Another Government supported the retroactive application of certain articles. According to the present formulation, the principle of non-retroactivity will apply to proceedings instituted prior to the entry into force of the articles between the States concerned. The Special Rapporteur would like to obtain further views from members before accepting any of the above proposals for changes in the text adopted on first reading.

PART II. GENERAL PRINCIPLES

Article 6. State immunity

Text adopted

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].

Text proposed

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.

Comments

(1) It is no secret that the views of Governments as well as those of members of the Commission have been divided between those which in theory favour the principle of absolute immunity and those which in theory favour that of restricted immunity. Nevertheless, thanks to the tacit understanding among members that the Commission should undertake the second reading without once again entering into a doctrinal debate, the issue concerning article 6 has been reduced to the treatment of the bracketed phrase. Some members favoured its retention in order to maintain sufficient flexibility for the future development of State practice and the rules of general international law, while some other members felt that such a reference would encourage the unilateral interpretation of international law by local courts and lead to the erosion of the principle of State immunity. The Special Rapporteur is of the view that the purpose of the present articles should be to reach agreement on precisely the areas in which State immunity should and should not apply. If the reference to "general international law" remained, there would be a danger that the agreed articles might be subject to unilateral interpretation by local courts. Accordingly, in his preliminary report he proposed the deletion of the bracketed phrase from the article.[13]

(2) However, in order to accommodate the position of those who insisted upon the need to provide for the further development of State practice and international law, the Special Rapporteur suggested in his preliminary

[13] Document A/CN.4/415 (see footnote 1 (*a*) above), para. 67.

report the inclusion in the preamble, should the present articles become a convention, of the following paragraph suggested by a Government:[14]

Affirming that the rules of general international law continue to govern questions not expressly regulated in this Convention.

The above suggestion received the support of some members of the Commission as well as some representatives in the Sixth Committee.

(3) In his second report the Special Rapporteur also suggested another alternative,[15] namely the addition of an article 6 *bis* providing for an optional declaration regarding exceptions to immunity which would apply between parties that did not raise objections to such a declaration. The suggestion was criticized as creating a multiplicity of régimes and, thereby, uncertainty. In the light of those objections, the proposed article 6 *bis* was withdrawn. Although substantial differences of opinion still remain, the Special Rapporteur submits for the consideration of the Commission a text in which the bracketed phrase has been deleted.

Article 7. Modalities for giving effect to State immunity

Text adopted

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Text proposed

1. A forum State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against a foreign State.

2. A proceeding in a forum State shall be considered to have been instituted against a foreign State, whether or not the foreign State is named as a party to that proceeding, so long as the proceeding in effect seeks to compel the foreign State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of the foreign State.

3. In particular, a proceeding before a court of a forum State shall be considered to have been instituted against a foreign State when the proceeding is instituted against any organ or other entity of a State or its representative referred to in article 2, paragraph 1 (*b*).

[14] *Ibid.*, paras. 65 and 67.

[15] Document A/CN.4/422 and Add.1 (see footnote 1 (*b*) above), para. 17.

Comments

(1) Regarding paragraphs 1 and 2, drafting changes have been made pursuant to the suggestion of a Government in its written comments that the words "a State" be changed to "a forum State" and that "another State" or "other State" be changed to "a foreign State". In addition, the words "in a forum State", which appeared in paragraph 1 of the text proposed by the Special Rapporteur in his preliminary report,[16] have been replaced by the words "in a proceeding before its courts".

(2) With respect to paragraph 3, the proposed text has been considerably shortened from the original paragraph in order to avoid duplication with article 2, paragraph 1 (*b*). The final portion of paragraph 3, starting with the words "or when the proceeding is designed to deprive", has also been deleted in order to avoid duplication with paragraph 2.

(3) The suggestion was made by one Government that the words "interests" and "control" should be replaced by more commonly used legal terms. Although those words may not be used very frequently or may be used with slightly different meanings outside the common-law countries, it would be difficult in fact to find suitable alternatives. As a result of the aforementioned deletion of the final portion of paragraph 3, the problem concerning "control" no longer exists as far as the present article is concerned. Although the reservation on the part of the members not belonging to the common-law system concerning the use of the word "interests" is understandable, it would be difficult to avoid using it entirely in the present articles.

Article 8. Express consent to the exercise of jurisdiction

Text adopted

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

Text proposed

1. A foreign State cannot invoke immunity from jurisdiction in a proceeding before a court of a forum State with regard to any matter if the foreign State has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) *by international agreement*;

(b) *in a written contract*; *or*

(*c*) by a written express consent given after a dispute between the parties has arisen.

2. An agreement by one State concerning application of the law of another State shall not be interpreted as the consent of the former State to the exercise of jurisdiction by the court of the latter State.

[16] Document A/CN.4/415 (see footnote 1 (*a*) above), para. 79.

Comments

(1) In paragraph 1, the words "a State" and "another State" have been replaced by "a foreign State" and "a forum State", respectively. In subparagraph (*c*) a less strict formula has been used, taking into account the views expressed by two Governments in their written comments.

(2) Paragraph 2 has been added in order to make it clear that an agreement made by one State concerning the application of the law of another State on a certain subject does not necessarily signify agreement to the exercise of jurisdiction by the court of the latter State.

Article 9. Effect of participation in a proceeding before a court

Text adopted

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(*a*) itself instituted that proceeding; or

(*b*) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (*b*) above does not apply to any intervention or step taken for the sole purpose of:

(*a*) invoking immunity; or

(*b*) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Text proposed

1. A foreign State cannot invoke immunity from jurisdiction in a proceeding before a court of a forum State if the foreign State has:

(a) *itself instituted that proceeding*; *or*

(*b*) intervened in that proceeding or taken any other step relating to the merits thereof. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on these facts provided it does so [before the court of first instance decides on the merits of the case] [at the earliest possible moment].

2. *Paragraph 1* (b) *above does not apply to any intervention or step taken for the sole purpose of*:

(a) *invoking immunity*; *or*

(b) *asserting a right or interest in property at issue in the proceeding.*

3. The appearance of a representative of a foreign State before a court of the forum State as a witness does not affect the immunity of the State from the jurisdiction of that court.

4. Failure on the part of the foreign State to enter an appearance in a proceeding before a court of the forum State shall not be considered as consent by the foreign State to the exercise of jurisdiction by that court.

Comments

(1) In the introductory clause of paragraph 1, the same drafting changes have been made as were made in articles 7 and 8, namely the replacement of the expressions "a State" and "another State" by "a foreign State" and "a forum State", respectively.

(2) The second sentence of paragraph 1 (*b*) has been added in order to offer the possibility of claiming immunity in cases where a State has taken a step relating to the merits of a proceeding before it acquires knowledge of facts on which a claim to immunity might be based. This proposal, which was originally put forward by two Governments in their written comments, was supported by a number of members of the Commission.

(3) In connection with paragraph 3, some members had made a proposal along the same lines but with broader scope, namely to use the words "appearance . . . in performance of the duty of affording protection". In the opinion of the Special Rapporteur, the phrase "affording protection" could be interpreted much more broadly than could "appearance . . . as a witness" and could thereby allow the foreign State to intervene in the proceeding too easily without losing immunity. He has therefore chosen to retain the present narrower formulation pending the expression of further views on the matter.

Article 10. Counter-claims

Text adopted

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

Comments

(1) In its written comments, one Government proposed the addition of a proviso to the effect that a counter-claim unrelated to the principal claim may be presented against the foreign State but the counter-claimant cannot recover an amount exceeding the principal claim.

(2) The Special Rapporteur had earlier been in agreement with the above proposal, and had suggested an additional paragraph 4 reading as follows:

> 4. A State cannot invoke immunity from jurisdiction only to the extent that the claim or counter-claim against it does not seek relief exceeding in amount or differing in kind from that sought by that State itself.[17]

However, after having given more thought to the question, he is now inclined to feel that more guidance on policy from the Commission might be desirable.

(3) According to the common-law concept, it would appear that the foreign State is subject to any counter-

[17] *Ibid.*, para. 107.

claim arising from the same transaction provided that the counter-claimant is properly joined to the action. Under-paragraph 1, a State cannot invoke immunity against a counter-claim if it instituted the proceeding itself; under paragraph 2, a State cannot invoke immunity against a counter-claim if it intervened in the proceeding to present a claim. These two provisions assume that the counter-claim arises out of the same original transaction, namely the same legal relationship as the principal claim. In this connection, common-law cases seem to suggest that even where counter-claims are allowed the counter-claimant cannot recover from the foreign State any amount by which the counter-claim exceeds the original claim. Paragraphs 1 and 2 do not impose such a limitation, in so far as the counter-claim arises from the same legal relationship as the principal claim.

(4) The United States Foreign Sovereign Immunities Act of 1976 (sect. 1607 (*b*) and (*c*)) provides for no limit if the counter-claim arises out of the same legal relationship. According to the Act, counter-claims not arising from the same legal relationship may be brought in the same proceeding against the foreign State provided that the recovery on that claim when raised as a counter-claim is limited to a set-off against any recovery in the initial action. It is explained that the limit of the recovery on the counter-claim is not the amount claimed but the amount awarded.

(5) Therefore, before entering into the drafting of an additional paragraph such as paragraph 4 mentioned above, the Special Rapporteur requests guidance as to (*a*) whether in the case of paragraphs 1 and 2 a counter-claim may be allowed without limit if it arises from the same legal relationship, and (*b*) whether the counter-claim may be allowed also in respect of a claim unrelated to the principal claim provided that the recovery is limited to a set-off against the principal claim.

PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Comments

With regard to the title of part III, the Special Rapporteur wishes to know if there would be any support for a neutral formulation such as "Activities of States to which immunity does not apply" or, as suggested by a member of the Commission at the last session, "Cases in which State immunity may not be invoked before a court of another State". If such is not the case, it is suggested that the subject be left open for decision at the conclusion of the consideration of the draft articles.

Article 11. Commercial contracts

Text adopted

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial contract concluded between States or on a Government-to-Government basis;

(*b*) if the parties to the commercial contract have otherwise expressly agreed.

Text proposed

Article 11. Commercial transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from the exercise of that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:

(*a*) in the case of a commercial transaction which took place between States or on a Government-to-Government basis;

(*b*) if the parties to the commercial transaction have otherwise expressly agreed.

Comments

(1) One member suggested the insertion of the phrase "Unless otherwise agreed between the States concerned" at the beginning of paragraph 1, as in articles 12 to 18. In view of the basic nature of the present rule, however, it does not seem desirable to add the phrase, as it might unnecessarily encourage deviation from the basic rule by way of regional agreement or written contract.

(2) Another member pointed out the necessity of making it clear that an agreement in a contract that it was to be governed by the law of another State was not to be deemed submission to the jurisdiction of that State. This would be taken care of if the addition to article 8 of the proposed paragraph 2 were to be approved.

(3) With regard to the phrase "by virtue of the applicable rules of private international law" in paragraph 1, a number of members pronounced themselves in favour of a rule pertaining to the jurisdictional link between a dispute arising from the transaction and the forum State. The Special Rapporteur was, however, of the view that, since there were differences between the solutions contained in various national and international instruments, the unification of the rules of private international law would be extremely difficult. The rule of a State concerning the territorial link necessary for the exercise of jurisdiction may variously be the place of conclusion of the contract, the place where obligations under the contract are to be performed or the nationality or place of business of one or more of the contracting parties. The formula "by virtue of the applicable rules of private international law" would be sufficiently neutral to enable the local court to determine under its own rules a jurisdictional link as appropriate between a particular commercial transaction and a forum State. The selection of any particular rule concerning the territorial link might create an unnecessary obstacle to the acceptance by States of the draft articles as a whole.

Article 11 bis. *State enterprises*

Text proposed

If a State enterprise engages in a commercial transaction with a foreign natural or juridical person, the State enterprise is subject, in respect of differences relating to the commercial transaction, to the same rules and liabilities as are applicable to a natural or juridical person, and that State may invoke immunity from the jurisdiction of the court of the forum State in respect of that commercial transaction. However, if a State enterprise engages in the commercial transaction on behalf of a State, article 11 shall apply.

Comments

(1) The Special Rapporteur has reformulated the text of article 11 *bis* submitted in his preliminary report[18] taking into account the views expressed in the Commission at the last session. According to paragraph 1 (*b*) (iii) of the new article 2, a State enterprise is not to be included in the agencies or instrumentalities of a State. The article provides, therefore, that a State enterprise is subject to the same rules and liabilities as are applicable to a natural or juridical person and therefore cannot invoke immunity from the jurisdiction of the court of the forum State, while the State which established the State enterprise may invoke immunity from the jurisdiction of the local court in respect of the commercial transaction performed by the State enterprise. In other words, the State cannot be sued, in principle, by the court of a forum State in relation to a commercial transaction performed by the State enterprise.

(2) However, if the State enterprise enters into and performs a commercial transaction on behalf of the State, article 11 will apply and the State cannot invoke jurisdiction in respect of that commercial transaction. Some members expressed the view that a State enterprise does not engage in a commercial transaction on behalf of a State. However, sometimes a State enterprise under the direction of a higher body (for example, a ministry) may conclude a commercial contract on behalf of the Government or execute a particular commercial transaction as the *alter ego*, so to speak, of the State. In such a case the commercial transaction may be regarded as a transaction between the State and a foreign natural or juridical person and the provisions of article 11 will apply. Of course, there is still room for a court of the forum State to take into account the purpose of the transaction in deciding whether that transaction is commercial under article 2, paragraph 2.

Article 12. Contracts of employment

Text adopted

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(*a*) the employee has been recruited to perform services associated with the exercise of governmental authority;

(*b*) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(*c*) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(*d*) the employee is a national of the employer State at the time the proceeding is instituted;

(*e*) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Text proposed

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State [and is covered by the social security provisions which may be in force in that other State].

2. Paragraph 1 does not apply if:

(*a*) (FIRST ALTERNATIVE) ***the employee has been recruited to perform services associated with the exercise of governmental authority*;**

(*a*) (SECOND ALTERNATIVE) **the employee is administrative or technical staff of a diplomatic or consular mission who is associated with the exercise of governmental authority;**

(*b*) the proceeding relates to the [recruitment,] renewal of employment or reinstatement of an individual;

(c) ***the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded*;**

(d) ***the employee is a national of the employer State at the time the proceeding is instituted*;**

(e) ***the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.***

Comments

(1) Divergent views were expressed with regard to article 12. One Government in its written comments and observations, some members of the Commission and some representatives in the Sixth Committee suggested that the entire article be deleted. Others, however, said that they considered the article necessary since a local court was the only convenient forum in which to provide protection to the employee of a State. There is also a lack of uniformity in the domestic legislations of States. The United Kingdom State Immunity Act 1978 contains, in section 4, detailed provisions on the subject-matter, which are followed closely in Singapore's State Immunity Act, 1979 and in Pakistan's State Immunity Ordinance, 1981, while the United States Foreign Sovereign Immunities Act of 1976 and the Canadian State Immunity Act, 1982 contain no such provisions. The 1972 European Conven-

[18] *Ibid.*, para. 122.

tion on State Immunity also contains detailed provisions in its article 5. All these provisions are rather complex. Article 12 as adopted on first reading probably takes into account the 1972 European Convention[19] and the United Kingdom Act.[20]

(2) In his preliminary report the Special Rapporteur suggested that in paragraph 1 the reference to the social security requirement be deleted,[21] since not all States had a social security system. Several members supported the deletion, while others preferred that the reference be retained.

(3) The Special Rapporteur also suggested that subparagraphs (*a*) and (*b*) of paragraph 2 be deleted, since according to subparagraph (*d*) the employer State may invoke immunity from the court if the employee is its own national and it would be rather unusual for a State to recruit a person who is not its national to a position associated with the exercise of governmental authority. However, the Special Rapporteur now holds the view that subparagraph (*a*) also has the effect of excluding administrative or technical staff of a mission from the application of paragraph 1, which effect may not be achieved under article 4. Accordingly, he offers two alternative versions of subparagraph (*a*) for consideration, the first of which is the original text.

(4) As to the deletion of subparagraph (*b*), it would appear that, if immunity could be invoked in proceedings relating to recruitment, renewal of employment or reinstatement, little would remain to be protected by the local court. One representative in the Sixth Committee raised the question of the adequacy of the word "recruitment" and felt that it might be better to replace it by "appointment". In any event, the Special Rapporteur will keep the matter open pending further discussion.

Article 13. Personal injuries and damage to property

Text adopted

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Comments

(1) The views of members of the Commission were also divided on article 13. Some proposed the deletion of the entire article, since in their view it was based on the legislation of a few States and such cases could be settled through the diplomatic channel; others held the view that disputes of this nature were not uncommon and diplomatic protection was not a viable alternative. It was also pointed out that, if the act or omission which caused the injury or damage was attributable to a State, the question of State responsibility would arise and the matter could be resolved only by international law and not by a national court.

(2) In the light of such differences of opinion, the Special Rapporteur made three suggestions: first, that a new paragraph 2 be added, reading: "Paragraph 1 does not affect any rules concerning State responsibility under international law"; secondly, that the phrase "if the author of the act or omission was present in that territory at the time of the act or omission" be deleted in order to extend the scope of the article to transboundary damage; thirdly, that the application of article 13 be limited mainly to pecuniary compensation arising from traffic accidents involving State-owned or State-operated means of transport and occurring within the territory of the forum State. The first suggestion met with no opposition in the Commission at the last session, but no clear support was expressed for it either; as for the second, some members expressed reservations with regard to the proposed deletion; on the third suggestion the views of members were divided, and it was also remarked that the general practice was to settle such matters through insurance, although it was pointed out that insurance did not always cover the full risk involved.

(3) In the light of those preliminary reactions, the Special Rapporteur submits the original version without change.

Article 14. Ownership, possession and use of property

Text adopted

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(*a*) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(*b*) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(*c*) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(*d*) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(*e*) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(*a*) which is in the possession or control of the State; or

(*b*) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

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[19] The 1972 European Convention on State Immunity provides, in article 5, paragraph 1:

"1. A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum."

[20] The United Kingdom State Immunity Act 1978 provides, in section 4 (1):

"4 (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there."

[21] Document A/CN.4/415 (see footnote 1 (*a*) above), para. 131.

Comments

Some Governments in their written comments expressed the view that the scope of article 14 was too broad. In the Commission doubts were expressed as to whether subparagraphs (*c*), (*d*) and (*e*) of paragraph 1 reflected universal practice. Taking into account these views, the Special Rapporteur suggests that the Commission consider the advisability of deleting subparagraphs (*c*), (*d*) and (*e*), which represent mainly the practice of common-law countries.

Article 15. Patents, trade marks and intellectual or industrial property

Text adopted

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(*b*) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (*a*) above which belongs to a third person and is protected in the State of the forum.

Text proposed

Unless otherwise agreed between the States concerned, the immunity of a foreign State cannot be invoked before a court of the forum State which is otherwise competent in a proceeding which relates to:

(*a*) the determination of any right of the foreign State in a patent, industrial design, trade name or business name, trade mark, copyright or any other form of intellectual or industrial property, including a plant breeder's right and a right in computer-generated works, which enjoys a measure of legal protection, even if provisional, in the forum State; or

(b) *an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph* (a) *above which belongs to a third person and is protected in the State of the forum.*

Comments

In response to a request by one Government in its written comments, a reference to "a plant breeder's right" has been inserted in subparagraph (*a*). The expression "a right in computer-generated works" is to be understood as including, *inter alia*, computer programmes and semiconductor chip layouts.

Article 16. Fiscal matters

Text adopted

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Text proposed

The only change recommended by the Special Rapporteur is the substitution, as in article 15, of the words "a foreign State" for "a State" and "the forum State" for "another State".

Comments

No question of substance has been raised concerning article 16. One Government proposed in its written comments that the article be redrafted along the lines of article 29(*c*) of the 1972 European Convention, to the effect that "the present articles do not apply to proceedings concerning customs duties, taxes or penalties". Although the Special Rapporteur has no objection to such a redrafting, he wishes to keep the matter open pending further discussion in the plenary Commission and in the Drafting Committee.

Article 17. Participation in companies or other collective bodies

Text adopted

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(*a*) has participants other than States or international organizations; and

(*b*) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Text proposed

The Special Rapporteur proposes only that, in the introductory clause of paragraph 1, the words "a State" be replaced by "a foreign State" and the words "another State" by "the forum State".

Comments

No substantive objections were raised with regard to article 17. One Government proposed in its written comments that the requirement that the collective body have "its principal place of business" in the forum State should be given preference over the other criteria. Another Government proposed that the words "participation" and "participants" be replaced by "membership" and "members" respectively. Except for the minor drafting suggestions indicated, the Special Rapporteur wishes to retain the draft article without change pending its further consideration in the Drafting Committee.

Article 18. State-owned or State-operated ships engaged in commercial service

Text adopted

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose,

the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purpose of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(*a*) a claim in respect of collision or other accidents of navigation;

(*b*) a claim in respect of assistance, salvage and general average;

(*c*) a claim in respect of repairs, supplies or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceeding there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Text proposed

The Special Rapporteur recommends no change other than the deletion of the bracketed term "non-governmental" in paragraphs 1 and 4.

Comments

(1) A number of Governments in their written comments proposed the deletion of the term "non-governmental" in paragraphs 1 and 4. The Special Rapporteur also feels that its use in those paragraphs would render their meaning ambiguous and might represent a departure from the practice followed in a number of treaties relating to the law of the sea, including, *inter alia*, the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels,[22] the 1958 Convention on the Territorial Sea and the Contiguous Zone,[23] the 1969 International Convention on Civil Liability for Oil Pollution Damage[24] and the 1982 United Nations Convention on the Law of the Sea.[25] Therefore, although a few members still hold the view that the term "non-governmental" should be retained without brackets, the general trend in the Commission appears to be in favour of its deletion.

(2) Two Governments suggested the introduction of the concept of segregated State property relating to State-owned or State-operated ships engaged in commercial service. However, the Special Rapporteur is inclined to the opinion, shared by some other members, that the Commission should be careful to avoid unnecessary duplication, in particular between article 11 *bis* and the present article.

(3) With regard to State-owned or State-operated aircraft engaged in commercial service, the Special Rapporteur suggested in his second report[26] that this question could be covered more suitably in the commentary than in an additional provision of article 18, and no objection was raised to that suggestion.

Article 19. Effect of an arbitration agreement

Text adopted

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Text proposed

The Special Rapporteur recommends no change other than the addition of a new subparagraph to read:

[22] The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) (League of Nations, *Treaty Series*, vol. CLXXVI, p. 199) provides, in article 3, paragraph 1:

"*Article 3*

"1. The provisions of the two preceding articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*."

[23] The Convention on the Territorial Sea and the Contiguous Zone (Geneva, 29 April 1958) United Nations, *Treaty Series*, vol. 516, p. 205) provides, in article 21:

"*Article 21*

"The rules contained in sub-sections A and B shall also apply to government ships operated for commercial purposes."

[24] The International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) (United Nations, *Treaty Series*, vol. 973, p. 3) provides, in article XI:

"*Article XI*

"1. The provisions of this Convention shall not apply to warships or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.

"2. With respect to ships owned by a Contracting State and used for commercial purposes, each State shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State."

[25] The United Nations Convention on the Law of the Sea (Montego Bay, 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/L.122) provides, in article 31:

"*Article 31. Responsibility of the flag State for damage caused by a warship or other government ship operated for non-commercial purposes*

"The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law."

[26] Document A/CN.4/422 and Add.1 (see footnote 1 (*b*) above), para. 31.

"(*d*) the recognition of the award" (see below, para. (2) of the comments).

Comments

(1) There are three points on which the Special Rapporteur would like to learn the views of members. The first concerns the choice between the bracketed expressions "commercial contract" and "civil or commercial matter" in the introductory clause of the article, on which views were divided. If it is decided to use the expression "commercial transaction" in article 2 instead of "commercial contract", the same change might also be made in article 19. Even in such a case, some members might still prefer the term "commercial contract". Whichever is chosen, the Special Rapporteur holds the view that there would be little reason to limit the supervisory jurisdiction of a court of a forum State to either a "commercial contract" or a "commercial transaction", since the scope of an arbitration depends primarily on the terms of the arbitration agreement. Again, there are a number of arbitration cases between States and natural or juridical persons, arising out of civil or commercial matters. The words "unless the arbitration agreement otherwise provides", at the end of the article, indicate that if the parties to the agreement wish to limit the scope of arbitration to differences arising out of a commercial contract they can do so by inserting a provision to that effect in the arbitration agreement. Therefore, the Special Rapporteur prefers to leave open the possibility of choosing the formula "civil or commercial matter".

(2) The second point has to do with the wording of subparagraph (*c*), to which one Government in its written comments proposed adding a reference to the "recognition and enforcement" of the arbitral award. However, since the question of measures of constraint is to be dealt with in part IV of the draft articles, the Special Rapporteur would suggest simply that in article 19 a new subparagraph (*d*) be added relating to "the recognition of the award". In this connection, the Special Rapporteur has followed the interpretation of "recognition" as the act which entails "turning the award into a judgment or a title equivalent to a judgment by providing it with an *exequatur* or some similar judicial certificate".[27] On the other hand, under a different interpretation of recognition, "an application for enforcement serves no useful purpose except as a first step towards execution".[28] If the latter interpretation prevails in the Commission, the above proposal may have to be reconsidered.

[27] F.A. Mann, "State contracts and international arbitration", *The British Year Book of International Law, 1967*, vol. 42, p. 18.

[28] *Ibid.*, p. 19.

(3) The third point concerns the reference to "a court" in the introductory clause. The previous Special Rapporteur, in his sixth report, had proposed the formula "a court of another State on the territory or according to the law of which the arbitration has taken or will take place",[29] while the formula adopted on first reading was "a court of another State which is otherwise competent". The present Special Rapporteur is of the opinion that the first formula, which is that used in article 12 of the 1972 European Convention,[30] may have some merits as far as arbitration procedure is concerned. He would therefore recommend that the members of the Commission devote further consideration to this point.

Article 20. Cases of nationalization

Text adopted

The provisions of the present articles shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual.

Comments

Article 20 emerged from the first reading as a general reservation clause. Governments stated in their written comments that measures of nationalization, as sovereign acts, were not subject to jurisdiction before the court of another State; others, however, commented that the meaning and the proper scope of the article were unclear; the suggestion was also made that it be placed in part I of the draft. The Special Rapporteur felt that to follow the latter suggestion might give the article undue weight, since the question of the territorial effects of nationalization was not one on which the Commission was expected to express an opinion. At the last session many members stated that they were in favour of deleting the article; accordingly, the Special Rapporteur recommends that it be deleted from the draft.

[29] *Yearbook . . . 1984*, vol. II (Part One), p. 58, document A/CN.4/376 and Add.1 and 2, para. 256 (art. 20).

[30] Article 12 of the 1972 European Convention reads as follows:

"*Article 12*

"1. Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

"(*a*) the validity or interpretation of the arbitration agreement;

"(*b*) the arbitration procedure;

"(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

"2. Paragraph 1 shall not apply to an arbitration agreement between States."

PART IV. STATE IMMUNITY IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT*

Articles 21, 22 and 23

Text adopted

[First alternative for the second reading[31]]

Article 21. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(*a*) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

Article 22. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 23. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (*a*) of article 21:

(*a*) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State which is in the territory of another State;

(*d*) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

* Part IV (arts. 21-23) is dealt with here as a whole.

[31] See para. (5) of the comments.

Text proposed

[Second alternative for the second reading[32]]

Article 21. State immunity from measures of constraint

1. No measures of constraint, including measures of attachment, arrest and execution, against the property of a foreign State may be taken in the territory of a forum State unless and to the extent that:

(*a*) the foreign State has expressly consented to the taking of such measures in respect of that property, as indicated:

(i) by arbitration agreement;

(ii) by international agreement or in a written contract;

(iii) by a written consent given after a dispute between the parties has arisen; or

(*b*) the foreign State has allocated or earmarked its property for the satisfaction of the claim which is the object of that proceeding; or

(*c*) the property is in the territory of the forum State and is specifically in use or intended for use by the State for commercial [non-governmental] purposes [and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed].

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which separate consent shall be necessary.

Article 22. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1(*c*) of article 21:

(a) *property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences*;

(b) *property of a military character or used or intended for use for military purposes*;

(*c*) property of the central bank or other monetary authority of the foreign State which is in the territory of a forum State and used for monetary purposes;

(d) *property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale*;

(e) *property forming part of an exhibition of objects of scientific or historical interest which is in the territory of*

[32] *Idem.*

another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of a forum State, unless the State in question has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under paragraph 1(*a*) of article 21, or allocated or earmarked that property within the meaning of paragraph 1(*b*) of article 21.

Article 23

If a State property including a segregated State property is entrusted by the State to a State enterprise for commercial purposes, the State cannot invoke immunity from a measure of constraint before a court of a forum State in respect of that State property.

Comments

(1) There was in the past a general tendency to consider separately the questions of immunity from measures of constraint and immunity from jurisdiction, which led to the independent development of the two subjects. Consequently, while there was a trend, in particular among the industrialized countries, towards restricted immunity as far as the jurisdiction of a court of the forum State was concerned, two opposing views continued to coexist in the field of execution. According to one view, the power to proceed to execution was regarded as the consequence of the power to exercise jurisdiction, and according to the opposing view international law prohibited forced execution on the property of a foreign State situated in a forum State, even where a court of the forum State had jurisdiction to adjudicate over the dispute. Among the relevant cases, the courts of Switzerland, the Netherlands and the Federal Republic of Germany held the former view, while a number of socialist Governments were inclined to the latter view. However, the tendency has been emerging recently among developed countries to restrict immunity from execution subject to certain safeguards for protected State property.

(2) An example of this restrictive trend is the United Kingdom State Immunity Act 1978 (sect. 13), which has served as a model also for the domestic legislation of South Africa, Singapore, Pakistan and, more recently, Australia. Under this system, provision is made for the enforcement of a judgment or an arbitral award in respect of State property which is for the time being in use or is intended to be used for commercial purposes. Another group of recent enactments along these lines, but which differs slightly from the above, is represented by the United States Foreign Sovereign Immunities Act of 1976 (sect. 1609) which, while setting up a general rule of immunity from execution, provides for a number of exceptions to the effect that property used for a commercial activity in the United States is subject to execution. The main difference between the two systems is that under the United Kingdom Act a waiver can apply to non-commercial as well as commercial property, whereas under the United States Act a waiver is only possible in respect of commercial property.

(3) The 1972 European Convention sets up a rather complex system. Although its basic rule is the general prohibition of enforcement measures subject to the possibility of express waiver, the Convention does provide for the direct obligation of contracting States to abide by a judgment rendered against them. In case of non-compliance, the plaintiff may institute proceedings before a court of the State against which the judgment has been rendered, and there is the further possibility of bringing an action before the European Tribunal. Still another possibility is the procedure of optional declaration, according to which judgments in cases arising from industrial or commercial activities may be enforced against the property of a debtor State that is used exclusively for such activities. With regard to the procedure laid down in the European Convention, one writer has said that the model presented by the Convention must be seen as "a compromise between countries with widely differing attitudes" and that "this solution does not commend itself for general use. It is based on a special confidence between the European countries parties to it which cannot be generalized".[33] It may be that the procedure established in the European Convention is too complex to serve as a guide for the Commission.

(4) Once again, the views expressed in the Commission were squarely opposed. Two members said that the principle of prohibition of execution against the property of a foreign State should be made clear. The Governments of some socialist States had expressed the same view in their written comments. However, several Governments, in commenting on particular phrases, had indicated that they were not basically opposed to the draft article as adopted on first reading. In addition, one representative in the Sixth Committee expressed concern that the provisions on measures of constraint might make it impossible to execute in one State a judicial decision rendered against another State. On the other hand, another representative favoured the reformulation of the draft article in such a manner as to make the principle of prohibition of execution against State property clear.

(5) With this background in mind, the Special Rapporteur suggests that the Commission proceed with the further consideration of part IV of the draft based on two alternatives. The first would be the text as adopted on first reading; the second would be a reformulation of the first alternative, but without the idea of total prohibition of execution, since it is the view of the Special Rapporteur, in the light of the written comments received so far and of observations made in the Sixth Committee and in the Commission, that carefully limited execution rather than its total prohibition would have a better chance of obtaining general approval. The Special Rapporteur has already commented on the first alternative in his two previous reports;[34] his comments on the second alternative are set out below.

(6) As regards article 12, the Special Rapporteur has taken into account the drafting suggestion of one member that the principle on measures of constraint be stated at the outset of part IV, as well as the suggestion by other members that the original articles 21 and 22 be combined

[33] C. H. Schreuer, *State Immunity: Some Recent Developments* (Cambridge, Grotius Publications, 1988), p. 128.

[34] Document A/CN.4/415, paras. 209-242; document A/CN.4/422 and Add.1, paras. 42-46 (see footnote 1 above).

in one article. The introductory clause of paragraph 1 states the principle of non-execution against the property of a foreign State in the territory of a forum State, with certain exceptions. The adopted text of the introductory clause of article 21 and of paragraph 1 of article 22 contained the bracketed phrase "or property in which it has a legally protected interest", over which there were differences of view among the members of the Commission. In their written comments, a number of Governments criticized the phrase as being vague and permitting a broadening of the scope of immunity from execution. Although a few members favoured its retention, the Special Rapporteur recommends that it be deleted.

(7) Exceptions to the principle on measures of constraint will thus apply (*a*) if a foreign State has expressly consented to such measures by agreement or contract (a reference to "arbitration agreement" is made in paragraph 1(*a*) (i), as arbitration seems to be one practical possibility), (*b*) if the foreign State has allocated or earmarked property for satisfaction of the claim, or (*c*) if the property is used for commercial purposes. The text of paragraph 1(*c*) was taken from the former article 21(*a*) but the bracketed word "non-governmental" has been deleted to conform with paragraphs 1 and 4 of article 18, and the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed" has been placed within square brackets, as views were divided with regard to it; in the light of the written comments of Governments, its deletion was proposed by the Special Rapporteur but was opposed by some members. As to paragraph 2, its text is identical to that of the former article 22.

(8) Only a few comments are necessary with regard to article 22, which is basically a reproduction of the former article 23, with a few changes. In the introductory clause of paragraph 1 the bracketed word "non-governmental" has been deleted for the same reason that it was deleted in articles 18 and 21, and because of the rewording of article 21 there is a consequential change in the reference to that article, from paragraph 1(*a*) to paragraph 1(*c*). The words "and used for monetary purposes" were added to paragraph 1(*c*) as a result of the written comments of one Government. In paragraph 2 the reference to article 22 has been replaced by a reference to article 21, because of the rearrangement of the articles.

(9) With regard to article 23, article 11 *bis* provides that if a State enterprise "engages in a commercial transaction with a foreign natural or juridical person, that State enterprise is subject . . . to the same rules and liabilities as are applicable to a natural or juridical person". This means also that in respect of measures of constraint the State enterprise is subject to the same rules and liabilities as are applicable to a natural or juridical person. As the logical consequence of the above, article 23 provides that, if a State enterprise is entrusted with a State property for commercial purposes, the State to which that State enterprise belongs cannot invoke immunity from the measure of constraint before the court of the forum State in respect of that State property.

PART V. MISCELLANEOUS PROVISIONS

Article 24. Service of process

Text adopted

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any special arrangement for service between the claimant and the State concerned; or

(*b*) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*c*) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or

(*d*) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1(*c*) and (*d*) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Text proposed

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(*a*) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(*b*) failing such a convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned.

2. Service of process referred to in paragraph 1(*b*) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied [, if necessary,] by a translation into the official language, or one of the official languages, of the State concerned [, or at least by a translation into one of the official languages of the United Nations].

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Comments

(1) In their written comments some Governments expressed the view that service of process should be

deemed to have been effected by transmission to the Ministry of Foreign Affairs, or that service of process should be effected through diplomatic channels. It was also pointed out that a special arrangement for the service of process between a claimant and the State would not be acceptable in many legal systems. In consideration of those views, the new paragraph 1 provides that service of process shall be effected either in accordance with an international convention or by transmission through diplomatic channels. In the case of the existence of a convention binding upon both the forum State and the State concerned, the service of process in accordance with the convention should have priority.

(2) The change in paragraph 2 is simply a consequence of the changes in paragraph 1.

(3) With regard to paragraph 3, several members commented that the bracketed words "if necessary" should be deleted. In view of the practical problems that would be encountered by the authority serving the process, if those words were deleted the Special Rapporteur would suggest that the bracketed phrase indicated be added at the end of the paragraph so that, in a case where translation into a language that was not widely used might give rise to difficulties for the authority serving the process, a translation into one of the official languages of the United Nations would be acceptable.

Article 25. Default judgment

Text adopted

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Text proposed

The only change recommended by the Special Rapporteur is the addition at the end of paragraph 1 of the words "and if the court has jurisdiction in accordance with the present articles".

Comments

(1) The concept embodied in the words which it is proposed to add at the end of paragraph 1 was suggested by one Government in its written comments, in order to make it clear that the default judgment should not be rendered merely by virtue of due service of process. The same idea was expressed by a member of the Commission. The Special Rapporteur has no objection to this addition if the other members so concur.

(2) Some members suggested that the words "if necessary" be deleted from paragraph 2, as proposed in the case of paragraph 3 of article 24. The Special Rapporteur suggests that the same solution be adopted for article 25 as for article 24.

Article 26. Immunity from measures of coercion

Text adopted

A State enjoys immunity, in connection with a proceeding before a court of another State, from any measure of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Comments

The Special Rapporteur has no proposal to make with regard to article 26. Two Governments in their written comments expressed doubts as to the appropriateness of the provision. One other Government, while endorsing the objective of the provision, suggested that it be reformulated in order to prevent the very possibility that such an order might be issued. The Special Rapporteur would prefer to keep the original formulation but would like to learn the views of other members.

Article 27. Procedural immunities

Text adopted

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Text proposed

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State which is a defendant in a proceeding before a court of another State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Comments

Two Governments in their written comments expressed the view that the provision on non-requirement of security should be amended to apply only to a State which is a defendant and suggested the reformulation of paragraph 2 based on that view. The reformulation was supported by one member of the Commission but doubts were expressed with regard to it by some other members.

Article 28. Non-discrimination

Text adopted

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(*a*) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(*b*) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

Comments

During the discussion at the last session of the Commission, some members suggested the deletion of article 28, and some others supported its retention. Since the subject will require careful consideration after general agreement has been reached on the preceding articles, the Special Rapporteur would prefer to retain the article in its present form for the time being.

DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

[Agenda item 5]

DOCUMENT A/CN.4/429 and Add.1-4

Observations of Member States received pursuant to General Assembly resolutions 43/164 and 44/32

[Original: English, French, Spanish]
[23 March, 11, 15 and 21 May and 15 June 1990]

CONTENTS

Introduction

1. In its resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind, the General Assembly, *inter alia*, invited the International Law Commission to continue its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind and requested the Secretary-General to continue to seek the views of Member States regarding the conclusions contained in paragraph 69(*c*) (i) of the Commission's report on its thirty-fifth session.[1]

2. In implementation of the above-mentioned resolutions, the Secretary-General, by notes dated 28 February 1989 and 15 February 1990, requested the views of Member States on the conclusions referred to above.

3. The replies received pursuant to resolution 43/164 were reproduced in a report submitted by the Secretary-General to the General Assembly at its forty-fourth session.[2]

4. The replies received subsequent to the distribution of that document will be reproduced in the relevant report to be submitted by the Secretary-General to the General Assembly at its forty-fifth session. They include the replies received from the Governments of eight Member States before 15 June 1990, which are reproduced below.

[1] Paragraph 69 (*c*) (i) reads as follows:

"(*c*) With regard to the implementation of the code:

"(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;".

(*Yearbook . . . 1983*, vol. II (Part Two), p. 16).

[2] The report (A/44/465) contained the replies received from the Governments of the following Member States: Brazil, Finland, Libyan Arab Jamahiriya and Sweden.

Argentina

[*Original: Spanish*]
[*23 April 1990*]

With regard to paragraph 3 of General Assembly resolution 44/32, the Government of Argentina considers that it is too early for the International Law Commission to discuss the question of the preparation of the statute of a competent international criminal jurisdiction for individuals. In its opinion, the consideration of that question should begin only after agreement has been reached on the definition of offences and penalties under an international criminal law system.

Australia

[*Original: English*]
[*7 May 1990*]

While conscious of the heavy workload of the International Law Commission, Australia supports the continued consideration by the Commission of the proposal for an international tribunal to deal with crimes against the peace and security of mankind. Such a view is consistent with Australia's support for General Assembly resolutions 44/32 and 44/39, its continuing endeavours to make the work of the Commission more timely and relevant and its recognition of the pressures imposed on the judicial systems of small States by major crimes such as international drug trafficking. The consideration of the practical difficulties implicit in the implementation of a proposed international tribunal would, in Australia's view, require the Commission to eventually consider the terms of any statute creating a competent international criminal jurisdiction for individuals. Australia therefore considers that the Commission's mandate should be understood as extending to the drafting of such a statute.

Belgium

[*Original: French*]
[*10 May 1990*]

In reply to the request made by the Secretary-General pursuant to paragraph 3 of General Assembly resolution 44/32 on the draft Code of Crimes Against the Peace and Security of Mankind, seeking the views of the Belgian Government regarding the conclusions contained in paragraph 69(*c*) (i) of the report of the International Law Commission on its thirty-fifth session, the Permanent Representative of Belgium has the honour to refer to the reply transmitted by his Government on 7 July 1988, which was before the General Assembly at its forty-third session.[1]

The reply read as follows:

1. It will be possible to implement the draft Code of Crimes against the Peace and Security of Mankind only to the extent that an international judicial organization is able to impose sanctions for breaches of the norms of that Code. It is with this in mind that the International Convention on the Prevention and Punishment of the Crime of Genocide provides, in article 6, that an international criminal court should have jurisdiction for the trial of persons charged with genocide. While the principle of universal punishment, which is set forth in a number of international conventions, to some extent offsets the lack of an international criminal jurisdiction, it must be recognized that the principle of universal punishment is not the ideal solution in respect of international crime; that is so for the two following reasons.

2. Firstly, there has always been some opposition to universal punishment because it makes national tribunals responsible for judging the conduct of foreign Governments. Secondly, it is logical that a crime which constitutes a breach of international order as such should be referred to a jurisdiction which is itself the expression and guarantor of that international order. Accordingly, it is essential that the mandate of the International Law Commission include the creation of an international criminal jurisdiction.

[1] See A/43/525.

Mali

[*Original: French*]
[*15 February 1990*]

1. Following the First World War, the international community felt the need to draw up an international criminal code and to set up an international criminal jurisdiction, but the will to do so could not be translated into reality until after the Second World War, when for the first time in history war criminals were put on trial, at Nürnberg.

2. The United Nations has made a consistent endeavour to draw up a draft code of crimes against the peace and security of mankind. After many years of suspension of this work, the General Assembly once again invited the International Law Commission to consider the issue of whether there is an international legal order, namely whether there are interests whose protection is not the concern of individual nations but of all mankind.

3. Environmental pollution problems (for example, destruction of the ozone layer or toxic waste) are a case in point. It is recognized that the environment is a matter of public concern and that it must therefore be given international protection. Likewise, all civilizations must receive equal protection. When it is a question of civilized nations, there is no room for slavery, colonization and domination by one race over another, or for hegemonistic wars, which constitute a negation of peace and security in the world or even crimes against humanity.

4. The Commission will have to list and define in a code acts whose perpetration would disrupt international peace, thus constituting crimes falling within the competence of an international criminal jurisdiction. However, the purpose of such a codification exercise, highly laudable though it may be, remains somewhat unclear, since no international criminal jurisdiction really exists and, moreover, many perpetrators of international crimes are heads of State or Government who, owing to their position, are beyond the reach of the law in their countries. At present, such political leaders are merely denounced before world public opinion. Since such denunciations are insufficient, sanctions are sometimes applied to their countries, wrongly.

5. The purpose of setting up an international criminal jurisdiction is to facilitate the prosecution and personal conviction of all perpetrators, whatever position they hold, of crimes against the peace and security of all mankind.

6. Such a project would inevitably have implications for domestic legislation, which must be brought into line with the measures adopted by the international community in the field of criminal law.

7. In view of the foregoing, the Government of Mali is of the view that the International Law Commission should proceed with the preparation of the draft statute of an international criminal jurisdiction.

Nigeria

[Original: English]
[25 April 1990]

Nigeria is of the view that it is rather premature at this stage for the International Law Commission to consider the preparation of a statute. There are still many issues which remain unsolved in the international criminal system relating to the definition of offences and penalties which would arise from such offences. The Commission should speed up action so that the definition of offences in the draft code can be completed in good time. As soon as the draft code is completed, the question of a statute for an international criminal tribunal for individuals could be deliberated on.

Norway

[Original: English]
[29 May 1990]

In the view of the Norwegian Government, the question of determining the extent of the International Law Commission's mandate in relation to the preparation of a statute for an international criminal jurisdiction for individuals should await further clarification of the underlying substantive issues.

Singapore

[Original: English]
[30 April 1990]

The Government of Singapore supports the request of the International Law Commission that its mandate extend to the preparation of the statute of a competent international criminal jurisdiction for individuals. The Government of Singapore also holds the view that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective.

Trinidad and Tobago

[Original: English]
[3 May 1990]

1. Trinidad and Tobago has always supported the formulation and adoption by States of a code of crimes against the peace and security of mankind. A code, once accepted by States, would serve as an important international legal instrument and would enumerate the most dangerous crimes which shock the conscience of States and disrupt international peace and security.

2. Certain crimes have assumed a transnational character which unfortunately severely limits the effectiveness of States to combat these crimes when acting within the confines of their domestic jurisdiction. Acts of genocide, torture, crimes against diplomats, mercenarism, terrorism and the illicit traffic in narcotic drugs across international frontiers all pose grave threats to the integrity of States and have the potential to undermine their stability, security and development.

3. The idea for the establishment of an international criminal jurisdiction and an international criminal court to deal with individuals accused of committing such crimes was, very broadly speaking, nurtured by scholars and non-governmental organizations until the Second World War. Following the establishment of the Nürnberg International Military Tribunal in 1946 it was envisaged that the jurisdiction of an international criminal court would cover individuals charged with violations of certain rules of international law, particularly in such fields as war crimes, genocide and other offences likely to disturb international peace.

4. Under the auspices of the General Assembly a draft statute for an international criminal jurisdiction was formalized in 1951, then revised in 1954.[1] There followed, however, a period of inactivity brought about by the contents of General Assembly resolution 1187 (XII) of 11 December 1957, in which the Assembly recommended that consideration of the question of an international criminal jurisdiction be deferred "until such time as the General Assembly takes up again the question of defining aggression and the question of a draft Code of Offences against the Peace and Security of Mankind".

5. Trinidad and Tobago recognizes that the proposal for the establishment of an international criminal jurisdiction has been on the agenda of the International Law Commission in its drafting of a code of crimes against the peace and security of mankind.

6. In exercising its mandate, the Commission has successfully categorized and defined a number of crimes which disrupt international peace and security, such as aggression, *apartheid*, colonialism and war crimes. Trinidad and Tobago notes the recent submission by Mr. Doudou Thiam, Special Rapporteur for the topic, of the draft articles on illicit traffic in narcotic drugs[2] and commends the Commission for its timely and positive response in the examination of this global problem.

7. Trinidad and Tobago firmly believes however that the elaboration of a code unaccompanied by penalties, a competent jurisdiction and a court would not be effective. In order to ensure that the code is effective, it would be necessary to establish a mechanism for its implementa-

[1] Draft statute prepared by the Committee on International Criminal Jurisdiction set up under General Assembly resolution 489 (V) of 12 December 1950 (*Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136, annex I), and revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction set up under General Assembly resolution 687 (VII) of 5 December 1952 (*ibid., Ninth Session, Supplement No. 12* (A/2645), annex).

[2] See below, p. 35, document A/CN.4/430 and Add.1, part II.

tion. It is in this regard that Trinidad and Tobago supports the establishment of a competent international criminal jurisdiction for individuals.

8. The judges of such a court would be appointed on the basis of their moral standing, their legal qualifications and their status as representatives of the world's legal systems. The jurisdiction of such a court, which would require the political support of States, would be derived from its own statute. The statute should seek to guarantee that body's objectivity and impartiality, and to ensure that a code of crimes against the peace and security of mankind is less open to varying interpretations. The draft statute should also suggest the parameters of the court's jurisdiction and, in accordance with the Charter of the United Nations, should seek to ensure adherence to the principles of sovereignty and non-interference in the internal affairs of States parties.

9. Trinidad and Tobago welcomes the "questionnaire-report" on the statute of an international criminal court submitted by Mr. Doudou Thiam in his eighth report,[3] which will enable States to consider provisions that may be included in the statute of an international criminal court.

10. Trinidad and Tobago firmly believes that the international community should attach high priority to the Commission's useful and productive work on the formulation of the draft code and to the proposals contained in the "questionnaire-report" on the statute of an international criminal court. The possible alternatives submitted in the latter document would not only facilitate the work of the Commission but would also assist States in their examination of the feasibility and the merits of establishing an international criminal jurisdiction.

11. In this context, the Government of Trinidad and Tobago is of the view that, in order to facilitate the fullest possible consideration of the question of an international criminal jurisdiction, the Commission could appoint either a special rapporteur or a working group to that end.

[3] See document A/CN.4/430 and Add.1, part III.

DOCUMENT A/CN.4/430 and Add.1

Eighth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur

[*Original: French*]
[*8 March and 6 April 1990*]

CONTENTS

Introduction

1. The present report, which is the eighth in the series of reports submitted by the Special Rapporteur to the International Law Commission on the draft code of crimes against the peace and security of mankind, is in three parts.

2. Part I concerns the "related offences" or "other offences"—i.e. complicity, conspiracy (*complot*) and attempt—which the Special Rapporteur had occasion to discuss in his fourth report[1] and on which he is submitting draft articles, accompanied by comments.

3. Part II concerns international drug trafficking, pursuant to the Commission's decision, at its forty-first session, to request the Special Rapporteur to prepare a draft provision on the question.[2] In the light of the views expressed by several members of the Commission,[3] the Special Rapporteur is submitting two draft articles, accompanied by comments, one defining international drug trafficking as a crime against peace and the other defining it as a crime against humanity.

4. Part III deals in a preliminary manner with the question of the statute of an international criminal court, for which the Special Rapporteur offers the Commission various possible solutions.

[1] *Yearbook . . . 1986*, vol. II (Part One), pp. 63 *et seq.*, document A/CN.4/398, paras. 89-145.

[2] *Yearbook . . . 1989*, vol. II (Part Two), p. 65, para. 210.

[3] *Ibid.*, paras. 205-209.

PART I. COMPLICITY, CONSPIRACY (*COMPLOT*) AND ATTEMPT

A. Complicity

1. Draft article 15

5. The Special Rapporteur proposes the following draft article 15:

Article 15. Complicity

The following constitute crimes against the peace and security of mankind:

1. Being an accomplice to any of the crimes defined in this Code.

[2. Within the meaning of this Code, complicity may mean both accessory acts prior to or concomitant with the principal offence and subsequent accessory acts.]

2. Comments

(a) *Remarks on methodology*

6. Before article 15 is considered, a question of methodology must be resolved. Some members of the Commission maintained that the concept of complicity should be included in the general part of the draft code, dealing with general principles, rather than in the part dealing with the crimes themselves. The Special Rapporteur does

not agree. It is no doubt axiomatic that the accomplice incurs the same criminal responsibility as the principal. But the affirmation of this principle is one thing, and the definition of the crime of complicity itself is another. Complicity, as a crime, should be included in the part of the code dealing with the definition of offences.

(b) *Paragraph 1*

(i) *Physical and intellectual acts of complicity*

7. Acts of complicity can be divided into two categories: physical acts (aiding, abetting, provision of means, gifts etc.) and acts which are intellectual or moral in character (counsel, instigation, provocation, orders, threats etc.).

8. Aiding, abetting, and provision of means and gifts are specific physical acts. In the case of acts in this category, it is relatively easy to draw a distinction between the principal—the person who has killed, for example—and the accomplice—the person who aided and abetted the principal or provided him with the means to kill.

9. The problem is more complex in the case of acts of an intellectual character. It is sometimes difficult to determine who is the principal and who the accomplice: the person who inspired, instigated or ordered an act, or the person who actually committed it. In such situations, those who ordered, inspired or instigated the commission of a criminal act have sometimes been considered as "originators" (*auteurs intellectuels*), sometimes as indirect perpetrators and sometimes as accomplices. On other occasions, those who gave the order and those who executed it have been considered as co-perpetrators. Everything depends on the circumstances of the case and the degree of participation of the persons involved, and also on the legal system.

10. It is for this reason that the laws of some countries provide examples in which superiors are considered the accomplices of their subordinates. Thus, the French Ordinance of 28 August 1944 on the punishment of war crimes (art. 4) provides that where a subordinate is prosecuted as the actual perpetrator, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organized or tolerated the criminal acts of their subordinates. A similar approach is taken in the Luxembourg Act of 2 August 1947 on the punishment of war crimes (art. 3), the Greek Constitutional Act. No. 73 of 8 October 1945 on the trial and punishment of war criminals (art. 4) and the Chinese Act of 24 October 1946 on the trial of war criminals (art. 9).

11. The United States Supreme Court, in the *Yamashita* case, considered that complicity could result from an army commander's breach of his duty to control the troops under his command, which in the case in question had led to serious violations of the laws and customs of war.[4]

12. Along the same lines, one may also cite the judgment of the International Military Tribunal for the Far East, which extended this complicity to members of the Government and to all officials concerned with the well-being of protected persons.[5] Again, in the *Hostages* case, a presumption of responsibility was established in the case of corps commanders for acts committed by their subordinates which they "knew or ought to have known about".[6]

13. These examples show that there is no hard and fast distinction between the concepts of principal perpetrator, co-perpetrator and accomplice. The content of these concepts varies from one penal code to another. The difficulty of establishing precise criteria for distinguishing between accomplices, principal perpetrators, co-perpetrators and so on probably explains why the Charters of the International Military Tribunals referred, in the same articles and without distinction, to "leaders, organizers, instigators and accomplices" (art. 6 *in fine* of the Charter of the International Military Tribunal[7] and art. 5(*c*) of the Charter of the International Military Tribunal for the Far East),[8] or again, any person who "was an accessory to the commission of a crime or ordered or abetted the same or took a consenting part therein" (art. II, para. 2, of Law No. 10 of the Allied Control Council).[9] These brief references illustrate the scope of the concept of complicity and the variety of its content, which are reflected both in the acts of complicity and their characterization and in the status of those committing such acts.

(ii) *Acts of complicity and their characterization*

14. Penal codes vary in their approach to the different categories of acts of complicity. Thus, some codes do not qualify counsel as a crime (for example, the French Penal Code). Others, on the other hand, consider that counsel to commit a crime is an act of complicity. The Canadian Criminal Code, for example, defines counsel as the act of procuring, abetting or leading a person to commit an offence (art. 22).

15. Concerning another aspect of the question, it may be observed that in the laws of some countries negative acts such as abstention or non-intervention are not defined as crimes or are so defined only on very rare occasions (for example, the French Ordinance of 28 October 1944 on the punishment of war criminals). In the laws of other countries abstention is defined as a crime; this is the case in German law.

[4] See *Law Reports of Trials of War Criminals* (15-volume series, prepared by the United Nations War Crimes Commission) (London, H.M. Stationery Office, 1947-1949), vol. IV, p. 43; and *United States Reports* (Washington, D.C., 1947), vol. 327, pp. 14-15.

[5] See *Law Reports of Trials . . .*, vol. XV, pp. 72-73.

[6] See *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (Nuernberg, October 1946-April 1949) (15-volume series, hereinafter referred to as "American Military Tribunals") (Washington, D.C., U.S. Government Printing Office, 1949-1953), case No. 7, vol. XI, p. 1303.

[7] Hereinafter referred to as the "Nürnberg 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).

[8] See *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

[9] 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)).

16. This diversity is also reflected in the actual characterization of the act of complicity. An act regarded as an act of complicity in one legal system will be considered a separate offence in another system. The typical example is concealment.

17. Sometimes, the characterization has evolved over time within the same system of law. For example, the French Penal Code, between 1810 and 1915, then from 1915 to the present day, has made various changes in the classification of the concept of concealment: in the 1810 Code concealment was characterized as an act of complicity, then in 1915 as an autonomous offence.

18. Generally speaking, when an act of complicity has certain specific features or attains a certain degree of seriousness, there is a tendency to detach it from complicity and make it a separate offence. This rule also applies in international law. Thus, following the judicial precedents set in the *Yamashita* case[10] and others, complicity by a military commander was made an autonomous offence under article 86, paragraph 1, of Additional Protocol I to the 1949 Geneva Conventions.[11] These successive and diverse characterizations demonstrate the complexity and evolutionary character of the content of the concept of complicity.

(iii) *The actors*

19. On turning to the actors in the drama, those who play a role in complicity, we again note the existence of grey areas, areas of uncertainty. To find a way among the concepts of principal perpetrator, co-perpetrator, direct perpetrator, indirect perpetrator and accomplice is a most uncertain undertaking.

20. The laws of some countries do not define the perpetrator: for example, the 1810 French Penal Code, the 1871 German Code, the 1889 Finnish Code, the 1902 Norwegian Code, the 1930 Danish Code, the 1930 Italian Code, the 1932 Polish Code, the 1937 Chinese Code, the 1940 Icelandic Code, the 1950 Greek Code, the 1951 Yugoslav Code and the 1954 Greenland Code.

21. The penal codes of other countries, however, do define the perpetrator: these include the 1867 Belgian Code (art. 66), the 1879 Luxembourg Code (art. 66), the 1881 Netherlands Code (art. 47), the 1886 Portuguese Code (art. 20), the 1932 Philippine Code (art. 17), the 1936 Cuban Code (art. 28), the 1951 Egyptian Code (art. 39), the 1944 Spanish Code (art. 14), the 1951 Bulgarian Code (art. 18), the 1957 Ethiopian Code (art. 32), the 1961 Soviet Code (art. 17), the 1961 Hungarian Code (art. 13), and the 1961 Czechoslovak Code (art. 9).

22. This uncertainty regarding definition becomes perplexity if one seeks to assign the actors to one category or another and to determine the precise role played by each. Reduced to its simplest terms, complicity involves two actors: the physical perpetrator of the offence (thief, murderer etc.), called the principal, and the person who assists the principal (by aiding, abetting, provision of means etc.), who is called the accomplice. But this simple schema does not reflect the complex reality of the phenomenon of complicity in the context of the topic under consideration. As we have just seen, situations may arise in which it is hard to tell who is the principal and who is the accomplice, especially when acts of an intellectual or moral character (counsel, incitement, order, abuse of authority) are involved. There, the hierarchical relationship which sometimes exists between the actual perpetrator of the act and his superior makes it difficult to conceive of the latter as the accomplice of the former, in so far as the role of the accomplice is acknowledged to be a secondary one. That is the reason why such offences are sometimes separated from complicity and characterized separately. This is so in the case of a military commander who is held responsible for crimes or offences committed by his subordinates, as we have already seen.

23. It should also be noted that the giving of orders and counsel is sometimes difficult to prove when it has not been done in writing. Moreover, those who have given an order are very often not present when it is carried out; sometimes, as in the case of leaders or organizers, they are not even informed of every offence committed in application of the general plan which they drew up and which guided the conduct of those who committed the offences. This case will be analysed at greater length in connection with draft article 16, on conspiracy (*complot*) (para. 46 below). As regards the offences under discussion here, the traditional moulds are broken. The classic dichotomy of principal and accomplice, which is the simplest schema, is no longer applicable because of the plurality of actors. The dualistic classification gives way to the broader concept of participants, which encompasses both principals and accomplices. It might sometimes be wondered whether all the actors should not be defined as participants, without it being necessary to determine the precise role played by each of them.

24. In their decisions, military tribunals have sometimes refused to draw a distinction between principals and accomplices. For example, the Supreme Court of the British Zone considered that the act of complicity and the principal act were both crimes against humanity and that consequently accomplices should be sentenced for having committed a crime against humanity and not for being accomplices in the commission of such a crime.[12] The acts in question—whether principal acts or accessory acts—are all acts of participation and are not subordinate to each other in any way. They are equivalent as regards responsibility, even if certain subjective considerations, such as intent or degree of awareness, come into play in the imposition of the penalty.

25. At this level of analysis, the distinction between principal act and accessory act disappears completely and the two concepts merge in the more general concept of criminal participation, which encompasses both. The distinction between the concepts of principal and accomplice likewise disappears, giving way to the concept of participant, which is applied to all those involved in a crime

[10] See footnote 4 above.

[11] Protocol 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).

[12] *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (Berlin, 1949), vol. 1, p. 25 (cited in H. Meyrowitz, *La répression par les tribunaux allemands des crimes contre l'humanité et de l'appartenance à une organisation criminelle en application de la loi n° 10 du Conseil de contrôle allié* (Paris, Librairie générale de droit et de jurisprudence, 1960), p. 373).

committed through participation. This is the principle of placing all participants in a crime on an equal footing.

26. In its broadest sense, the concept of criminal participation encompasses not only the traditional concept of complicity, but also that of conspiracy (*complot*), so that both concepts could have been covered in a single provision under the heading of criminal participation. The Special Rapporteur has nevertheless preferred to devote separate articles to complicity and conspiracy (*complot*), while bearing in mind that the content of these concepts changes as soon as they are transposed to international law, because of the mass nature of the crimes involved and the plurality of acts and actors (which makes it difficult to define the roles played by the various actors).

27. The complexity of the concept of complicity is also reflected in the links of causality between the act of complicity and the commission of the principal offence. This raises the problem of whether the act of complicity was committed before or after the offence, which is dealt with in paragraph 2 of draft article 15.

(c) *Paragraph 2*

28. Paragraph 2 concerns the question whether the act of complicity was committed before or after the principal act. Is the concept of complicity limited to acts committed prior to or concomitantly with the principal act? Can it also encompass acts committed after the principal act? Here again the solutions vary according to the legal system.

29. For certain legal systems, acts committed after the principal act constitute autonomous offences, even if they are linked to the principal act. This is the case with concealment of persons or property or non-denunciation of the offence. This method is generally said to be that of the Continental legal systems, as opposed to the common-law systems. It is not the intention here to undertake a comparative law study but simply to choose some examples which illustrate the point. Thus, the Canadian Criminal Code[13] contains, in section 23 (1), a specific provision concerning the accessory after the fact, which reads:

> 23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.

30. This *post factum* offence is based on the idea that participation is not limited to a link to an offence to be committed in the future or in the course of being committed, but may also be linked to an offence already committed. It is therefore not absolutely necessary that there should be a causal relationship between the act of the accomplice and the offence itself.

31. This concept, today too closely linked to the common law, derives from Roman law, which drew a distinction between various phases in the *cursus plurium delictum*: *antecedens, concomitans, subsequens*. We have seen that in 1810 the French Penal Code still made concealment an offence of complicity. Not until a later stage was concealment of property defined as a specific crime. And even today, concealment of wrongdoers (art. 61, first para.) remains a crime of complicity.

32. Today, there are no longer two separate legal systems, one of which limits the definition of complicity to prior or concomitant acts of participation, while the other includes also acts committed later. There is, rather, a diversity of approaches in this domain.

33. Contemporary Continental law refers also to acts of complicity committed after the principal offence. Thus, the 1975 Penal Code of the German Democratic Republic provides, in article 22, paragraph (2), 3, that "as a participant in a punishable act a person is criminally responsible who . . . renders the perpetrator previously promised assistance after the act (aiding and abetting)". According to French judicial practice, aiding or abetting after the commission of an offence constitutes complicity if it results from a prior agreement.[14] Under the Penal Code of the Federal Republic of Germany, "whoever renders assistance to a person who has committed an unlawful act with the intention of securing for him the fruits of that crime" (art. 257, para. 1) and "whoever, acting intentionally or knowingly, obstructs, either altogether or partially, the imposition of criminal punishment . . . on another for an unlawful act" (art. 258, para. 1) shall be prosecuted for complicity. Soviet penal law acknowledges a form of complicity subsequent to the principal offence. According to Igor Andrejew, this concept is based on the idea of "contact", i.e. on a direct link between the subsequent act and the offence committed previously.[15]

34. Turning to international criminal law, it should be recalled that the international military tribunals applied this extended concept of criminal participation in their decisions. In the *Funk* case, the accused, in his capacity as Minister of Economics and President of the Reichsbank, had signed an agreement with the SS under which they delivered to the Reichsbank the valuables and gold, including that obtained from spectacles and false teeth, that had belonged to murdered Jews. The Nürnberg Tribunal was of the opinion that there had been express or tacit consent on the part of Funk to acts of concealment of goods improperly acquired subsequent to the death of their owners. According to the Tribunal: "Funk has protested that he did not know that the Reichsbank was receiving articles of this kind. The Tribunal is of the opinion that he either knew what was being received or was deliberately closing his eyes to what was being done."[16]

35. These examples prove that any attempt at rigid classification in this matter is a risky undertaking. It would probably be preferable to simplify in this area, in one way or another.

36. The resolution on the question of the modern approach to the concepts of principal and participation in

[13] See *Revised Statutes of Canada 1970* (Ottawa, 1970), vol. II, p. 1505.

[14] Judgment of 30 April 1963 of the Criminal Chamber of the Court of Cassation (*Bulletin des arrêts de la chambre criminelle de la Cour de cassation* (Paris), No. 157).

[15] I. Andrejew, *Le droit pénal comparé des pays socialistes* (Paris, Pedone, 1981), pp. 61 *et seq.*

[16] See *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 14 November 1945-1 October 1946) (official English text, 42 volumes) (Nürnberg, 1947-1949), vol. I, p. 306; cited in Meyrowitz, *op. cit.* (see footnote 12 above), p. 377.

the offence adopted by the Seventh International Congress of Penal Law, held at Athens in 1957, stated: "Acts of subsequent assistance not resulting from a prior agreement, such as concealment, should be punished as special offences" (sect. B, para. 5).[17]

37. It is true that legal writers tend to detach this *post factum* participation from complicity. Despite this tendency, however, it must be acknowledged that in this area penal legislation is not yet uniform and that indeed, as we have seen, great diversity exists. Since the Special Rapporteur cannot propose a single rule without denying the coexistence of these two tendencies, he has felt it preferable to propose a text which takes that coexistence into account. That is the purpose of paragraph 2 of draft article 15, which is placed in square brackets.

(d) *Conclusion*

38. These comments lead to the conclusion that in international criminal law complicity is a very broad concept, not only because of the innumerable quantity and diversity of the acts and actors involved in criminal participation but also because of the scope of its application in time, which may cover both acts committed before the principal offence and acts committed afterwards. To use the terminology of the theatre, it may be said that, among the crimes under consideration, complicity is a drama of great complexity and intensity.

B. Conspiracy

1. DRAFT ARTICLE 16

39. The Special Rapporteur proposes the following draft article 16:

Article 16. Conspiracy

The following constitute crimes against the peace and security of mankind:

1. Participation in a common plan or conspiracy to commit any of the crimes defined in this Code.

2 (FIRST ALTERNATIVE). Any crime committed in the execution of the common plan referred to in paragraph 1 above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution.

2 (SECOND ALTERNATIVE). Each participant shall be punished according to his own participation, without regard to participation by others.

2. COMMENTS

(a) *Paragraph 1*

40. Paragraph 1 characterizes conspiracy, namely participation in a common plan with a view to committing a crime against the peace and security of mankind, as a crime.

41. There are two degrees of conspiracy. The first degree consists in agreement, namely a concordance of intentions or an accord between two or more individuals with a view to committing a crime. The second degree concerns physical acts to carry out the crime planned.

42. Paragraph 1 concerns agreement. If the draft code makes agreement a separate offence, regardless of any physical act, it will do so in order to act as a deterrent. The aim would be to prevent individuals from exonerating themselves on the basis of the argument that they did not participate in the physical act of implementing the proposed plan.

43. Mere agreement to formulate a criminal plan is, in and of itself, a crime against the peace and security of mankind. Such a characterization is not peculiar to the crimes under consideration. In many legal systems criminal agreement is a crime, in and of itself, even if it is not followed by a physical act.

(b) *Paragraph 2*

(i) *First alternative*

44. Paragraph 2 concerns the second phase of conspiracy, namely the execution of the common plan. It combines the concepts of collective responsibility and individual responsibility: any act by any of the participants with a view to executing the common plan simultaneously attaches criminal responsibility to the perpetrator of such act and to all the participants in the conspiracy.

45. This twofold responsibility of participants was laid down in the Nürnberg Charter (art. 6 *in fine*). Some members of the Nürnberg Tribunal entered major reservations in respect of this twofold responsibility. They considered it unacceptable to hold an individual responsible for crimes that he had not personally committed. Other members, on the other hand, were in favour of strict implementation of the last paragraph of article 6 of the Charter, which was based on the definition of the theory of conspiracy put forward by Chief Prosecutor Jackson.[18] According to the Chief Prosecutor, conspiracy implies a twofold responsibility: individual responsibility and collective responsibility. In a common plan, each individual is responsible not only for acts committed by him personally in execution of the plan but also for all acts committed by anyone else who participated in the plan, even if the person concerned was not present when the acts in question were committed and was not even informed of their commission.

46. The provision contained in the last paragraph of article 6 owes its existence to the emergence of a hitherto barely known category of participants, namely organizers. In this context, an organizer is regarded as the individual who conceived of, organized or directed the crime. This type of participation is unquestionably the most dangerous one occurring in our time. Leaders and organizers are not always visible. They conceive of the crime, give orders, but stay away from the theatre of operations. Since they are not present when the plan is executed, they do not have knowledge of every offence

[17] See *Actes du VII^e Congrès international de droit pénal* (Athens, 26 September-2 October 1957), *Compte rendu des discussions* (Athens, 1961), p. 349.

[18] In this connection, see the fourth report by the Special Rapporteur, document A/CN.4/398 (footnote 1 above), para. 123.

committed by those who execute their orders, particularly when the offences in question are numerous and of a diverse and mass nature. That was so in the case of the major war criminals, who therefore had to be held responsible under the Nürnberg Charter not only for the conception and organization of the criminal activity but also for every individual crime committed in execution of the plan formulated by them.

47. This special responsibility of organizers was clarified in particular by the Soviet jurist A. N. Traïnin, who became a member of the Soviet delegation to the 1945 London Conference. In his study, published in Moscow in 1944,[19] Traïnin distinguishes between two categories of responsible individuals: direct perpetrators of the crime and indirect perpetrators—namely, responsible government officials, members of a military command, financial and economic leaders, etc. Those indirect perpetrators are organizers. Even although they bore a greater responsibility, they would have entirely escaped punishment if only the direct perpetrators of the crimes organized by them had been prosecuted. The last paragraph of article 6 of the Nürnberg Charter is based on this idea, but it was Chief Prosecutor Jackson who, where the Tribunal was concerned, linked the idea to the conspiracy theory and gave it the twofold content of individual responsibility and collective responsibility.

48. It should be noted that the words *complot* and conspiracy are synonymous in the Nürnberg Charter and that they correspond to each other in the English and French texts of the Charter.

49. The solution chosen by the Nürnberg Tribunal consisted in limiting the application of conspiracy to crimes against peace. The Tribunal was of the view that the crimes against peace referred to in article 6(*a*) of its charter, namely "planning, preparation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances", could be committed only by responsible government officials linked with one another by collective responsibility.

50. In its 1954 draft code[20] the Commission, unlike the Nürnberg Tribunal, extended the concept of conspiracy to cover all crimes against the peace and security of mankind. Article 2, paragraph (13) (i), of the 1954 draft referred to "conspiracy to commit any of the offences defined in the preceding paragraphs of this article". That represented a considerable extension.

51. In many legal systems, the concept of conspiracy has traditionally been applied more to crimes against the State. It is the State that is the target when crimes are directed against its institutions, its territorial integrity or its security.

52. This definition would appear to be too restrictive in the case of crimes against the peace and security of mankind. The State is not the only entity involved; there are others, including ethnic, religious and cultural entities. Crimes committed against those entities are precisely those which constitute crimes against humanity. Genocide and *apartheid* are thus not directed against a State but against ethnic entities. Moreover, the concept of *complot* or conspiracy was included in the conventions on genocide and *apartheid.*

53. It should be pointed out, furthermore, that the Nürnberg Tribunal's restrictive interpretation was not uniformly followed by all the military tribunals. For example, the concept of collective responsibility was applied in the *Pohl* case, which did not involve a crime against peace. The United States Military Tribunal stated in the judgment it rendered:

> The fact that Pohl himself did not actually transport the stolen goods to the Reich or did not himself remove the gold from the teeth of dead inmates, does not exculpate him. This was a broad criminal program, requiring the co-operation of many persons, and Pohl's part was to conserve and account for the loot. Having knowledge of the illegal purposes of the action and of the crimes which accompanied it, *his active participation even in the after-phases of the action makes him* particeps criminis *in the whole affair**.[21]

54. Today, the ever-greater need to deal more and more with the continuing growth of collective crime and with the new problems to which it gives rise must be met by means of legal solutions that are geared better to punishment requirements. The argument between those in favour of individual responsibility and those in favour of collective responsibility is thus gradually subsiding.

55. Major crimes can no longer be regarded as acts committed by isolated individuals. It is private individuals, organized in associations or groups in order to increase the impact of their action, and sometimes also officials holding a high political, civil or military position, who commit or abet the commission of the crimes under consideration. The law therefore responds to this new dimension of crime by providing a new definition of criminal responsibility, which in the cases in question takes a collective form, since it is becoming increasingly difficult to determine the role played by each participant in a collective crime.

56. It was above all the twofold responsibility implied by the concept of conspiracy that gave rise to reservations by some members of the Nürnberg Tribunal. Henri Donnedieu de Vabres, who had been the French member of the Tribunal, indicated in this connection that it was "an interesting but somewhat far-fetched construction".[22] That eminent jurist would perhaps have a different opinion today.

57. Studying the phenomenon of collective crime, Roger Merle and André Vitu indicate that:

> The legal problems to which these collective offences give rise no longer occur in quite the same criminological context as at the time of Napoleon, and the way of solving such problems naturally has a tendency to evolve. Faced with the two main alternatives that immediately come to mind, namely, the individual responsibility of each member of the group based on the role played by him in the action in question, or the collective responsibility of all participants, traditional specialists in criminal law were obviously won over to the first alternative, which, it seemed, was the only option in keeping with the principle of the individualization of the penalty, and rejected the second alternative, of which old forms of legislation had provided too many unfortunate examples. However, that laudable position of principle did not withstand the pressure exerted by the logical course of events for

[19] English translation: A. N. Traïnin, *Hitlerite Responsibility under Criminal Law* (London, Hutchinson & Co., 1945).

[20] Adopted by the Commission at its sixth session, in 1954 (*Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693), pp. 11-12, para. 54; reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18).

[21] American Military Tribunals (see footnote 6 above), case No. 4, vol. V, p. 989.

[22] H. Donnedieu de Vabres, *Le procès de Nuremberg*, course of lectures (Paris, Domat-Montchrestien, 1948), p. 254.

long. . . . While continuing to show the same attachment to the principle of personal criminal responsibility, contemporary specialists in criminal law seem more tempted than their predecessors to draw more extensive consequences from the collective nature of the offence.[23]

58. Some authors who have studied the impact of specific laws on criminal law in general have reached the conclusion that "criminal law, which has traditionally been subjective, is increasingly taking the path of anonymity, risk and objectivization".[24] It is a fact that in order to respond to new situations resulting from developments in the field of criminology it is increasingly specific laws that meet the need for punishment, and such laws depart from the principles of traditional criminal responsibility.

59. Moreover, some codes now lay down the principle of collective responsibility. Article 23 of the Yugoslav Penal Code specifies: "Whoever creates or exploits an organization, a band, a conspiracy, a group or some other association for the purpose of committing criminal offences shall be punished for all criminal offences resulting from the criminal plan of such associations as if he himself had committed them".

(ii) *Second alternative*

60. The second alternative for paragraph 2 is based on the principle of individual responsibility, examples of which can be found in some penal codes. The Penal Code of the Federal Republic of Germany specifies, in article 29, that "each participant shall be punished according to his own individual guilt, without regard to the guilt of others".

61. The Penal Code of the German Democratic Republic goes further, in article 22, paragraph 3, in that it introduces more nuances. Under that provision, the extent of criminal responsibility is assessed on the basis of the seriousness of the act as a whole, the manner in which the participants took joint action, the extent and the effects of the individual's contribution to the act, and his motives, as well as the extent to which he brought about participation by other individuals. The purpose of the provision, which is very detailed, is to determine the precise extent of the responsibility of the individual. The question may be asked, however, whether it is really applicable in the case of crimes such as those under consideration, and whether it is suited to modern criminology and meets the need for punishment of the offences involved.

(c) *Conclusion*

62. It will be noted that although complicity and conspiracy are two separate concepts, they are very similar and sometimes overlap. The concept of conspiracy implies a certain degree of complicity among the members of the conspiracy, who support, aid and abet one another. Conspiracy, like complicity, implies agreement and a concordance of intentions. The two concepts therefore often produce the same phenomenon, namely group crime, and that is why article 6 of the Nürnberg Charter included organizers and accomplices in the same text in situations where accomplices participated in a common plan.

C. Attempt

1. Draft article 17

63. The Special Rapporteur proposes the following draft article 17:

Article 17. Attempt

The following constitutes a crime against the peace and security of mankind:

Attempt to commit a crime against the peace and security of mankind.

2. Comments

64. It will be noted that the concept of attempt is not included in the charters of the international military tribunals; it is therefore understandable that the concept was also not included in the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal", drawn up by the Commission in 1950.[25] On the other hand, the concept of attempt is included in article 2, paragraph (13) (iv), of the 1954 draft code, but it is not defined there.

65. Generally, attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator's intention. This concept has given rise in the past and continues to give rise to interesting theoretical discussions.[26]

66. The theory of attempt can be applied only to a limited extent in the area of the crimes under consideration, owing to the nature of the offences involved. For example, what form does attempt to commit an act of aggression take? When can it be said that commencement of execution of an act of aggression exists? Can the borderline between commencement of the execution of an act of aggression and the act of aggression itself be established? If one considers the crime of threat of aggression, the situation is even more perplexing. Is it possible to speak of attempt to make a threat of aggression? Can one speak of attempt to prepare aggression, or of attempt to breach a treaty? Can one speak of attempt to implement *apartheid* or of attempt to commit genocide?

67. The concept of attempt must, however, not be disregarded; most crimes against humanity (for example, genocide and *apartheid*) consist in a series of specific criminal acts (for example, murders and assassinations), and attempt is altogether conceivable in such cases.

[23] R. Merle and A. Vitu, *Traité de droit criminel*, 6th ed. (Paris, Cujas, 1988), pp. 644-645.

[24] R. Legros, "L'influence des lois particulières sur le droit pénal général". *Revue de science criminelle et de droit pénal comparé* (Paris), vol. 23 (1968), p. 234.

[25] For the text, see *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

[26] See the fourth report of the Special Rapporteur, document A/CN.4/398 (footnote 1 above), paras. 142-145.

PART II. INTERNATIONAL ILLICIT TRAFFIC IN NARCOTIC DRUGS

A. Illicit traffic in narcotic drugs: a crime against peace

1. DRAFT ARTICLE X*

68. The Special Rapporteur proposes the following draft article X:

Article X. Illicit traffic in narcotic drugs: a crime against peace

The following constitute crimes against peace:

1. Engaging in illicit traffic in narcotic drugs.

2. Illicit traffic in narcotic drugs means any traffic organized for the purpose of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the conventions which have entered into force.

2. COMMENTS

(a) *Paragraph 1*

69. Paragraph 1 deals with traffic in narcotic drugs as a crime against peace. Naturally, that does not cover traffic in narcotic drugs constituting acts by isolated individuals that are punished by the legislation of the country in which they are perpetrated. What is being dealt with here is large-scale trafficking by associations or private groups, or by public officials, either as principals or accomplices in the trafficking.

70. Such trafficking can give rise to a series of conflicts, involving for example the producer or dispatcher State, the transit State and the destination State. The threat to peace is even greater when organized groups infiltrate Governments, with the result that the State itself becomes to a certain extent the perpetrator of the internationally illicit act.

(b) *Paragraph 2*

71. Paragraph 2 concerns substances in which trafficking is considered to be illicit. It seems unnecessary to enumerate these substances in the draft, as they are listed in the conventions in force, mainly in the 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Geneva Protocol amending the Single Convention[27] and in the 1971 Convention on Psychotropic Substances.[28]

(c) *Relationship between the draft code and the conventions in force*

72. In defining traffic in narcotic drugs as a crime against the peace and security of mankind, the draft code meets the requirements of the international community, which regards the phenomenon in question more and more as one of the greatest scourges of mankind.

73. In the 1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs,[29] the contracting States undertook, in article 2, to punish illicit traffic in narcotic drugs, conspiracy, attempts and preparatory acts severely, particularly by imprisonment or other penalties of deprivation of liberty. The relevant provisions were included in the 1961 Single Convention on Narcotic Drugs.

74. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1988,[30] provides, in article 3 (Offences and sanctions), that the contracting parties shall adopt the measures necessary to establish as criminal offences the offences referred to in paragraph 1 of the same article. In particular, the parties must ensure that their courts and other competent authorities can take into account factual circumstances that make the commission of the offences particularly serious, such as the involvement of the offender in other international organized criminal activities; the involvement of the offender in other illegal activities facilitated by commission of the offence; the use of violence or arms by the offender; and the fact that the offender holds a public office and that the offence is connected with the office in question (art. 3, para. 5(*b*) to (*e*)). All the aggravating circumstances referred to in the Convention make the criminal nature of the offence more and more pronounced and thus give it the serious nature required for crimes covered by the draft code.

B. Illicit traffic in narcotic drugs: a crime against humanity

1. DRAFT ARTICLE Y*

75. The Special Rapporteur proposes the following draft article Y:

Article Y. Illicit traffic in narcotic drugs: a crime against humanity

The following constitutes a crime against humanity:

Any illicit traffic in narcotic drugs, in accordance with the requirements laid down in article X of this Code.

2. COMMENTS

76. While constituting a threat to peace, drug trafficking also, and above all, constitutes a threat to humanity. It could be the downfall of mankind. The twofold characterization of illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity is therefore fully justified.

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* The Commission will have to decide on the place of this article in the part of the draft devoted to crimes against peace.

[27] United Nations, *Treaty Series*, vol. 976, p. 105.

[28] *Ibid.*, vol. 1019, p. 175.

[29] League of Nations, *Treaty Series*, vol. CXCVIII, p. 299.

[30] E/CONF.82/15 and Corr.2.

* The Commission will have to decide on the place of this article in the part of the draft devoted to crimes against humanity.

PART III. STATUTE OF AN INTERNATIONAL CRIMINAL COURT

A. Introductory remarks

77. This part of the report is a response to the approach taken by the Commission in draft article 4 (Obligation to try or extradite) adopted on first reading. It is stated in paragraph 3 of that article that the provisions of its paragraphs 1 and 2 do not prejudge the establishment and the jurisdiction of an international criminal court. Furthermore, the Commission indicated in the commentary (para. (5)) that paragraph 3 of article 4 deals with the possible establishment of an international criminal court and shows that the jurisdictional solution adopted in the draft article would not prevent the Commission from dealing, in due course, with the formulation of the statute of an international criminal court.[31]

78. In addition, part III is a response to paragraph 2 of General Assembly resolutions 43/164 of 9 December 1988 and 44/32 of 4 December 1989 on the draft Code of Crimes against the Peace and Security of Mankind. In that paragraph the Assembly notes the approach currently envisaged by the Commission in dealing with the judicial authority to be assigned for the implementation of the provisions of the draft code, and encourages the Commission to explore further all possible alternatives on the question.

79. Being of a preliminary character, this part III is rather in the nature of a "questionnaire-report". Its purpose is to offer the Commission some choices among the various possible solutions and to elicit responses. These choices deal mainly with the following points:

1. Competence of the court:
   (*a*) Jurisdiction limited to crimes mentioned in the code or jurisdiction as to all international crimes?
   (*b*) Necessity or non-necessity of the agreement of other States.
2. Procedure for appointing judges.
3. Submission of cases to the court.
4. Functions of the prosecuting attorney.
5. Pre-trial examination.
6. Authority of *res judicata* by a court of a State.
7. Authority of *res judicata* by the court.
8. Withdrawal of complaints.
9. Penalties.
10. Financial provisions.

B. Statute of the international criminal court

1. COMPETENCE OF THE COURT

(a) *Jurisdiction limited to the crimes mentioned in the code or jurisdiction as to all international crimes?*

Versions submitted

80. The Special Rapporteur submits the following versions:

VERSION A

There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind.

VERSION B

There is established an International Criminal Court to try natural persons accused of crimes referred to in the Code of Crimes against the Peace and Security of Mankind, or other offences defined as crimes by the other international instruments in force.

Comments

81. The question is whether international criminal jurisdiction will be limited to the crimes referred to in the draft code of crimes against the peace and security of mankind, or whether it will also encompass other international crimes which are not referred to in the code. As is well known, the draft code does not cover all international crimes. Among those not mentioned therein are the dissemination of false or distorted news, or false documents, with the intention of adversely affecting international relations; insults to a foreign State; the counterfeiting of currency practised by one State to the detriment of another State, and the theft of national or archaeological treasures; the destruction of submarine cables; and international trafficking in obscene publications.

82. Accordingly, since the concept of an international crime is broader than that of a crime against the peace and security of mankind and covers a wider field, which includes all other international crimes in addition to those defined in the code, the question is whether the jurisdiction of the court is limited to crimes against the peace and security of mankind, or whether the court will deal with all international crimes.

83. It would seem preferable to confer the broadest possible jurisdiction upon the court; otherwise, it would be necessary to establish two international criminal jurisdictions, which would lead to complications.

(b) *Necessity or non-necessity of the agreement of other States*

Versions submitted

84. The Special Rapporteur submits the following versions:

VERSION A

No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State in which the crime was committed, or by the State of which such person is a national, or by the State against which the crime was directed, or of which the victims were nationals.

VERSION B

Any State may bring before the Court a complaint against a person if the crime of which he is accused was

[31] For the text of article 4 and the commentary thereto, provisionally adopted by the Commission at its fortieth session, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 67-68.

committed in that State, or if it was directed against that State, or if the victims are nationals of that State. If one of the said States disagrees as to the jurisdiction of the Court, the Court shall resolve the issue.

Comments

85. Version A is based on article 27 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.[32] Is it appropriate? From the legal point of view, nothing prohibits a State from punishing crimes against its own security, even if such crimes are committed abroad by foreigners. Moreover, in the vast majority of cases this solution would lead to requesting the consent of Governments guilty of having organized or tolerated criminal acts.

2. Procedure for appointing judges

Versions submitted

86. The Special Rapporteur submits the following versions:

VERSION A

The judges shall be elected by the General Assembly of the United Nations, by an absolute majority of those present and voting, when convened by the Secretary-General of the United Nations.

VERSION B

The judges shall be elected by representatives of the States Parties to the Statute of the Court, by an absolute majority of the States present and voting.

Comments

87. Version B is based on article 11 of the revised draft statute prepared by the 1953 Committee on International Criminal Jurisdiction.[33] However, the small college envisaged in this provision seems to be out of keeping with the nature of crimes against the peace and security of mankind, which concern the international community as a whole. It should also be noted that there is a contradiction in article 11, which entrusts the election to a small body while at the same time assigning to the Secretary-General of the United Nations the task of convening the meetings for this election.

3. Submission of cases to the court

Versions submitted

88. The Special Rapporteur submits the following versions:

VERSION A

Cases may be brought before the Court by any State Member of the United Nations.

VERSION B

Cases may be brought before the Court by any State Party to this Statute.

VERSION C

Cases may be brought before the Court by any State Member of the United Nations subject to the agreement of the United Nations organ specified in the Statute of the Court.

Comments

89. Should the organ referred to in version C be the General Assembly or the Security Council? In the opinion of some, it should be the General Assembly, since abuse of the veto in the Security Council could paralyse the court. On the other hand, the General Assembly, by an absolute majority or a qualified, two-thirds majority, could provide a guarantee against improper complaints as well as against abuse of the veto.

4. Functions of the prosecuting attorney

Versions submitted

90. The Special Rapporteur submits the following versions:

VERSION A

A jurisconsult appointed by the complainant shall assume the functions of prosecuting attorney. He shall draw up the indictment and shall be responsible for conducting the prosecution if the case is committed for trial before the full Court.

VERSION B

A prosecuting attorney-general assigned to the criminal court shall assume the functions of conducting the prosecution if the case is committed for trial before the full Court.

Comments

91. Version A corresponds to article 34 of the revised draft statute prepared by the 1953 Committee.[34] This solution is simple, but it does not differentiate sufficiently between the interests of a State and those of the international community. The functions of prosecuting attorney call for a degree of specialization and technical expertise which a person appointed for a given occasion may not necessarily have for upholding the interests of a State. There is a risk of confusing the prosecuting attorney with the agent of a State.

5. Pre-trial examination

Text submitted

92. The Special Rapporteur submits the following text:

[32] For the report of this Committee, see *Official Records of the General Assembly, Ninth Session, Supplement No. 12* (A/2645), annex.

[33] *Ibid.*

[34] *Ibid.*

1. A committing chamber, composed of a number of members of the judiciary to be determined by the Statute of the Court, shall be responsible for the pre-trial examination. The members of this chamber shall be appointed for the term of office of the Court. Their appointment shall not be immediately renewable.

2. The committing chamber may order any preparatory inquiries or security measures that it deems necessary, such as summoning witnesses, issuing summonses, warrants of commitment and arrest warrants, appointing commissions of inquiry, issuing letters rogatory and requests for extradition and, if need be, requesting the co-operation of States.

6. Authority of *res judicata* by a court of a State

Versions submitted

93. The Special Rapporteur submits the following versions:

VERSION A

The Court cannot try and punish a crime on which a final judgment in criminal law has been handed down by the court of a State.

VERSION B

The Court can try and punish a crime on which the court of a State has handed down a judgment, if the State in whose territory the crime was committed, or the State against which the crime was directed, or the State whose nationals were the victims, has grounds for believing that the judgment handed down by that State was not based on a proper appraisal of the law or the facts.

Comments

94. Version A expresses a strict application of the *non bis in idem* rule.

95. However, there appeared to be some possible drawbacks to this principle. It seemed preferable to avoid reverting to certain precedents where defendants were shown a certain amount of leniency. That is the reason for version B.

7. Authority of *res judicata* by the Court

Text submitted

96. The Special Rapporteur submits the following text:

No court of a State party to this Statute may hear a case which has already been referred to the Court.

Comments

97. This is the simplest and clearest solution. It avoids conflicts of jurisdiction between the court and national courts and, at the same time, enhances the authority of the court.

8. Withdrawal of complaints

Versions submitted

98. The Special Rapporteur submits the following versions:

VERSION A

If a complaint is withdrawn, the proceedings shall be discontinued, *ipso facto*, so that criminal proceedings may be instituted before the Court, unless they are reopened by another State having the authority to do so.

VERSION B

Withdrawal of a complaint does not mean, *ipso facto*, that the proceedings shall be discontinued. The proceedings must continue until such time as the case is dismissed or there is a conviction or acquittal.

Comments

99. Version A favours the principle that if a complaint is withdrawn the proceedings should be discontinued, provided no objection is raised by other States entitled to be heard by the court in some capacity, particularly as complainant or civil party.

100. Version B is based on the principle that prosecution for crimes against the peace and security of mankind should not be interrupted solely at the behest of the States directly concerned. Such crimes are of concern to the whole international community. There is a real danger that negotiations or arrangements may interrupt the prosecution of acts which, if particularly serious, transcend the subjective interests of the parties.

9. Penalties

Versions submitted

101. The Special Rapporteur submits the following versions:

VERSION A

The Court shall sentence defendants found guilty to whatever penalty it deems fair.

VERSION B

With the exception of the death penalty, the Court shall sentence defendants to whatever penalty it deems fair.

VERSION C

The Court shall sentence defendants found guilty to life imprisonment or prison terms, with or without the addition of fines and confiscation of property.

Comments

102. Version A is based on article 27 of the Nürnberg Charter,[35] which did not exclude the death penalty.

[35] See footnote 7 above.

103. Version B excludes the death penalty. It takes into account developments in the criminal law of certain countries, particularly those in Western Europe.

104. Version C excludes not only the death penalty but also other forms of severe punishment the application of which is not unanimously accepted.

105. It should be noted that criminal penalties vary according to the times and the country, and they involve moral, philosophical or religious concepts. It therefore seems appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community.

10. Financial provisions

Versions submitted

106. The Special Rapporteur submits the following versions:

Version A

The General Assembly shall establish a fund which shall be financed and administered in accordance with rules to be established by it. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.

Version B

The States Parties to the Statute of the Court and those which accede to it shall establish a fund to be financed and administered in accordance with the rules adopted by them. The costs of the Court and of any other entity or institution under its authority shall be paid from this fund.

Comments

107. Version A is based on the hypothesis that the court is established by the General Assembly.

108. Version B is based on the narrower hypothesis that the court is established only by the States parties to the statute.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 6]

DOCUMENT A/CN.4/427 and Add.1*

Sixth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur

[*Original: English*]
[*23 February and 7 June 1990*]

CONTENTS

* Incorporating document A/CN.4/427/Corr.1.

Introduction

1. In accordance with the schedule set forth in his fourth report on the law of the non-navigational uses of international watercourses,[1] the Special Rapporteur deals in the present report with the remaining parts of the draft articles, concerning management of international watercourses, security of hydraulic installations, and settlement of disputes. Draft articles, together with supporting material, are submitted on each of these subtopics. In addition, the Special Rapporteur has included provisions on "Implementation of the articles", which deal with the facilitation of private remedies for actual or potential harm. These provisions grew out of comments in the Commission and in the Sixth Committee of the General Assembly, as well as the Special Rapporteur's own research, all of which suggest that all feasible steps should be taken to facilitate private redress as a first, practical step towards implementation of the obligations laid down in the present draft articles.

[1] *Yearbook . . . 1988*, vol. II (Part One), p. 208, document A/CN.4/412 and Add.1 and 2, para. 8.

CHAPTER I

Management of international watercourses

A. Introduction

2. The question of the management of international watercourses—also referred to as administrative arrangements for international watercourse systems—has been treated thoroughly by the previous two Special Rapporteurs, Mr. Stephen Schwebel[2] and Mr. Jens Evensen,[3] and in various United Nations studies and reports.[4] In his third report, the present Special Rapporteur reviewed the relevant features of a modern system of water-resource management in order to provide a background

[2] See Mr. Schwebel's third report (*Yearbook . . . 1982*, vol. II (Part One), pp. 175-181, document A/CN.4/348, paras. 452-471).

[3] See Mr. Evensen's first report (*Yearbook . . . 1983*, vol. II (Part One), pp. 178-179, document A/CN.4/367, paras. 131-137) and second report (*Yearbook . . . 1984*, vol. II (Part One) and corrigendum, p. 116, document A/CN.4/381, para. 75).

[4] See: (*a*) *Integrated River Basin Development* (United Nations publication, Sales No. E.70.II.A.4); (*b*) *River Basin Management* (United Nations publication, Sales No. E.70.II.E.17); (*c*) *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2); (*d*) *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.80.II.A.17); (*e*) *Institutional Issues in the Management of International River Basins: Financial and Contractual Considerations*, Natural Resources/Water Series No. 17 (United Nations publication, Sales No. E.87.II.A.16).

for the consideration of procedural rules relating to the utilization of international watercourses.[5] The report described mechanisms for the multi-purpose planning and integrated development of watercourse systems that have been established wholly within one jurisdiction, between different units of a federal system, and on the international level. In view of the extensive previous coverage of this question, the Special Rapporteur will confine the present chapter to a brief review and update of the authorities that have been surveyed exhaustively in previous reports,[6] followed by a draft article on the subject for the consideration of the Commission.

B. State practice

3. Herbert Arthur Smith, in his seminal work on the economic uses of international rivers, published in 1931,[7] concluded on the basis of his extensive study that a number of principles of international law had emerged from the practice of States with regard to international watercourses:

> The first principle is that every river system is naturally an indivisible physical unit, and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions. It is the positive duty of every government concerned to co-operate to the extent of its power in promoting this development, though it cannot be called upon to imperil any vital interest or to sacrifice without full compensation and provision for security any other particular interest of its own . . .[8]

One of the principles that flows from this first one, according to Smith, is the following:

> (7) Where the circumstances of any river system are such that questions relating to its proper use are likely to be of frequent occurrence, permanent international commissions should be constituted to deal with all such questions, whenever they may arise.[9]

Indeed, Smith devoted chapter V of his work to "the function of international commissions". This was hardly a new idea, even in the first third of the twentieth century. Already in 1911, the Institute of International Law recommended, in paragraph 7 of its resolution on "International regulations regarding the use of international watercourses",[10]

> . . . that the interested States appoint permanent joint commissions, which shall render decisions, or at least shall give their opinion, when, from the building of new establishments or the making of alterations in existing establishments, serious consequences might result in that part of the stream situated in the territory of [another] State.

And the practice of States in this regard goes back considerably further in history. For example, the 1754 Treaty of Vaprio between the Empress of Austria, in her capacity as Duchess of Milan, and the Republic of Venice entrusted a pre-existing joint boundary commission with functions relating to the common use of the river Ollio.[11]

4. As has been seen in previous reports,[12] many of the early agreements concerning international watercourse systems, particularly those of the nineteenth century, were especially concerned with the regulation of navigation and fishing. The more recent agreements, especially those concluded since the Second World War, have been concerned principally with other aspects of the utilization or development of international watercourse systems, such as the study of the development potential of the watercourse, irrigation, flood control, hydroelectric power generation and pollution.[13] All these aspects, pushed to the forefront by the intensified demand for water, food and electricity, have necessitated to a much greater degree the establishment of joint institutional mechanisms for the implementation of the various agreements. Today there are nearly as many such joint bodies as there are international watercourses; they may be *ad hoc* or permanent, and they possess a wide variety of functions and powers.[14]

5. An annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses compiled by the Secretariat in April 1979[15] lists 90 such bodies. While most of the commissions listed deal with watercourse systems in Europe, every region of the world is represented. Moreover, the number of administrative arrangements in the developing countries, particularly in Africa, was on the rise when the list was prepared. The Secretariat noted in this connection that the newly independent African States had demonstrated a commendable desire to co-operate in fluvial matters through the creation of international river commissions; while in 1959 there had been only one international river commission in Africa, the Permanent Joint Technical Commission for the River Nile, eight new river commissions had since been established in Africa. The

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[5] *Yearbook . . . 1987*, vol. II (Part One), pp. 17 *et seq.*, document A/CN.4/406 and Add.1 and 2, paras. 6-38.

[6] See especially Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), paras. 452-471.

[7] H. A. Smith, *The Economic Uses of International Rivers* (London, 1931).

[8] *Ibid.*, pp. 150-151. It is interesting to note that the expression "river system" was used by Smith in a work written relatively early in the present century. The expression was also employed by J. L. Brierly, for example in the fifth edition of his well-known work *The Law of Nations* (Oxford, Clarendon Press, 1955), p. 205. The fact that such a conceptualization of international watercourses is of relatively long standing among students of the subject will be of interest to the Commission in connection with the decision it must ultimately take on the question of whether the draft articles should be based on the concept of the international watercourse "system".

[9] Smith, *op. cit.*, p. 152.

[10] Resolution adopted on 20 April 1911, see *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24, pp. 365-367; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 200, document A/5409, para. 1072.

[11] See also the 1785 Treaty of Fontainebleau between Austria and the Netherlands, which formed a bipartite body to determine the best sites for joint construction of locks on the River Meuse, also referred to in the 1952 ECE report "Legal aspects of the hydro-electric development of rivers and lakes of common interest" (E/ECE/136), para. 175.

[12] See, for example, the survey of international agreements in the fourth report of the Special Rapporteur, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), paras. 39-48.

[13] See the discussion of multilateral agreements in *Management of International Water Resources . . .* (footnote 4 (*c*) above), paras. 91-97, especially para. 96.

[14] For summary descriptions of some of these agreements, "selected to illustrate the widest possible variety of arrangements", *ibid.*, annex IV. See also the list of agreements setting up joint machinery for the management of international watercourses in ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (London, 1978), pp. 256 *et seq.*, N. Ely and A. Wolman, "Administration", *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), p. 124; and the extensive list of writings on international river and lake commissions given in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 2 above), footnote 746.

[15] Unpublished list.

trend has continued since those observations were made.[16]

6. The sheer number of commissions and other administrative arrangements that have been esablished by watercourse States, especially States that use international watercourses most intensively,[17] suggests that such joint institutional mechanisms are a natural and logical outgrowth of heavy reliance on shared water resources, and of the interdependence that is its inevitable by-product. Of perhaps greater significance is the fact that one of the resolutions of the Mar del Plata Action Plan, adopted at the United Nations Water Conference, recognizing the intensified demands placed by burgeoning populations upon finite freshwater resources, pointed to "the imperative *need** for accelerated progress in the investigation and development of water resources, and [their] integrated management for efficient use".[18] This need is perhaps felt nowhere more acutely than in Africa, where hydrologists have estimated that only approximately 2 per cent of total water resources are being utilized.[19] Similarly, although "one third of the world's potential hydropower is in Africa, . . . the ratio of energy generation to the exploitable potential is only 2 per cent".[20]

C. The work of international organizations

7. The emergence of a large number of joint river and lake commissions in recent years may be attributed at least in part to work that has been carried on under United Nations auspices. The theme that emerges from the reports and recommendations of United Nations meetings is that, while there is no obligation under general international law to form such bodies, management of international watercourse systems through joint institutions is not only an increasingly common phenomenon, but also a form of co-operation between watercourse States that is almost indispensable if anything approaching optimum utilization and protection of the system of waters is to be attained.

8. In a report dated January 1971 on issues of international water resources development,[21] prepared for the then newly formed Committee on Natural Resources, the Secretary-General reminds us that international watercourses can provide opportunities for strengthening relations between States, and points to the "need" for the establishment of institutional arrangements to that end:

> 3. The occurrence of international water resources offers a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action. Water is a vital resource, the benefits from which can be multiplied through joint efforts and the harmful effects of which may be prevented or removed through joint efforts. An incentive towards international co-operation thus demonstrably accompanies the status of co-basin State in an international river basin. Moreover, when plans are made and implemented jointly, valuable experience is gained with international institutions at both the policy and working levels. A characteristic trend in more recent international arrangements for water resources development has been the broadening of the scope and diversity of the parties' international water development activities. New dimensions are being added to the traditional organizational patterns developed in Europe and in North America, which were largely based on single-purpose and non-consumptive uses of the international rivers.
>
> . . .
>
> *The need for new institutional solutions*
>
> 12. As the pressure rises for more extensive development and use of international water resources, and the potential for conflict and the need for co-operation become every day more evident, water administrators, political leaders, regional planners and international lawyers are called upon to devise improved institutional frameworks capable of coping with the increased requirements for international co-operation. New flexible and broad-based channels of communication are needed between countries embarking upon the development and use of international water resources and those organizations and individuals having experience and information in these fields.

[16] See, for example, the agreements contained in *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (United Nations publication, Sales No. E/F.84.II.A.7), in particular the Convention of 30 June 1978 relating to the Creation of the Gambia River Basin Development Organization and the Convention of 21 November 1980 creating the Niger Basin Authority. See generally C. O. Okidi, "The State and the management of international drainage basins in Africa", *Natural Resources Journal* (Albuquerque, N.M.), vol. 28 (1988), p. 645; and K. V. Krishnamurthy, "The challenge of Africa's water development", *Natural Resources Forum* (New York), vol. 1 (1977), p. 369.

[17] Prominent examples that come readily to mind are the States sharing the Nile, the Great Lakes and other boundary waters between Canada and the United States of America, the Plata, the Ganges, the Indus, the Danube and the Rhine. See, for instance, the following agreements: for the *Nile*, the Agreement of 8 November 1959 between the United Arab Republic and Sudan and the Protocol of 17 January 1960 concerning the establishment of the Permanent Joint Technical Committee; for the *Great Lakes and other boundary waters between Canada and the United States*, the Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters and questions concerning the boundary between Canada and the United States (hereinafter "1909 Boundary Waters Treaty"), establishing, in article VIII, the International Joint Commission of the United States and Canada (discussed in L. M. Bloomfield and G. F. Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)* (Toronto, Carswell, 1958); for the *Plata*, the Joint Declaration of Buenos Aires of 27 February 1967 by the Ministers for Foreign Affairs of the River Plate Basin States, establishing the Intergovernmental Co-ordinating Committee of the River Plate Basin (see OAS, *Rios y Lagos Internacionales (Utilización para fines agricolas e industriales)*, 4th rev. ed. (OEA/Ser.I/VI, CIJ-75 rev.2), p. 148), summarized in *Yearbook . . . 1974*, vol. II (Part II), p. 322, document A/CN.4/274, para. 323; for the *Ganges*, the Agreement of 5 November 1975 on sharing of the Ganges waters at Farakka and on augmenting its flows, creating, in article IV, the Indo-Bangladesh Joint Committee to supervise the implementation of the arrangements for sharing of the waters; for the *Indus*, the Indus Waters Treaty 1960 of 19 September 1960 between India and Pakistan, establishing, in article VIII, the Permanent Indus Commission; for the *Danube*, the Convention of 18 August 1948 concerning the Regime of Navigation on the Danube, establishing, in chapter II, the Danube Commission; for the *Rhine*, *inter alia*, the Agreement of 29 April 1963 on the International Commission for the Protection of the Rhine against Pollution, and the Agreement of 3 December 1976 on the protection of the Rhine against chemical pollution.

For lists of agreements that establish joint commissions for the management of international watercourses, see the sources cited in footnote 4 above.

[18] Resolution VIII, on institutional arrangements for international co-operation in the water sector (see United Nations, *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), chap. I). Apart from their principal function of integrating management and development of international watercourse systems, such joint bodies have also been able to attract financial support from multilateral development banks and other international institutions for projects associated with the development of individual watercourses. See P. K. Menon, "Institutional mechanisms for the development of international water resources", *Revue belge de droit international* (Brussels), vol. 8 (1972), p. 99.

[19] See Krishnamurthy, *loc. cit.* (footnote 16 above), p. 371, and Okidi, *loc. cit.* (footnote 16 above), pp. 647-648.

[20] Okidi, p. 648.

[21] E/C.7/2/Add.6, reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), p. 328, document A/CN.4/274, para. 334.

13. The range of alternative institutional arrangements is impressive. It includes, for instance, the mere nomination of one official in each country who is empowered to exchange data or even development plans for a specific purpose; or it may entail the establishment of an international basin agency with its own professional staff, technical services and an intergovernmental governing body.

14. Institutional arrangements should be responsive to the specific co-ordination requirements in each case. Taking a long-term perspective, flexibility is also necessitated by the changing demands for water, the nature and characteristics of the resource base, and by other dynamic environmental influences. . . .

9. The efforts of international organizations to encourage watercourse States to build institutions for the management of international watercourses may be illustrated by way of the following examples.

10. The United Nations Conference on the Human Environment recommended, in recommendation 51 of the Action Plan for the Human Environment,[22] that States consider the formation of joint institutional arrangements and provided an inventory of the possible functions of such bodies:

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

. . .

(*c*) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

(i) Collection, analysis, and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;

(ii) Joint data-collection programmes to serve planning needs;

(iii) Assessment of environmental effects of existing water uses;

(iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic, and social considerations of water quality control;

(v) Rational use, including a programme of quality control, of the water resource as an environmental asset;

(vi) Provision for the judicial and administrative protection of water rights and claims;

. . .

(viii) Financial and technical co-operation [in the case] of a shared resource;

(*d*) Regional conferences should be organized to promote the above considerations.

11. A recommendation addressed to the Economic and Social Council by the Committee on Natural Resources at its third session, in 1973,[23] led ultimately to the convening, in 1977, of the United Nations Water Conference.[24] In addition to the numerous recommendations concerning management of shared water resources,[25] the Mar del Plata Action Plan adopted by the Conference contains a resolution on river commissions, which

Recommends to the Secretary-General to explore the possibility of organizing meetings between representatives of existing international river commissions involved that have competence in the management and development of international waters, with a view to developing a dialogue between the different river-basin organizations on potential ways of promoting the exchange of their experiences. Representatives from individual countries which share water resources but yet have no established basin-wide institutional framework should be invited to participate . . .[26]

12. That resolution led to the convening of a series of such conferences, the first of which was the United Nations Interregional Meeting of International River Organizations, held at Dakar in 1981. The Meeting's conclusions concerning institutional and legal arrangements contain important lessons that have been distilled from the experience of watercourse States having joint administrative machinery:

4. Where it is the intention of States to establish a permanent or *ad hoc* international organization for the management of shared water resources to reflect the common interests involved, the agreement establishing this organization should at least contain, within the framework of principles of international water law acceptable to the contracting States, the following elements, which should be defined as clearly as possible:

Objectives

Territorial jurisdiction

Composition

Authority and power

Decision-making procedures

Financial provisions

Procedures for the prevention and settlement of disputes.

5. . . . in view of the hydrologic unity of the drainage basins, it would be desirable that integrated development programmes be drawn and possibly executed at the basin level by recognized agencies. Where this approach was not viable, co-ordination of the activities of the various agencies concerned should be sought.

6. . . . concerning the composition of administrative, managerial and technical personnel, it was felt that technical matters should be dealt with by specialists, that diplomats should assist them where problems arose and that the activities of both groups should complement one another.

7. With regard to internal decision-making . . . the decision-making processes of international river basin agencies vary and provision should be made in the agreement to ensure the effectiveness of decisions taken.[27]

13. More recently, an interregional meeting on river and lake basin development with emphasis on the African region was held at Addis Ababa from 10 to 15 October 1988.[28] Among the recommendations it adopted are the following, under the heading "Resource assessment and planning":

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[22] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. II.

See also 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", approved by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978); according to principle 2, "States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources" (UNEP, *Environmental Law. Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).) For the background and text of the draft principles, see the note presented by Mr. Constantin A. Stavropoulos to the Commission at its thirty-fifth session (*Yearbook . . . 1983*, vol. II (Part One), p. 195, document A/CN.4/L.353).

[23] *Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 4* (E/5247), para. 114.

[24] For a discussion of the background of the Conference, see *Yearbook . . . 1974*, vol. II (Part Two), p. 329, document A/CN.4/274, para. 336.

[25] See *Report of the United Nations Water Conference . . .* (footnote 18 above), chap. I, "Recommendations", sects. A, D, G and H.

[26] *Ibid.*, chap. I, resolution VII.

[27] United Nations, *Experiences in the Development . . .* (see footnote 4 (*d*) above), part one, "Report of the Meeting", para. 28, conclusions on topic I; see also para. 49, conclusions 1, 3-6 and 8 on topic II (Progress in co-operative arrangements), and para. 69, conclusions 3 and 4 on topic III (Economic and other considerations).

[28] See *River and Lake Basin Development*, Natural Resources/Water Series No. 20 (United Nations publication, Sales No. 90.II.A.10).

The meeting recommended that national Governments and, where applicable, river basin organizations take action to implement the following proposals for improved resource assessment and for the integrated planning of multi-sectoral river basin development and management.

. . .

2. Develop and implement systems and institutional arrangements for the collection and storage of data relevant to river and lake basin projects, providing for and stimulating information exchange and access to data among concerned parties, for the better planning and management of basin resources. This should be supplemented by periodically updated programmes of priorities for data collection and networks, in support of phased basin plans.[29]

14. Under "Legal and institutional aspects", the following recommendations were made:[30]

2. Governments recognize that the system approach to the management of a basin's water resources is the necessary point of departure for regulating and managing the resources, given the interdependence and diversity of the components of the hydrological cycle—surface water, underground water, the water-atmosphere interface and the freshwater-marine interface;

3. Governments apply the general principles of international law applicable to the water resources which include, *inter alia*, the right of each basin State to an equitable utilization and the duty not to cause appreciable harm to a co-basin State (including to the environment), and recognize the duty to exchange available relevant information and data, the duty to notify and to consult reciprocally with co-basin States that may be adversely affected by a project or programme planned by one or more basin States and the duty to consult, concerning the institutionalization of co-operation or collaboration for basin development, upon the request of any other basin States; . . .[31]

. . .

7. Governments recognize that basin organizations are important and influential prime movers in the development process, and that Governments accord due importance to them and to enabling legislation which should provide for high-calibre personnel in both the policy-making and the technical bodies.

The interregional meeting also noted that river development strategies over the past 20 years had met with varying, and sometimes limited, success. In particular, the following factors were identified as having prevented administrative management schemes from achieving their full potential:

(*a*) In relation to the wide-ranging objectives of socio-economic development, the mandates and the scope of work entrusted to river basin organizations may be too restrictive to permit their timely, effective and flexible functioning;

(*b*) Institutional instruments and arrangements available to river basin organizations have proved inadequate;

(*c*) River basin organizations have adopted unsuitable working methods;

(*d*) There has been insufficient harmonization and co-ordination of work between river basin organizations and their respective national Governments;

(*e*) Member States have not given adequate financial support to river basin organizations;

(*f*) Both financial and human resources have been insufficient;

(*g*) There has been unnecessary overlapping and a lack of harmonization between the work of river basin organizations and that of various subregional organizations engaged in the planning and implementation of joint development programmes and projects;

(*h*) Local participation has been inadequate at all stages of project conception, planning and implementation;

(*i*) In some instances of project implementation, there has been an imbalance between the involvement of member States and donors, sometimes with a lack of co-ordination among donors.[32]

15. The subject of joint institutional management of international watercourses has also been addressed by the Economic Commission for Europe. In the "Principles regarding co-operation in the field of transboundary waters", which it adopted at its forty-second session, in 1987,[33] ECE recommended that watercourse States consider the establishment of joint commissions and made the following recommendations concerning joint administrative mechanisms:

6. Riparian countries should consider the setting up, where not yet existent, of appropriate institutional arrangements such as joint commissions and working groups, as a means of promoting the objectives of the agreement and facilitating implementation of its provisions. The structure, task, competence and financing of joint commissions or other co-operating bodies should be defined in the agreement.

6(*a*). The formal character, functions and geographical and substantive scope of activity of the commission should be adjusted to the prevailing conditions in the best possible way. Existing national structures and legal provisions in the contracting countries, as well as intergovernmental structures, should be fully taken into account together with hydrological, environmental, economic and other relevant conditions.

6(*b*). Where institutional arrangements are already set up, contracting parties should make full use of them by providing all necessary means for the efficient implementation of their tasks.

6(*c*). The commissions, working groups or other institutional arrangements should be composed of delegations appointed for this purpose by the individual contracting parties. Commissions should have their own rules of procedures for their work. Commissions should have the right

[29] *Ibid.*, part one, "Report of the Meeting", sect. 3.A.

[30] *Ibid.*, sect. 3.B.

[31] This recommendation was followed by a parenthetical note:

"(During the plenary session, several participants expressed reservations on this recommendation and stated that, even where there is a moral obligation to exchange data or to consult reciprocally, this must proceed on the basis of agreement.)"

While it is relevant to the Commission's work on the topic as a whole, the note does not appear to indicate that any reservations were expressed with regard to the portion of the recommendation concerning "the institutionalization of co-operation or collaboration for basin development", which relates to the subtopic currently under consideration.

Also of interest in connection with the present subtopic is the recommendation immediately following recommendation 3, quoted above.

"4. Governments realize that 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);". (*Ibid.*, sect. 3.B.)

[32] *Ibid.*, sect. 3.D.

[33] Decision I (42) of 10 April 1987 (see *Official Records of the Economic and Social Council, 1987, Supplement No. 13* (E/1987/33-E/ECE/1148), chap. IV).

See also the report entitled "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), which was submitted to the Working Party on Water Problems of the Senior Advisers to ECE Governments on Environmental and Water Problems at its third session (11-14 December 1989). Chapter III of that report, "Application of the ecosystems approach to water management", addresses, *inter alia*: institutional arrangements; planning; impact assessments; ecosystem evaluation; monitoring; ecological forecasting, simulations and modelling; and public participation and education.

Also of interest is the ongoing work of the Economic and Social Commission for Western Asia in this field. In a working paper (E/ESCWA/NR/89/WG.3/WP.5) prepared for the *Ad Hoc* Expert Group Meeting on Water Security in the ESCWA Region (13-16 November 1989), it is recommended that, as part of a proposed "Water strategy action plan", an institutional framework for water resources development, conservation and management be established. It is also noted in the working paper that ESCWA has proposed the establishment of a regional water resources council, which would be an institutional arrangement for the promotion of regional/subregional co-operation among the water resources governmental authorities in the field of water resources development in the ESCWA region.

to seek advice from experts and scientific institutes and to appoint *ad hoc* or permanent working parties.

6(*d*). In the case of small projects of limited duration, *ad hoc* working groups could be set up by contracting parties to deal with specific concerns in common. Where the scope of the activities is broader and the project more protracted in nature, joint commissions should be established, if necessary with permanent secretariats.

16. In the mid-1970s two important studies were produced concerning the management of international water resources through joint institutional arrangements. The first was a report prepared by the United Nations Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development.[34] The following findings of the Panel indicate developments in recent State practice and point to the increasing significance of joint administrative management of international watercourses:

557. . . . The recent arrangements with respect to the Nile, the Indus, the Niger, the Senegal, the Plata, the Lower Mekong and the Yarmuk basins constitute serious attempts to realize mutual co-operation and collaboration for joint development and conservation of international water resources. These agreements, among others, reflect the growing acceptance of the principles of regional international planning for the achievement of interdependent national interests.

558. Mutual co-operation of riparian States . . . has in many cases led to a more efficient exploitation than otherwise would be possible. Investigation of the multiple-use potentials and the hydrological effects of water resources works considered in the context of the basin, rather than in the national context alone, has led to development schemes of significant net benefit to all States concerned. The exchange of hydrological and other data, the co-ordinated or joint construction and operation of projects such as dams and river training works and the sharing of the costs of such undertakings have been the subject-matter of numerous successful international arrangements.

. . .

561. Given these varying national circumstances and the individuality of each international water resources system, it remains for the co-system States to fashion the specific legal régime and institutional arrangements best suited to their purposes and capabilities. Existing international law and international practice, however, are the proper points of departure . . .[35]

17. The other comprehensive study from the 1970s was prepared by the Committee on International Water Resources Law of the International Law Association.[36] At its fifty-seventh Conference, held at Madrid in 1976, ILA approved a set of articles on international water resources administration, with guidelines for the establishment of an international water resources administration.[37] These articles read as follows:

Article 1

As used in this chapter, the term "international water resources administration" refers to any form of institutional or other arrangement established by agreement among two or more basin States for the purpose of dealing with the conservation, development and utilization of the waters of an international drainage basin.

Article 2

1. With a view to implementing the principle of equitable utilization of the waters of an international drainage basin and consistent with the provisions of chapter VI [of the Helsinki Rules] relating to the procedures for the prevention and settlement of disputes, the basin States concerned and interested should negotiate in order to reach agreement on the establishment of an international water resources administration.

2. The establishment of an international water resources administration in accordance with paragraph 1 above is without prejudice to the existence or subsequent designation of any joint agency, conciliation commission or tribunal formed or referred to by co-basin States pursuant to article XXXI [of the Helsinki Rules] in the case of a question or dispute relating to the present or future utilization of the waters of an international drainage basin.

Article 3

Member States of an international water resources administration in appropriate cases should invite other States, including non-basin States or international organizations, which by treaty, other instrument or binding custom enjoy a right to, or have an interest in, the use of the waters of an international drainage basin, to participate in the activities of the international water resources administration.

Article 4

1. In order to provide for an effective international water resources administration the agreement establishing that administration should expressly state, among other things, its objective or purpose, nature and composition, form and duration, legal status, area of operation, functions and powers, and financial implications of such an international water resources administration.

2. The Guidelines annexed to these articles should be taken into account when an international water resources administration is to be established.

These articles, adopted 10 years after the Helsinki Rules on the Uses of the Waters of International Rivers, represent a distinct step forward in the approach to the joint administration of international watercourses. While the Helsinki Rules treated the subject in chapter 6, entitled "Procedures for the prevention and settlement of disputes",[38] the above articles focus clearly on the management function of such joint bodies.

[34] *Management of International Water Resources . . .* (see footnote 4 (*c*) above). It is stated in the preface to this report that it was designed as "a forward-looking consultation manual systematically setting forth and discussing the range of available legal and organizational alternatives".

[35] *Ibid.*, chap. VI. sect. A.1.

[36] See ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (see footnote 14 above), pp. 239 *et seq.*, report on administration of international water resources by the Rapporteur for that topic, Mr. D. A. Caponera. The report contains, *inter alia*, a list of agreements setting up a joint machinery for international drainage basin water resources management, arranged by continent (*ibid.*, pp. 256 *et seq.*).

[37] *Ibid.*, p. xxxvii (articles) and pp. xxxviii *et seq.* (guidelines).

[38] Chapter 6 of the Helsinki Rules provides in article XXXI as follows:

"*Article XXXI*

"1. If a question or dispute arises which relates to the present or future utilization of the waters of an international drainage basin, it is recommended that the basin States refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations for the fullest and most efficient use thereof in the interest of all such States.

"2. It is recommended that the joint agency be instructed to submit reports on all matters within its competence to the appropriate authorities of the member States concerned.

"3. It is recommended that the member States of the joint agency in appropriate cases invite non-basin States which by treaty enjoy a right in the use of the waters of an international drainage basin to associate themselves with the work of the joint agency or that they be permitted to appear before the agency."

(ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 524.)

D. Conclusion

18. The present chapter began by noting the conclusion of H. A. Smith that watercourse States should establish permanent joint commissions where questions relating to the proper use of a watercourse are likely to occur frequently. The international agreements and studies reviewed above go further than this, however, recognizing a need for such institutions not only to resolve questions that may arise as to utilization of an international watercourse, but also to engage in affirmative development and protection of the international watercourse system. The late James L. Brierly reached a similar conclusion:

> . . . it is increasingly recognized that, for international rivers of any size, some form of joint international administration will almost certainly be needed if the resources of the river system are to be put to the fullest use for the benefit of all the riparian States. . . .[39]

19. Studies by international organizations and individual publicists recognize that, while the generality and flexibility of the "equitable utilization" rule (enshrined in article 6) are its principal virtues, at the same time close co-operation, including regular communication, is required for its effective implementation. International agreements providing for the establishment of joint watercourse commissions reflect a recognition of this fact. The need for co-operation between watercourse States is addressed generally in articles 9 (General obligation to co-operate) and 10 (Regular exchange of data and information), and more specifically in part III of the draft articles, entitled "Planned measures". While the Special Rapporteur proposes further on in the present report the addition to the draft articles of an annex on implementation, the article submitted in the present chapter could itself be viewed as a form of implementation of the articles.[40] By encouraging the formation of permanent institutions for the management of international watercourses, the article provides for a practical context within which watercourse States can work together in planning and monitoring the utilization, protection and development of their joint water resources.

[39] J. L. Brierly, *The Law of Nations*, 6th ed., H. Waldock, ed. (Oxford, Clarendon Press, 1963), p. 232. See also Brierly's first edition (Oxford, 1928), p. 123. A number of other publicists have also recognized such a need, for example: F. Florio, "Sur l'utilisation des eaux non maritimes en droit international", *Festschrift für Friedrich Berber* (Munich, Beck, 1973), p. 156; B. Chauhan, "Management of international water resources through international water resources commissions", ILA, Indian Branch, "Proceedings of the annual seminar, March 10 and 11, 1973", New Delhi; R. D. Hayton and A. E. Utton, "Transboundary groundwaters: the Bellagio draft treaty" *Natural Resources Journal*, vol. 29 (1989), p. 663 (see especially art. III of the draft treaty, entitled "The Commission responsible under this Agreement", at p. 684). For a survey of the literature on the subject, see Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), footnote 746.

Scientists have reached similar conclusions: "Only international co-operation in the integrated management of water resources can ameliorate [problems of short supply and pollution]" (*Scientific American* (New York, N.Y.), special issue, "Managing Planet Earth" (September 1989), p. 4, summarizing J. W. M. la Riviere, "Threats to the world's water", p. 48.)

[40] Joint watercourse commissions could implement not only the general obligations of equitable utilization and participation (art. 6), co-operation (article 9), sharing of data and information (art. 10) and notification, consultation and negotiation with regard to planned measures (arts. 11-21), but also those concerning avoidance of appreciable harm (art. 8) and [watercourse] [system] agreements (arts. 4 and 5).

E. The proposed article

PART IX

MANAGEMENT OF INTERNATIONAL WATERCOURSES

Article 26. Joint institutional management

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse [system].

2. For the purposes of this article, the term "management" includes, but is not limited to, the following functions:

(*a*) implementation of the obligations of the watercourse States under the present articles, in particular the obligations under parts II and III of the articles;

(*b*) facilitation of regular communication, and exchange of data and information;

(*c*) monitoring international watercourse[s] [systems] on a continuous basis;

(*d*) planning of sustainable, multi-purpose and integrated development of international watercourse[s] [systems];

(*e*) proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse[s] [systems]; and

(*f*) proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse[s] [systems], emergency situations, or water-related hazards and dangers.

3. The functions of the joint organization referred to in paragraph 1 may include, in addition to those mentioned in paragraph 2, *inter alia*:

(*a*) fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and

(*b*) serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States.

Comments

(1) The numbering of part IX and draft article 26 is provisional only. As the Special Rapporteur indicated in his fourth report,[41] the present and the following subtopics are ones that could, in his judgment, be dealt with in the draft articles themselves or in annexes thereto. If the Commission decides to deal with them in annexes, the numbering will have to be changed accordingly.

(2) In large measure, draft article 26 parallels the articles on the same subtopic that were submitted by two former Special Rapporteurs, Mr. Evensen and Mr. Schwebel. Those earlier articles are sufficiently different in approach, when compared both to draft article 26 and to each other, that they are reproduced here as points of reference for the members of the Commission in their consideration of draft article 26. The draft article submitted by Mr. Schwebel in his third report reads as follows:

[41] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 7.

Article 15. Administrative management

At the request of any system State and where the economic and social needs of the region are making substantial or conflicting demands on water resources, or where the international watercourse system requires protection or control measures, the system States concerned shall enter into negotiations with a view to the establishment of permanent institutional machinery, or to the strengthening of any existing organization, for the purpose of expanding their consultations, of preparing or implementing their decisions taken with respect to the international watercourse system, and of promoting rational, optimum utilization, protection and control of their shared water resources.[42]

The draft article submitted by Mr. Evensen in his second report reads as follows:

Article 15. Management of international watercourses. Establishment of commissions

1. Watercourse States shall, where it is deemed practical and advisable for the rational administration, management, protection and control of the waters of an international watercourse, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other processes and decision-making procedures for the purposes of promoting effective and friendly co-operation between the watercourse States concerned with a view to enhancing optimum utilization, protection and control of the international watercourse and its waters.

2. To this end, watercourse States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(*a*) to collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse or watercourses;

(*b*) to propose and institute investigations and research concerning utilization, protection and control;

(*c*) to monitor the international watercourse on a continuous basis;

(*d*) to recommend to watercourse States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse;

(*e*) to serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by watercourse States;

(*f*) to propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of watercourse States.[43]

(3) A review of treaty provisions concerning institutional arrangements reveals that watercourse States have established a wide variety of such organizations. Some agreements deal only with a particular watercourse, while others cover a number of watercourses forming and crossing common boundaries. The powers vested in the respective commissions are tailored to the subject-matter of the individual agreement. Thus the competence of a joint body may be defined rather specifically where a single watercourse is involved, and more generally where the agreement covers a series of boundary rivers, lakes and aquifers. Draft article 26 is cast in terms that are intended to be sufficiently general to be appropriate for a framework agreement. At the same time, the article is designed to provide guidance to watercourse States with regard to the powers and functions that could be entrusted to such joint institutions as they may decide to establish. The drafting of article 26 was largely inspired by international agreements establishing joint institutions for the management of watercourses. Representative examples of such agreements follow. They are drawn from treaties relating to the River Niger, the "Indus system of rivers",[44] and the "boundary waters"[45] between Canada and the United States.

(a) *Convention of 21 November 1980 creating the Niger Basin Authority*[46]

CHAPTER II

AIM AND OBJECTIVES OF THE AUTHORITY

Article 3. Aim

1. The aim of the Authority is to promote the co-operation among member States and to ensure an integrated development of the Niger Basin in all fields, by developing its resources particularly in the fields of energy, water resources, agriculture, animal husbandry, fishing and fisheries, forestry exploitation, transport, communications and industry.

2. In pursuance of the purpose mentioned in the preceding paragraph, the action of the Authority shall be directed to the harmonization of national development policies in the Basin through the implementation of integrated development projects and programmes.

Article 4. Objectives

1. The Authority shall be responsible for:

(*a*) The harmonization and the co-ordination of national development policies, in order to ensure an equitable policy as regards sharing of the water resources among member States.

(*b*) The formulation, in agreement with the member States, of the general policy of the development of the Basin which shall be consistent with the international status of the River Basin.

(*c*) The elaboration and the execution of an integrated development plan of the Basin.

(*d*) The initiating and monitoring of an orderly and rational regional policy for the utilization of the surface and underground waters in the Basin.

(*e*) The designing and conduct of studies, research and surveys.

(*f*) The formulation of plans, the construction, exploitation and maintenance of structure and projects realized within the general objectives of the integrated development of the Basin.

2. For the purpose set out in the above paragraph 1 the "Authority" shall notably undertake, in harmony with the development plans of States relating to the Niger Basin and in accordance with the general objectives of integrated development of the Basin, the following activities:

(a) *Statistics and planning*

(i) Collection, centralization, standardization, exploitation, dissemination, exchange of technical and related data;

(ii) Co-ordination of plans, projects and research carried out in the member States;

[42] Document A/CN.4/348 (see footnote 2 above), para. 471.

[43] Document A/CN.4/381 (see footnote 3 above), para. 76.

[44] This is the expression used in the preamble to the Indus Waters Treaty 1960 between India and Pakistan.

[45] This is the expression used in the 1909 Boundary Waters Treaty between Great Britain and the United States of America, in, for example, the preliminary article.

[46] This Convention transforms the former "River Niger Commission" into the "Niger Basin Authority" (preamble and art. 1). For other examples of agreements between African States creating joint watercourse commissions, see the Convention of 11 March 1972 establishing the Organization for the Development of the Senegal River; the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin; and the Agreement of 10 October 1973 establishing a development fund for the Chad Basin Commission.

(iii) Consideration of projects presented by the member States with a view to making recommendations on co-ordinated programmes of research and implementation;

(iv) Monitoring of research and works undertaken by member States and subsequent exploitation of reports which such States should submit periodically;

(v) Drawing up a master plan and an integrated development programme of the Basin with an identification, at the various stages of the programme, of priorities among alternative uses, projects and sectors.

(b) *Infrastructure*

(i) Designing, study and construction of hydraulic multi-purpose structures of all types and sizes;

(ii) Designing, study and construction of works, plants and projects in the fields of transports and communications;

(iii) Improvement and maintenance of navigable waterways;

(iv) Development of river transport and promotion of an integrated multi-model transport system (sea-river-rail-road) as a factor of integration and for opening up the land-locked Sahelian member States.

(c) *Water control and utilization*

(i) Regulation of the flow and drainage of the main waterway;

(ii) Flood control;

(iii) Construction and maintenance of dykes;

(iv) Prevention and control of drought and desertification;

(v) Prevention of soil erosion and sedimentation;

(vi) Setting up of structures and works for land development including salt water and drainage control.

(d) *Environment control and preservation*

(i) Protection of the environment comprising the establishment of norms and measures applicable to the States in the alternative uses of waters in the Basin;

(ii) Prevention and reduction of water pollution;

(iii) Preservation of human health and genetic resources (fauna and flora).

(e) *Navigation control and regulation*

The control and the rules of all forms of navigation on the River, its tributaries and sub-tributaries are governed by the principles laid down in the Act of Niamey relating to the Navigation and the Economic Co-operation among the states of the Niger Basin, signed at Niamey in 1963.

(f) *Land and agro-pastoral development*

(i) Development of food crops;

(ii) Development of agro-pastoral, fishery and forestry resources;

(iii) Implementation of programmes allowing the rational use of waters for domestic, industrial, agricultural and pastoral purposes.

(g) *Financing the projects and works*

Applying for financial and technical assistance on a bilateral, multilateral or international basis for carrying out studies and works for the development of the Niger River Basin and to that effect concluding agreements, provided that agreements involving financial commitments for the member States become effective only after approval by the Council of Ministers.

3. The terms, conditions and statutory provisions to be defined with the view to achieving the objectives as stated in paragraph (2) above, shall be, if necessary and in each case, provided for in riders which shall be annexed to the Convention of which they shall form an integral part.

4. The member States pledge to keep the Executive Secretariat informed of all the projects and works they might intend to carry out in the Basin.

Moreover, they pledge not to undertake any work on the portion of the River, its tributaries and sub-tributaries under their territorial jurisdiction which pollute the waters or modify the biological features of the fauna and the flora.

CHAPTER III

THE INSTITUTIONS OF THE AUTHORITY

Article 5. Institutions

1. The Institutions of the Authority shall be as follows:

(*a*) The Summit of Heads of State and Government;

(*b*) The Council of Ministers;

(*c*) The Technical Committee of Experts;

(*d*) The Executive Secretariat and its specialized organs.

(b) *Indus Waters Treaty 1960 of 19 September 1960 between India and Pakistan*

Article VIII. Permanent Indus Commission

(1) India and Pakistan shall each create a permanent post of Commissioner for Indus Waters, and shall appoint to this post, as often as a vacancy occurs, a person who should ordinarily be a high-ranking engineer competent in the field of hydrology and water-use. Unless either Government should decide to take up any particular question directly with the other Government, each Commissioner will be the representative of his Government for all matters arising out of this Treaty, and will serve as the regular channel of communication on all matters relating to the implementation of the Treaty, and, in particular, with respect to:

(*a*) the furnishing or exchange of information or data provided for in the Treaty; and

(*b*) the giving of any notice or response to any notice provided for in the Treaty.

(2) The status of each Commissioner and his duties and responsibilities towards his Government will be determined by that Government.

(3) The two Commissioners shall together form the Permanent Indus Commission.

(4) The purpose and functions of the Commission shall be to establish and maintain co-operative arrangements for the implementation of this Treaty, to promote co-operation between the Parties in the development of the waters of the Rivers and, in particular,

(*a*) to study and report to the two Governments on any problem relating to the development of the waters of the Rivers which may be jointly referred to the Commission by the two Governments: in the event that a reference is made by one Government alone, the Commissioner of the other Government shall obtain the authorization of his Government before he proceeds to act on the reference;

(*b*) to make every effort to settle promptly, in accordance with the provisions of Article IX (1), any question arising thereunder;

(*c*) to undertake, once in every five years, a general tour of inspection of the Rivers for ascertaining the facts connected with various developments and works on the Rivers;

(*d*) to undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary by him for ascertaining the facts connected with those works or sites; and

(*e*) to take, during the Transition Period, such steps as may be necessary for the implementation of the provisions of Annexure H.

(5) The Commission shall meet regularly at least once a year, alternately in India and Pakistan. This regular annual meeting shall be held in November or in such other month as may be agreed upon between the Commissioners. The Commission shall also meet when requested by either Commissioner.

(6) To enable the Commissioners to perform their functions in the Commission, each Government agrees to accord to the Commissioner of the other Government the same privileges and immunities as are accorded to representatives of member States to the principal and subsidiary organs of the United Nations under Sections 11, 12 and 13 of Article IV of the Convention on the Privileges and Immunities of the

United Nations (dated 13th February 1946) during the periods specified in those Sections. It is understood and agreed that these privileges and immunities are accorded to the Commissioners not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the Commission; consequently, the Government appointing the Commissioner not only has the right but is under a duty to waive the immunity of its Commissioner in any case where, in the opinion of the appointing Government, the immunity would impede the course of justice and can be waived without prejudice to the purpose for which the immunity is accorded.

(7) For the purposes of the inspections specified in paragraph (4) (*c*) and (*d*), each Commissioner may be accompanied by two advisers or assistants to whom appropriate facilities will be accorded.

(8) The Commission shall submit to the Government of India and to the Government of Pakistan, before the first of June of every year, a report on its work for the year ended on the preceding 31st of March, and may submit to the two Governments other reports at such times as it may think desirable.

(9) Each Government shall bear the expenses of its Commissioner and his ordinary staff. The cost of any special staff required in connection with the work mentioned in Article VII (1) shall be borne as provided therein.

(10) The Commission shall determine its own procedures.

Article IX. Settlement of differences and disputes

(1) Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.

. . .

(c) *Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters and questions concerning the boundary between Canada and the United States (1909 Boundary Waters Treaty)*

Article VII

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada, composed of six commissioners, three on the part of the United States, appointed by the President thereof, and three on the part of the United Kingdom, appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

Article VIII

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters, with respect to which, under Articles III and IV of this Treaty, the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules and principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

. . .

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

Article X

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council. In each case so referred the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the 4th, 5th and 6th paragraphs of Article XLV of the Hague Convention for the Pacific Settlement of International Disputes, dated the 18th October, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

Article XI

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor-General of the Dominion of Canada, and to them shall be addressed all communications of the Commission.

Article XII

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before

proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this Treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States and Canadian sections of the Commission may each appoint a secretary, and these shall act as joint secretaries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission incurred by it shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses and to take evidence on oath whenever deemed necessary in any proceeding, or enquiry, or matter within its jurisdiction under this Treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

(4) *Paragraph 1* of draft article 26 attempts to strike a balance between two approaches, one requiring that joint institutions be established, which is not an obligation of watercourse States under general international law and may not even be necessary with regard to certain international watercourses, and the other merely recommending that watercourse States consider establishing such bodies, which would not adequately reflect the importance attached to joint institutional management by States and experts in the field. Thus paragraph 1 requires that watercourse States enter into consultations, if any of them should so request, concerning the formation of a joint organization. It does not require "negotiations" *per se*, in view of the discussions in the Commission relating to articles 7 and 11-21. A particular question that the Commission may wish to consider is whether a stronger obligation, such as that envisaged in draft article 15 proposed by Mr. Schwebel in his third report,[47] would be preferable.

(5) *Paragraph 2* contains an illustrative list of functions that joint organizations might perform. As indicated in the treaty provisions quoted in paragraph (3) of the present comments, the range of possible functions that might be performed by such an organization is extremely broad. An effort was made to confine the list in paragraph 2 to the most important and common of these functions. It will be noted, however, that subparagraph (*a*) embraces a wide variety of functions since it relates to the implementation of the substantive and procedural obligations under the draft articles. The same technique is employed in the Indus Waters Treaty 1960, which provides in its article VIII that the Permanent Indus Commission shall "serve as the regular channel of communication on all matters relating to the implementation of the Treaty" (para. (1)) and that the "purpose and functions of the Commission shall be to establish and maintain co-operative arrangements for the implementation of this Treaty, to promote co-operation between the parties in the development of the waters of the Rivers" (para. (4)).

(6) *Paragraph 3* contains a non-exhaustive list of additional functions that might be entrusted to a joint organization. The functions enumerated in the paragraph go beyond management *per se*. They are, however, functions that are often assigned to joint institutional mechanisms, as in the case of the Permanent Indus Commission (India and Pakistan)[48] and the International Joint Commission (Canada and the United States).[49] Applicable international agreements usually provide that the reports and recommendations submitted by such bodies are of a non-binding nature.

(7) Joint commissions are normally staffed largely by technical experts and, to this extent, are particularly well suited to finding facts and recommending alternative methods of accommodating any differences between watercourse States. The report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development recommends that differences be resolved at the technical level, whenever possible,

> . . . because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations involved in a water resources matter on which there is some disagreement. . . . every effort should be made to promote the resolution of differences by the provision of competent accommodation machinery at the operating level.[50]

This same theme—that procedures should be made available for the resolution of disputes at lower levels before they are referred to higher governmental authorities—has inspired the Special Rapporteur's recommendations in chapters III and IV of the present report, dealing respectively with implementation and with the settlement of disputes.

[47] This draft article, which is quoted in full in paragraph (2) of the present comments, provides *inter alia* that " the system States concerned shall enter into negotiations with a view to the establishment of permanent institutional machinery . . .".

[48] See article VIII, para. (4), and article IX, para. (1), of the Indus Waters Treaty 1960, quoted above in paragraph (3) (*b*) of the present comments.

[49] See article VIII and, in particular, articles IX and X of the 1909 Boundary Waters Treaty, quoted above in paragraph (3) (*c*) of the present comments.

[50] *Management of International Water Resources* . . . (see footnote 4 (*c*) above), para. 457.

CHAPTER II

Security of hydraulic installations

A. Introduction and overview

20. The previous two Special Rapporteurs have considered extensively the subtopic of security of hydraulic installations and have submitted draft articles on the subject.[51] These treatments on the subtopic have identified a number of possible elements that could be included in one or more draft articles: (1) an obligation to design, construct and maintain "works or installations containing dangerous forces",[52] including dams, dykes and weirs, in such a manner as to provide reasonable assurances of their safety;[53] (2) an obligation to prevent poisoning; (3) an obligation not to attack, destroy or damage hydraulic installations and other facilities in peacetime or in time of armed conflict (unless in use for military purposes); (4) an obligation not to use hydraulic installations or other facilities capable of releasing dangerous forces or substances in preparation for, or in the conduct of, offensive military operations; (5) an obligation to consult, upon request, concerning security and safety measures for protection against poisoning and terrorist acts; (6) an obligation to maintain during times of armed conflict, in so far as possible, previously established systems for warning other States of water-related hazards and emergencies; and (7) an obligation not to withhold, during times of peace or armed conflict, water from a watercourse State so as to jeopardize the survival of the civilian population or to imperil the viability of the environment.

21. While both Mr. Schwebel and Mr. Evensen have regarded the subtopic as a whole as being extremely important, Mr. Evensen expressed doubts in his first report about the advisability of dealing in the draft articles with the aspect of the subtopic regarding protection of water resources and installations in time of armed conflict:

> . . . The two Protocols of the 1949 Geneva Conventions were agreed on after long and delicate negotiations. The Special Rapporteur fears that the inclusion of such provisions here might be considered as constituting an amendment or an addition to the two Protocols and thus renew the discussions on the principles and rules pertaining to international and internal armed conflicts. . . .[54]

These considerations led Mr. Evensen to exclude any reference to armed conflict from the version of article 28 proposed in his first report. However, the discussions on this article in 1983 in the Commission and in the Sixth Committee of the General Assembly convinced him that the subject should be addressed, at least in a general way, in a draft article. He accordingly proposed in his second report a new draft article (art. 28 *bis*) that deals, in a single paragraph, with the status of international watercourses and related installations in armed conflicts.[55] Mr. Schwebel, for his part, addresses armed conflict in four of the six paragraphs of article 13 proposed in his third report.[56]

22. The present Special Rapporteur, while fully recognizing the signal importance of the protection of water resources and installations in time of armed conflict, cannot help being influenced by the considerations identified by Mr. Evensen, and by similar concerns expressed both in the Commission and in the Sixth Committee. After careful consideration of the matter, he has reached the conclusion that an approach to the subtopic more along the lines of the two articles proposed in Mr. Evensen's second report would be least likely to give rise to serious objections. The Special Rapporteur will therefore submit draft articles following this basic approach after briefly reviewing the most important precedents in the field.

B. State practice and views of commentators

23. The nature of the problem of water resources and installation safety was well described by Mr. Schwebel in his third report:

> Questions of public safety with respect to the possible failure, mismanagement or sabotage of major hydraulic works and of the security of the installations themselves are not novel. The collapse of a high storage dam, for example, may take thousands of lives as well as have devastating economic and financial consequences. As more elaborate and much more costly multi-purpose projects have been constructed, especially in recent decades, concern has heightened. In addition to the potential for catastrophe posed by intensified occupation and use of low-lying areas downstream, the vulnerability of such works to acts of terrorism has led, or should have led, waterworks administrators to enhance their security precautions and to review their emergency operating procedures.
>
> . . .
>
> System States have a legitimate interest in the safety and security of water-related installations, and not simply because of their potential for death and destruction. More and more major projects are part of a regional or system-wide plan for development, control and environmental protection, with benefits and costs, direct and indirect, to each participating system State. In their consultations and their sharing of information and data, system States will increasingly include questions

[51] See, in the third report of Mr. Schwebel, the discussion of hydraulic installations and water security and draft article 13 (Water resources and installation safety) (document A/CN.4/348 (see footnote 2 above), paras. 390-415); in the first report of Mr. Evensen, draft article 28 (Safety of international watercourse systems, installations and constructions) and the accompanying comments (document A/CN.4/367 (see footnote 3 above), paras. 186-190), and in his second report, draft articles 28 (Safety of international watercourses, installations and constructions, etc.) and 28 *bis* (Status of international watercourses, their waters and constructions, etc. in armed conflicts) and the accompanying comments (document A/CN.4/381 (see footnote 3 above), paras. 94-97).

[52] The quoted language is from article 56, para. 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (see para. 32 below).

[53] Under paragraph 1 of both versions of article 28 proposed by Mr. Evensen, watercourse States would be required to "employ their best efforts to maintain and protect" both the international watercourse and the installations and constructions pertaining thereto. The danger that could be posed by such installations, in particular to downstream States, is recognized in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 2 above), para. 391.

[54] See document A/CN.4/367 (footnote 3 above), para. 186.

[55] See document A/CN.4/381 (footnote 3 above), para. 96.

[56] See document A/CN.4/348 (footnote 2 above), para. 415.

of installation security and water safety, as well as the more familiar concern for safe construction and operation.[57]

24. Of course, these concerns are not confined to peacetime. But the fact that armed conflict can pose particularly grave dangers to the safety of drinking water and the security of hydraulic installations should not obscure the importance of proper construction, maintenance and management in time of peace. Recognition of the disastrous consequences of, for example, the burst of hydraulic works such as dams has led a number of Governments, notably Switzerland, Sweden and Germany,[58] to enact municipal legislation providing for special protection.

25. State treaty practice evinces similar concerns. An example is the Convention of 23 August 1963 on the Emosson hydroelectric project, by which France and Switzerland agreed to share the power produced by the project from waters originating in both countries. The Convention provides that the designs and general plans for the works shall be prepared by a concessionaire but may not be carried out without the prior approval of the parties (art. 2); it also defines the obligations of the concessionaire relating to drainage and spillways and obliges him to allow the flows deemed necessary to safeguard general interests, such as those relating to public health, irrigation, fish conservation and environmental protection, to run downstream from the dam and the water intakes (art. 3). A permanent supervisory commission is established to enforce the provisions of the Convention (art. 4). The security of the works is also specifically made subject to the legislation of the State in whose territory they are constructed (art. 2).

26. Another example of an agreement addressing the issue of water installation safety is the Convention of 27 May 1957 between Switzerland and Italy concerning the use of the water power of the Spöl. Article 8 of the Convention deals with the conditions for the construction of the dam, and protection against flooding. It provides that the dam is to be constructed in such a way as to assure maximum safety for Switzerland and is to be in accordance with the laws in force in that country. The article further provides that the dam is to be designed in such a way as to afford adequate free outlets for water, so that flood waters may flow away at all times.

27. With regard to armed conflict, publicists from Gentili, Grotius and Vattel to Fauchille and Oppenheim have condemned the poisoning of water supplies as a means of waging war.[59] The subject was also addressed in the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. In particular, article 23(*e*) of the Regulations concerns the use of weapons or material "calculated to cause unnecessary suffering". In his analysis of article 23, Oppenheim concluded that "wells, pumps, rivers, and the like from which the enemy draws drinking water must not be poisoned".[60] Also addressing this question, the 1956 field manual on the law of land warfare of the army of the United States of America includes in a list of acts "representative of violations of the law of war ('war crimes')", the "poisoning of wells or streams".[61]

28. The portion of the British manual of military law of 1958 that deals with the law of war on land similarly provides:

> Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.[62]

29. While the question of poisoning water supplies has thus been addressed by a variety of authorities and instruments down through the centuries, it is only recently that attempts have been made systematically to study and codify rules on the broader subject of water resources and installation safety. In the "Intermediate report" submitted at the International Law Association's fifty-sixth Conference, held at New Delhi in 1974, the ILA Committee on International Water Resources Law recognized this development:

> It is only in the last decade that the new awareness of the world-wide threat to the human environment has meant a turning point also in the considerations concerning the protection of water and water installations in times of armed conflict although these considerations are still far from being materially comprehensive or methodically systematic.[63]

30. Subsequently, at its fifty-seventh Conference, held at Madrid in 1976, ILA adopted the following provisions on the protection of water resources and water installations in times of armed conflict:

Resolution

Recalling the significant increase, during recent decades, in the demand for water and the consequent development of water installations;

Being aware of the destructive power of modern weapons;

Taking into account the vital importance of water and water installations for the health and even the survival of people all over the world and the susceptibility of water and water installations to damage and destruction;

Considering the lack of specific rules of international law for the protection of water and water installations against damage or destruction in times of armed conflict;

Convinced of the urgent need to establish precise rules for the protection of water and water installations against damage or destruction and thus to contribute to the development of international humanitarian law applicable to armed conflicts;

[57] Document A/CN.4/348 (see footnote 2 above), paras. 390 and 392.

[58] See "Intermediate report on the protection of water resources and water installations in times of armed conflict" by F. J. Berber, Rapporteur of the ILA Committee on International Water Resources Law for that topic, in ILA, *Report of the Fifty-sixth Conference, New Delhi, 1974* (London, 1976), p. 136.

[59] But see, to the contrary, the conclusion of Michel d'Amboise, in *Le guidon des gens de guerre* (1543), that it was legally permissible to "gaster, infester, intoxiquer et empoisonner les eaues des ennemys". The views of all these writers are noted in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 2 above), paras. 400-401.

[60] L. Oppenheim, *International Law: A Treatise*, 7th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1952), vol. II, *Disputes, War and Neutrality*, p. 340, sect. 110. Oppenheim added that "an armed force besieging a town may . . . cut off the river which supplies drinking water to the besieged, but must not poison the river" (*ibid.*, p. 419, sect. 157).

[61] United States of America, Department of the Army, Field Manual (FM 27-10) on the Law of Land Warfare (1956), para. 504 (*i*), as quoted in M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office), vol. 10 (1968), p. 455. See also para. 37 (*b*), of the manual, quoted in Whiteman, *ibid.*

[62] United Kingdom, War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), p. 42, as quoted in Whiteman, *op. cit.*, p. 458.

[63] ILA, *Report of the Fifty-sixth Conference* . . . (see footnote 58 above), p. 136.

Adopts the following articles as guidelines for the elaboration of such rules:

Article I

Water which is indispensable for the health and survival of the civilian population should not be poisoned or rendered otherwise unfit for human consumption.

Article II

Water supply installations which are indispensable for the minimum conditions of survival of the civilian population should not be cut off or destroyed.

Article III

The diversion of waters for military purposes should be prohibited when it would cause disproportionate suffering to the civilian population or substantial damage to the ecological balance of the area concerned. A diversion that is carried out in order to damage or destroy the minimum conditions of survival of the civilian population or the basic ecological balance of the area concerned or in order to terrorize the population should be prohibited in any case.

Article IV

The destruction of water installations such as dams and dykes, which contain dangerous forces, should be prohibited when such destruction might involve grave dangers to the civilian population or substantial damage to the basic ecological balance.

Article V

The causing of floods as well as any other interference with the hydrologic balance by means not mentioned in articles II to IV should be prohibited when it involves grave dangers to the civilian population or substantial damage to the ecological balance of the area concerned.

Article VI

1. The prohibitions contained in articles I to V above should be applied also in occupied enemy territories.

2. The occupying Power should administer enemy property according to the indispensable requirements of the hydrologic balance.

3. In occupied territories, seizure, destruction or intentional damage to water installations should be prohibited when their integral maintenance and effectiveness would be vital to the health and survival of the civilian population.

Article VII

The effect of the outbreak of war on the validity of treaties or of parts thereof concerning the use of water resources should not be termination but only suspension. Such suspension should take place only when the purpose of the war or military necessity imperatively demand the suspension and when the minimum requirements of subsistence for the civil population are safeguarded.

Article VIII

1. It should be prohibited to deprive, by the provisions of a peace treaty or similar instrument, a people of its water resources to such an extent that a threat to the health or to the economic or physical conditions of survival is created.

2. When, as a result of the fixing of a new frontier, the hydraulic system in the territory of one State is dependent on works established in the territory of another State, arrangements should be made for the safeguarding of uninterrupted delivery of water supplies indispensable for the vital needs of the people.[64]

[64] ILA, *Report of the Fifty-seventh Conference* . . . (see footnote 14 above), pp. xxxv-xxxvi.

ILA adopted the above provisions "with the understanding that these rules should be applied also with respect to other conduct intended to damage or destroy the water resources of a State or area".[65]

31. One year after the fifty-seventh Conference of the International Law Association, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, following three years of meetings, adopted by consensus, on 8 June 1977, two protocols additional to the Geneva Conventions of 12 August 1949, certain provisions of which are pertinent to the present inquiry. These provisions are articles 54 and 56 of Protocol I, relating to the protection of victims of international armed conflicts, and articles 14 and 15 of Protocol II relating to the protection of victims of non-international armed conflicts. Article 54 of Protocol I, which deals with the "Protection of objects indispensable to the survival of the civilian population", provides in its paragraph 2 as follows:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, *drinking water installations and supplies and irrigation works*,* for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.[66]

Paragraph 4 of the same article provides further: "These objects shall not be made the objects of reprisals".

32. Article 56 of Protocol I is entitled "Protection of works and installations containing dangerous forces" and provides in part as follows:

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(*a*) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(*b*) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

. . .

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

[65] *Ibid.*, p. xxxiv. Mr. Schwebel remarked in his third report that, useful as ILA's articles were, they should not be taken as an indication that the Commission's articles should be limited to situations of armed conflict (document A/CN.4/348 (see footnote 2 above), para. 407).

[66] The ICRC commentary to this provision explains that "the verbs 'attack', 'destroy', 'remove' and 'render useless' are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs . . ." (ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), p. 655.)

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in article 16 of annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this article.[67]

33. Article 14 of Protocol II, entitled "Protection of objects indispensable to the survival of the civilian population", provides as follows:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.[68]

34. Article 15, on the "Protection of works and installations containing dangerous forces", provides:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.[69]

35. As noted above (para. 21), Mr. Evensen expressed reservations about the advisability of addressing, in the Commission's draft articles, the subjects dealt with in the 1977 Geneva Protocols. He stated in particular:

. . . In view of the great difficulties with which the Geneva Diplomatic Conference of 1977 was faced, it seems doubtful whether questions pertaining to the laws of armed conflicts should be introduced in the present draft convention. . . . This may create unforeseen difficulties in the Commission's work. . . .[70]

[67] The ICRC commentary to this article recalls the widespread devastation that can be wreaked by the destruction of dykes, dams and other works:

". . . In 1938 the Chinese authorities breached the dykes of the Yellow River near Chang-Chow to stop the Japanese troops, resulting in extensive losses and widespread damage. In 1944 . . . in the Netherlands, German troops flooded many thousands of hectares of agricultural land with sea water to prevent the advance of the enemy.

"It was also during the Second World War that deliberate attacks were mounted against hydro-electric dams. The best known are those which destroyed the dams in the Eder and the Möhne in Germany in May 1943. These operations resulted in considerable damage: 125 factories were destroyed or seriously damaged and in addition 3,000 hectares of cultivated land were lost for the harvest of that year, 1,300 persons were killed, including some deported persons and allied prisoners, and finally, 6,500 head of livestock were lost." (*Ibid.*, p. 667.)

[68] The background and an explanation of this provision may be found in the ICRC commentary (*ibid.*, pp. 1455 *et seq.*).

[69] The ICRC commentary to this article notes that:

". . . The list is exhaustive, which does not mean that there are not other kinds of works or installations whose destruction is likely to entail heavy losses among the civilian population. Thus, for example, the problem of storage facilities for crude oil and oil products and the risks of oil rigs were raised during the Diplomatic Conference. In the end it was only possible to arrive at a consensus on the items listed above, though this does not exclude the protection of other types of installations under different international legal régimes." (*Ibid.*, p. 1462.)

C. The proposed articles

36. For the reasons set forth in section A of the present chapter, the following draft articles do not deal in detail with the protection of water resources and hydraulic installations in times of armed conflict. Draft article 27 focuses on the safety of water resources and installations, while draft article 28 deals generally with their status in times of armed conflict.

PART X

PROTECTION OF WATER RESOURCES AND INSTALLATIONS

Article 27. Protection of water resources and installations

1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:

(*a*) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(*b*) the establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this article.

Comments

(1) For the reasons given in paragraph (1) of the comments on draft article 26, the numbering of part X and of draft article 27 is provisional only.

(2) *Paragraph 1* of draft article 27 requires watercourse States to use their "best efforts" to keep international watercourses, as well as any installations or works, in safe condition and to protect them from sabotage, as by poisoning or destruction.

(3) In contrast to paragraph 1 of draft article 26, *paragraph 2* would require watercourse States to enter into consultations whether or not any watercourse State so requests. This is consistent with paragraph 2 of the comparable draft article proposed by Mr. Evensen (art. 28)[71] and, in the judgment of the present Special Rapporteur, is made necessary by the disastrous consequences that could ensue from the failure of a major installation or from the contamination of water supplies.

[70] See Mr. Evensen's first report, document A/CN.4/367 (footnote 3 above), para. 46.

[71] *Ibid.*, para. 186.

The consultations would be aimed at reaching agreement upon such matters as conditions and specifications for the construction and maintenance of dams, for example as provided for in article 8 of the 1957 Convention between Switzerland and Italy concerning the use of the water power of the Spöl.[72] Under subparagraph (*b*) of paragraph 2, watercourse States are further to consult with regard to the establishment of adequate safety standards and security measures in relation to "hazards and dangers due to the forces of nature, or to wilful or negligent acts". The corresponding provision submitted by Mr. Evensen (art. 28, para. 2(*b*)) also referred to "hazards and dangers created by faulty construction, insufficient maintenance or other causes". These matters are not included in subparagraph (*b*) because it is believed that they are covered by the terms of subparagraph (*a*).

(4) Finally, *paragraph 3* requires watercourse States to exchange data and information relating to the protection of water resources and installations. It makes particular mention of the "conditions" and "specifications" referred to in subparagraph (*a*) of paragraph 2, and of the safety "standards" and security "measures" referred to in subparagraph (*b*). Watercourse States have a legitimate interest in such information because of their larger interest in protecting their population from disasters, as well as from harm due to interference with any of the increasingly common bilateral or multilateral arrangements for development of the watercourse, sharing of power, conservation and management of living resources, or the like.

Article 28. Status of international watercourses and water installations in time of armed conflict

International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts.

Comments

(1) Draft article 28 closely parallels the draft article 28 *bis* submitted by Mr. Evensen in his second report.[73] It has been somewhat simplified, but the basic substantive elements are retained.

(2) While the first limb of the draft article, viz. that international watercourses and works are to be used exclusively for peaceful purposes, is consistent with article 56 of Additional Protocol I to the 1949 Geneva Conventions, it is not clearly required by that article .[74] It is likewise uncertain whether the second limb of the draft article, viz. that such watercourses and works are inviolable in international as well as in internal armed conflicts, is literally required by international law. Indeed, while the poisoning of water supplies is universally condemned, cutting off an enemy's source of water has been found permissible by Fauchille[75] and Oppenheim,[76] as well as in the 1956 United States army field manual in commenting upon the Regulations annexed to the 1907 Hague Convention (IV).[77] Yet the importance and scarcity of fresh water in today's world are such that the rule proposed by Mr. Evensen has compelling force. To these considerations may be added the humanitarian principles underlying the 1977 Geneva Protocols—in particular, the principle of protection of resources indispensable to the survival of the civilian population[78]—and the notion of inviolability of international watercourses and installations seems fundamental indeed. The principle is therefore submitted once again for the Commission's consideration.

[72] See para. 26 above.

[73] See footnote 51 above.

[74] Paragraph 5 of article 56 (set forth in para. 32 above) provides only that the "Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of . . . works or installations" that are protected under paragraph 1 of the article.

[75] Fauchille maintained that it was "permissible to perforate dykes and to demolish sluice gates", and that "one may also divert the course of a river, cut off the enemy's sources of water" (P. Fauchille, *Traité de droit international public*, 8th rev. ed. of *Manuel de droit international public* by H. Bonfils, tome II (Paris, 1921), p. 123)).

[76] See footnote 60 above.

[77] The manual states, in para. 37 (*b*), that article 23 (*a*) of the Regulations "does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses . . ." (as quoted in Whiteman, *op. cit.* (footnote 61 above)).

[78] Chapter III (Civilian objects) of part IV (Civilian population) of Protocol I deals, in article 54, with "Protection of objects indispensable to the survival of the civilian population" (quoted above, para. 31). There is no provision concerning "resources" indispensable to the survival of the civilian population, but "objects" expressly covers "drinking water installations and supplies and irrigation works".

CHAPTER III

Implementation of the articles

A. Introduction

37. Although they were not initially reflected in the outline of remaining issues presented to the Commission in his fourth report,[79] the Special Rapporteur believes that provisions dealing with implementation of the articles are of great importance to the smooth functioning of the future instrument. While the proposed annex (sect. B below) is entitled "Implementation of the articles", it does not purport—nor should a framework agreement attempt—to deal with every aspect of the subject. Instead it lays down several overarching principles that should facilitate implementation of the articles, make redress

[79] Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 7.

more readily available to private parties and help to avoid disputes between watercourse States.

38. The first of these principles is that of non-discrimination. Draft article 2 of annex I provides for implementation of the principle by requiring that watercourse States give extraterritorial effects the same weight as domestic ones in considering the permissibility of activities affecting an international watercourse system. Draft article 3 of the annex requires that recourse be available under the domestic legal system of watercourse States to those injured in other States. Draft article 4 provides for equal rights of access by persons in other States to the relevant administrative and judicial procedures in a watercourse State that is the source of actual or potential harm. To make the latter provision meaningful, draft article 5 requires that watercourse States take appropriate measures to provide potentially affected persons in other States with sufficient information to allow them to exercise their rights under article 4. Draft article 6 deals with jurisdictional immunity, providing that a watercourse State that has caused harm to persons in other States should enjoy no greater jurisdictional immunity with regard to those persons than it does with regard to its own citizens. Draft article 7 establishes a procedure for regular meetings of a "Conference of the Parties" to review the implementation of the articles and perform other functions. Finally, draft article 8 sets forth procedures for amendment of the articles by the conference of the parties. The Special Rapporteur recognizes that draft articles 7 and 8, like other articles of the annex, could well form a part of the main body of the draft articles. He has included them in the annex not for substantive reasons but because the outline of the draft articles approved by the Commission did not contain provisions of the kind proposed in the present chapter. The Special Rapporteur recommends, however, that the Commission consider the possibility of including the provisions contained in annex I in the body of the draft articles.

39. Mr. Schwebel emphasized the "utility of several 'echelons'" of procedures for the avoidance and resolution of differences.[80] He also noted that

> In some international watercourse systems, a rule of equal access to information and to administrative and judicial process by nationals of co-system States—a matter of equal treatment—has already attained considerable importance. . . .[81]

It is a major premise of the proposed annex that actual and potential watercourse problems should be resolved at the private level, through courts and administrative bodies, in so far as possible.[82] Beyond being supported by policies underlying the doctrine of exhaustion of local remedies,[83] resolution at this level will usually bring relief to those actually suffering injury more rapidly than diplomatic procedures[84] and will prevent problems from escalating and from becoming unnecessarily politicized. Moreover, a State may be loath to espouse the claim of an individual for fear of jeopardizing relations with the State which the individual alleges to have caused his injury. The availability of access by natural and legal persons to the judicial and administrative procedures of other watercourse States should help to avoid many disputes between the States themselves by resolving problems at the level of those most directly affected. If these procedures are not applicable or if the problem cannot be resolved at that level, however, the procedures in annex II, on the settlement of disputes, would be available to the States involved.

B. The proposed annex

ANNEX I

IMPLEMENTATION OF THE ARTICLES

Article 1. Definition

For the purposes of this annex, "watercourse State of origin" means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State.

Comments

(1) The definition of "watercourse State of origin" is based on the definition of "country of origin" in the

[80] Document A/CN.4/348 (see footnote 2 above), paras. 478-479.

[81] *Ibid.*, para. 515.

[82] In the context of transfrontier pollution injuries, this thesis is developed in S. C. McCaffrey, "Trans-boundary pollution injuries: Jurisdictional considerations in private litigation between Canada and the United States", *California Western International Law Journal* (San Diego), vol. 3 (1973), p. 191, especially pp. 192-193; and *Private Remedies for Transfrontier Environmental Disturbances*, IUCN Environmental Policy and Law Paper No. 8 (Morges, Switzerland, International Union for the Conservation of Nature and Natural Resources, 1975), especially pp. 11-12. See also A. Rest, *Convention on Compensation for Transfrontier Environmental Injuries*, Beiträge zur Umweltgestaltung, No. A 53 (Berlin, Erich Schmidt, 1976) (in English, French and German); and *Luftverschmutzung und Haftung in Europa* (Kehl am Rhein, N. P. Engel, 1986).

[83] According to Brownlie:

> ". . . This is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law as a whole. The more persuasive practical considerations advanced are the greater suitability and convenience of national courts as forums for the claims of individuals and corporations, the need to avoid the multiplication of small claims on the level of diplomatic protection, the manner in which aliens by residence and business activity have associated themselves with the local jurisdiction, and the utility of a procedure which may lead to classification of the facts and liquidation of the damages. . . ." (I. Brownlie, *Principles of Public International Law*, 3d ed. (Oxford, Clarendon Press, 1979), p. 496.)

While this doctrine has been applied for the most part in cases involving claims against a State in which an injury was suffered, it would also seem applicable in cases where an act in one State causes an injury to the claimant in another:

> ". . . The policy underlying the customary requirement that injured parties exhaust all local remedies before seeking governmental assistance is particularly well suited to this situation since the offensive activity will often be located in the same ecological region as, and in proximity to, the injured party." (McCaffrey, "Trans-boundary pollution injuries . . .", *loc. cit.* (footnote 82 above), p. 191.)

[84] For example, in the *Elettronica Sicula S.p.A. (ELSI)* case between the United States of America and Italy, the facts giving rise to the case—in particular, the requisitioning of ELSI's plant by the Mayor of Palermo—occurred in 1968, the claim by the United States Government was initially submitted to the Italian Government in 1974, and the Chamber of the ICJ delivered its judgment on 20 July 1989 (*I.C.J. Reports 1989*; p. 15, at p. 32, paras. 30 *et seq.*).

annex to the OECD Council of 17 May 1977 on "Implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution",[85] which provides as follows:

(*e*) "Country of origin" means any Country within which, and subject to the jurisdiction of which, transfrontier pollution originates or could originate in connection with activities carried on or contemplated in that Country.[86]

(2) The term "activities" is used in its broad sense, referring to any use of land or water, including "measures" within the meaning of part III, "Planned measures", of the draft articles. The term "activities" was employed, rather than "measures", because the latter was not considered broad enough to cover the full panoply of uses that should be covered. The term "activities" has also been used in the draft articles on "International liability for injurious consequences arising out of acts not prohibited by international law".[87]

Article 2. Non-discrimination

In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.

Comments

(1) Draft article 2 is based on article 2 of the Convention on the Protection of the Environment of 19 February 1974[88] ("Nordic Convention"), which provides as follows:

Article 2

In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.

(2) The purpose of article 2 is twofold: to implement the general principle of non-discrimination, and to provide a legal basis for administrative consideration of extraterritorial effects of planned activities. It implements the principle of non-discrimination[89] by requiring that, in regulating existing or prospective activities, the authorities of a watercourse State treat any adverse effects which those activities may have in other States in the same way as they would treat domestic effects. For example, if the legislation of State A requires that the competent authority consider the harmful effects of a proposed activity in determining whether to grant it an operating licence, the proposed article 2 would require that any harmful effects that the activity would cause in State B be given the same weight in the decision-making process as harmful effects in State A itself. In requiring consideration of the extraterritorial impact from the beginning of the licensing process, this provision would also help to reduce the possibility of disagreements between watercourse States arising out of the application of the provisions of part III of the draft articles, which deals with planned measures.

(3) The second purpose of draft article 2 is to provide a legal basis for the consideration by administrative authorities of the comments of persons residing or carrying on activities in other States. Such comments are provided for in draft article 4, below. In many legal systems, administrative authorities are empowered to consider only such effects as may occur within the State whose legislation established them. However, a right of aliens to participate in administrative proceedings would be meaningless if the body in question lacked authority to consider extraterritorial effects. Draft article 2 would therefore require that watercourse States empower their otherwise competent administrative authorities to take into consideration, when evaluating the permissibility of proposed activities, effects that are, or may be, produced in other States.

(4) The reference to adverse effects "in another State" indicates that it is not only such effects in other *watercourse* States that are to be taken into consideration, but those in any State other than that in which an activity is or may be situated. This provision would apply, for example, to a case in which pollutants discharged into an international watercourse ultimately affected persons or property in, or the environment of, a coastal State that was not a watercourse State.

(5) As in the case of article 12, provisionally adopted in 1988, the expression "adverse effects" is intended to refer to effects that do not necessarily rise to the level of "appreciable harm" within the meaning of article 8, also provisionally adopted in 1988. However, the expression "adverse effects" is used in an even more generic sense than that of "appreciable adverse effect" in draft article 12, since all kinds of negative consequences that the administrative body may consider under its enabling legislation—which may go beyond "appreciable" ones—must be covered by draft article 2.

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[85] Recommendation C(77)28(Final) (OECD, *OECD and the Environment* (Paris, 1986), pp. 150 *et seq.*). See generally S. Van Hoogstraten, P. Dupuy and H. Smets, "Equal right of access: Transfrontier pollution", *Environmental Policy and Law* (Lausanne), vol. 2 (1976), p. 77.

[86] Transfrontier pollution is defined as follows in the annex to the OECD recommendations:

"(*c*) 'Transfrontier pollution' means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under, the national jurisdiction of one Country and which has effects in the area under the national jurisdiction of another Country." (OECD, *op. cit.*, p. 151.)

[87] The term "activities" is used throughout the draft articles proposed in the fifth report of the Special Rapporteur on the topic, Mr. Barboza, although it is not defined. For example, article 1 of that draft provides in part: "The present articles shall apply with respect to activities carried on in the territory of a State . . .". (*Yearbook . . . 1989*, vol. II (Part One), p. 134, document A/CN.4/423, para. 16.)

[88] On this Convention, see generally A. C. Kiss, "La convention nordique sur l'environnement", *Annuaire français de droit international, 1974* (Paris), vol. XX, p. 808; and C. Flinterman, B. Kwiatkowska and J. G. Lammers, eds., *Transboundary Air Pollution* (Dordrecht, Martinus Nijhoff, 1986), chap. 8 by B. Broms and chap. 9 by C. Phillips.

[89] See OECD document "Non-discrimination in regard to transfrontier pollution" (1978). See also the UNEP "Draft principles of conduct in the field of the environment . . ." (footnote 22 above), principle 13 of which reads:

"*Principle 13*

"It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it."

Article 3. Recourse under domestic law

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Comments

(1) *Paragraph 1* is based on article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea, which provides as follows:

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

(2) The requirement of paragraph 1 that compensation "or other relief" be available for harm caused "or threatened" in other States is intended to apply in particular to cases in which the implementation of measures in a watercourse State poses a significant likelihood of causing appreciable harm in another State. In such instances, persons threatened with harm in the second State should be entitled, to the same extent as persons in the first State, to seek injunctive or similar relief[90] through the competent judicial or administrative authorities of the first State in order to prevent the harm. It is in this sense that the phrase "or other relief" is used in paragraph 1. The paragraph requires that such recourse be made available to those potentially affected in other States.

(3) As in the case of draft article 2 of the present annex, the reference to appreciable harm "in other States" indicates that it is not only such harm in other *watercourse* States for which recourse must be made available.[91] Thus, if a person acting in State A, a watercourse State, discharged substances into the watercourse that ultimately caused appreciable pollution harm to the operator of an activity in the territorial sea of State B, article 3 would require that recourse be available in the first State to that operator.

(4) *Paragraph 2* is based on article 235, paragraph 3, of the United Nations Convention on the Law of the Sea, which provides as follows:

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

(5) The purpose of paragraph 2 is to highlight the importance of the implementation and further development by States of the substantive and procedural law relating to remedies for transfrontier harm occasioned or threatened by water-related activities. Paragraph 2 concerns, in particular, the implementation and further development of (*a*) international legal norms concerning compensation or other relief for harm resulting from violations of articles of the future convention and (*b*) procedures and mechanisms for the assessment of harm and the payment of compensation. These objectives could be accomplished through bilateral, regional or multilateral meetings and instruments designed to facilitate the provision of appropriate remedies for harm to persons, property or the environment. Such efforts by watercourse States should be aimed at eliminating any substantive or procedural obstacles to redress through courts or administrative bodies and at assuring the availability of compensation through such devices as compulsory insurance or funds for the indemnification of injured parties. The phrase "or other relief" is intended to include not only injunctive relief of the kind described above but also environmental rehabilitation[92] and clean-up.

Article 4. Equal right of access

1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

2. The treatment referred to in paragraph 1 of this article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

Comments

(1) Paragraph 1 is based on the principles concerning transfrontier pollution annexed to OECD Council recommendation C(77)28 of 17 May 1977 on "Implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution". Paragraph 4(*a*) of these principles provides as follows:

4. (*a*) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant

[90] As used here, the expression "injunctive relief" includes an order that an activity not commence operation or that it be halted, or that measures be taken to clean up pollution or rehabilitate damaged property, ecosystems or plant or animal life. The term "injunction" has been defined as a judicial order "operating in personam, and requiring [the] person to whom it is directed to do or refrain from doing a particular thing". (*Black's Law Dictionary*, 5th ed. (St. Paul, Minn., West Publishing Co., 1979), p. 705.)

[91] See above, paragraph (4) of the comments on draft article 2.

[92] The term "rehabilitation" is discussed below, in the comments on draft article 4.

risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status;[93]

(2) Similar rights are guaranteed by the 1974 Nordic Convention on the protection of the environment, which provides in article 3 as follows:

Article 3

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured Party than the rules of compensation of the State in which the activities are being carried out.[94]

(3) In article 8 of its Rules on Water Pollution in an International Drainage Basin, adopted at its sixtieth Conference, held at Montreal in 1982, the International Law Association called upon States to provide affected persons with access to judicial and administrative procedures on a non-discriminatory basis:

Article 8

States should provide remedies for persons who are or may be adversely affected by water pollution in an international drainage basin. In particular, States should, on a non-discriminatory basis, grant these persons access to the judicial and administrative agencies of the State in whose territory the pollution originates, and should provide, by agreement or otherwise, for such matters as the jurisdiction of courts, the applicable law, and the enforcement of judgments.[95]

(4) As in the case of draft articles 2 and 3 of the present annex, the reference to appreciable harm "in other States" indicates that it is not only such harm in other watercourse States for which recourse must be made available.[96]

(5) Paragraph 2 is also based on the principles concerning transfrontier pollution annexed to recommendation C(77)28 adopted by the OECD Council on 17 May 1977, paragraph 4 (*b*) of which reads:

(*b*) From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial procedures existing within the country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.[97]

(6) The term "rehabilitation" is used in reference to the environment since "restoration" of the environment, in the strict sense, would not be possible.[98] The term would include, for example, clean-up of petroleum or chemical spills, treatment of wildlife affected by such spills and restoration to the extent practicable of natural systems, including habitat and spawning grounds. Where it is not feasible or desirable for the operator of the harmful activity to carry out rehabilitation in the territory of the affected State, other alternatives, such as indemnification for the costs incurred by affected persons or entities in that State, should be available.

Article 5. Provision of information

1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this article. To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin.

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[93] OECD, *op. cit.* (footnote 85 above), p. 152.

[94] See also the UNEP "Draft principles of conduct in the field of the environment . . ." (footnote 22 above), principle 14 of which reads:

"*Principle 14*

"States should endeavour, in accordance with their legal systems and, where appropriate, on a basis agreed by them, to provide persons in other States who have been or may be adversely affected by environmental damage resulting from the utilization of shared natural resources with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdictions who have been or may be similarly affected."

[95] ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 544.

[96] See the explanations given above in paragraph (4) of the comments on article 2 and in paragraph (3) of the comments on article 3.

[97] OECD, *op. cit.* (footnote 85 above), p. 152.

For a case allowing a citizen of another country to take part in administrative proceedings in a country of origin, see the *Emsland* case (1986), in which a Netherlands citizen was allowed to take part in administrative proceedings in the Federal Republic of Germany. The proceedings concerned whether to authorize the construction of a nuclear power plant (the Emsland plant) on the German side of the border, 25 kilometres from the plaintiff's residence in the Netherlands; the plaintiff had challenged the adequacy of the plant's safety and precautionary measures (see the decision of the Federal Administrative Court of the Federal Republic of Germany of 17 December 1986 (*Entscheidungen des Bundesverwaltungsgerichts*, vol. 75 (1987), p. 285)). According to an article on this case, the Court had observed that States were under an obligation to prevent, reduce and control pollution to avoid injury to foreign territory; therefore, when authorizing nuclear power stations in a frontier area, authorities must be sure to implement the high standards of the federal Atomic Energy Act in consideration of foreign interests; granting an equal right of access was one more way of ensuring the fulfilment of this obligation of international customary law. (Flormann, "Nuclear power plant at the border: The right of a Netherlands citizen before the Administrative Court of West Germany", *Transboundary Resources Report* (Albuquerque, N.M.), vol. 3, No. 3 (1989).)

[98] In the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* brought before the ICJ (Application of 19 May 1989) Nauru claimed that

"Australia, through its failure to make any provision . . . for the *rehabilitation** of the phosphate lands worked out under Australian administration . . ., failed to comply with the international standards recognized as applicable in the implementation of the principle of self-determination." (Para. 45.)

In addition to self-determination, Nauru based its claim on the theories of abuse of rights (para. 47) and denial of justice (para. 46). Naura claims, *inter alia*, that Australia is under a duty of restitution which "extends to the *restoration** of those parts of the island . . . *to a reasonable condition** for habitation by the Nauruan people as a sovereign nation". (Para. 49.)

Comments

(1) Draft article 5 is designed to contribute to the implementation of the principles of non-discrimination and equal treatment. Without information, it will not be possible for actually or potentially affected persons in other States to identify, and seek relief from, the source of their injuries. The importance of access to information is recognized in, *inter alia*, the report on conclusions and recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, held at Sofia in November 1989.[99] According to that report:

> The participating States reaffirm their respect for the right of individuals, groups and organizations concerned with environmental issues . . . to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions. . . .
>
> The participating States further undertake to promote
>
> . . . the reproduction, circulation and exchange of information and data, as well as of audiovisual and printed material, on environmental issues, and encourage public access to such information, data and material.

A similar right of access by the public to environmental information has been recognized by the European Community.[100] Access to information by individuals is also provided for in a set of preliminary draft rules on compensation for damage resulting from dangerous activities that has been prepared under the auspices of the European Committee on Legal Co-operation of the Council of Europe.[101] These rules provide for access by "any person" to information held by public authorities or by any operator of a dangerous activity, *inter alia* where such information is necessary to the establishment of a claim for compensation under the rules.[102] Certain restrictions apply in the case of both public authorities and operators. The rationale for affording injured persons access to information held by public authorities and operators was stated by the Committee of Experts in part as follows:

> Persons who have suffered a damage would be in a better position to assess the extent of such damage and to ascertain a causal link if they had access to the information on the environment held by public authorities. . . .[103]

(2) *Paragraph 1* of draft article 5 is based on the principles concerning transfrontier pollution annexed to recommendation C(77)28 adopted by the OECD Council on 17 May 1977, which provide in paragraph 9 (*a*) as follows:

> 9. (*a*) Countries of origin should take any appropriate measures to provide persons exposed to a significant risk of transfrontier pollution with sufficient information to enable them to exercise in a timely manner the rights referred to in this Recommendation. As far as possible, such information should be equivalent to that provided in the country of origin in cases of comparable domestic pollution.[104]

The expression "persons in other States" is used in the same sense as in previous articles of the present annex.

(3) *Paragraph 2* is also based on the above-mentioned principles concerning transfrontier pollution, paragraph 9 (*b*) of which provides as follows:

> (*b*) Exposed countries[105] should designate one or more authorities which will have the duty to receive and the responsibility to disseminate such information within limits of time compatible with the exercise of existing procedures in the country of origin.

Article 6. Jurisdictional immunity

1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these articles.

Comments

(1) Draft article 6 is based on the principle of non-discrimination. It would ensure that those harmed by State-owned or State-operated activities have the same rights to redress from those entities whether they live, or operate, in the watercourse State of origin or in another State, *Paragraph 1* lays down this general rule. The term "proceedings" includes those in which the plaintiff or petitioner seeks "measures of constraint", as that expression is used in part IV of the Commission's draft articles

[99] Document CSCE/SEM.36/Rev.1, Sofia, 3 November 1989. See also the report of the Economic Commission for Europe on the Bergen Conference (8-16 May 1990), submitted to the Preparatory Committee for the United Nations Conference on Environment and Development at its first session (Nairobi, August 1990) (A/CONF.151/PC/10). Annex I to that report contains the "Bergen Ministerial Declaration on sustainable development in the ECE region", section V of which deals with "Awareness raising and public participation".

[100] The Council of the European Communities adopted on 7 June 1990 a directive on the freedom of access to information on the environment. The directive is designed to ensure freedom of acccess to, and dissemination of, information on the environment held by public authorities and to set out the basic conditions under which such information should be made available (para. 1). Subject to certain reservations, the public authorities are to allow any natural or legal person access to information on the environment on request, with no obligation to prove an interest (art. 3). (*Official Journal of the European Communities* (Luxembourg), No. L 158, 23 June 1990, p. 56.)

The municipal law of a number of States also requires the provision of information to the public on activities that pose a significant risk of causing appreciable harm. An example of such a statute is the Emergency Planning and Community Right-to-know Law of 17 October 1986 of the United States of America (*United States Code, 1988 Edition*, vol. 17, title 42, sects. 11001-11050).

[101] The draft rules and the accompanying commentary were prepared by the Committee of Experts on Compensation for Damage caused to the Environment. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

[102] Rule 11 (Access to information held by public authorities) and rule 12 (Access to information held by operators) (*ibid.*, pp. 29-30). These two draft rules, especially rule 12, are characterized in the report as "a first attempt to reconcile various ideas put forward within the committee and the working group" (*ibid.*, p. 15, para. 46).

[103] *Ibid.*, p. 15, para. 46. On the other hand,

> ". . . some experts considered it more appropriate to entrust an 'environment protection agency' with the task of collecting any information relevant to the establishment of the facts of a case and of placing such information at the disposal of the courts and of the parties concerned." (*Ibid.*)

While such a proposal may be a sound one, not all watercourse States will have established such an agency, and it would go beyond the scope of the present draft articles to require the establishment of one.

[104] OECD, *op. cit.* (footnote 85 above), p. 153.

[105] The expression "exposed country" is defined as "any country affected by transfrontier pollution or exposed to a significant risk of transfrontier pollution" (*ibid.*, p. 151).

on jurisdictional immunities of States and their property.[106]

(2) As used in this article, the expression "watercourse State of origin" includes not only the organs of that State but also its agencies, companies and other instrumentalities. It is used in the same sense as the term "State" in the draft articles on jurisdictional immunities of States and their property.[107] The expression "other States" is used in the same sense as in previous draft articles of the present annex.

(3) The expression "nationals and habitual residents" refers to natural and legal persons residing or doing business in the watercourse State of origin. The expression "habitual residence" is used in the Hague Conventions on Private International Law to harmonize the meaning of the concept of "domicile" in the various civil-law and common-law countries that are parties to those conventions.[108]

(4) *Paragraph 2* is based on article 236 of the 1982 United Nations Convention on the Law of the Sea, which provides:

Article 236. Sovereign immunity

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

While the purpose of paragraph 2 is not identical with that of article 236 of the Convention, both provisions emphasize the importance of efforts by States to ensure that their agencies and instrumentalities comply with the obligations in question. Unlike article 236, however, paragraph 2 applies even where the agency or instrumentality involved would enjoy jurisdictional immunity. While the need for such a provision is perhaps greater where jurisdictional immunity exists, it does not necessarily follow from the lack of such immunity that State entities will act consistently with their obligations or that persons injured in other States will obtain relief. There are a number of potential obstacles to obtaining relief even in the absence of immunity—such as the cost of bringing proceedings, the gathering of evidence and the establishment of causation[109]—which may have the same ultimate effect as a rule of immunity itself. This points up the importance of prevention, which is the province of the watercourse State of origin. For these reasons, it does not seem necessary or desirable to confine the obligation set forth in paragraph 2 to situations in which immunity exists.

(5) As used in paragraph 2, the expression "agencies or instrumentalities" includes companies owned or operated by the watercourse State of origin. The reader is also referred in this connection to paragraph (2) of the comments on the present draft article.

(6) It is perhaps appropriate to address briefly the relationship between the present draft article 6 and article 13 (Personal injuries and damage to property) of the draft articles on jurisdictional immunities of States and their property, adopted on first reading.[110] Article 13 provides in relevant part that:

". . . the immunity of a State cannot be invoked before a court of another State . . . in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

The draft articles on jurisdictional immunities, of course, deal only with the immunity of a State from the jurisdiction of the courts of another State. Their provisions are thus not applicable to the present annex, under which any proceeding involving the watercourse State of origin that was initiated by persons injured outside that State would be brought before the State's own courts or administrative bodies. The proposition might be advanced, however, that the same policy that supports non-immunity in cases covered by draft article 13 would also support it in cases under the present annex. That policy seems to be that injured individuals should not be left "without recourse to justice" by reason of the jurisdictional immunity of the "author" State.[111] In the present context, this would

[106] *Yearbook . . . 1986*, vol. II (Part Two), p. 11. Another approach would be to deal with measures of constraint in a separate paragraph, which might read as follows:

"A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States, in which those persons seek measures of constraint, only in so far as it enjoys such immunity when such measures are sought by nationals or habitual residents of the State that owns or operates them."

The Special Rapporteur considers this approach somewhat cumbersome and therefore decided simply to make clear in the comments that the term "proceedings" includes those in which measures of constraint are sought against the watercourse State of origin.

[107] See the interpretative provision concerning the term "State" in article 3, para. 1, of those draft articles, which were adopted on first reading in 1986 (*Yearbook . . . 1986*, vol. II (Part Two), p. 9).

[108] See, for example, article 5 of the Convention concerning Settlement of Conflicts between the Law of Nationality and the Law of Domicile (The Hague, 15 June 1955).

[109] See generally McCaffrey, "Expediting the provision of compensation to accident victims", in G. Handl and R. E. Lutz, eds., *Transferring Hazardous Technologies and Substances: The International Legal Challenge* (London, Graham & Trotman, 1990), pp. 199 *et seq.*; and "Accidents *do* happen: Hazardous technology and international tort litigation", *The Transnational Lawyer* (Sacramento, Calif.), vol. 1 (1988), p. 41.

These kinds of problems—together, in some cases, with the spectre of sovereign immunity—probably explain the tendency of aggrieved individuals in recent cases to bring claims against their own governmental authorities for relief from foreign-source pollution. See, for example, the decision of 31 May 1989 of the Court of Appeal of the Canton of Bern in the *Rey und Leimgruber* v. *Schweizerische Eidgenossenschaft* case, upholding the liability of the Federal Government of Switzerland for damage to the plaintiff's vegetable business due to radiation from the Chernobyl nuclear incident (see *Recueil officiel des arrêts du Tribunal fédéral suisse* (Lausanne, 1991), vol. 116, part II, p. 483); and a case brought by an individual and the city of Lübeck in the Federal Republic of Germany against the competent Federal Republic authorities in Federal Republic courts, seeking relief from apprehended contamination of drinking water by transfrontier groundwater pollution emanating from the Schoenberg waste dump in the German Democratic Republic. The latter case is discussed in M. Núñez-Müller, "The Schoenberg case: Transfrontier movements of hazardous waste", *Natural Resources Journal* (Albuquerque, N.M.), vol. 30 (1990), p. 153.

[110] *Yearbook . . . 1986*, vol. II (Part Two), p. 10.

[111] See paragraph (3) of the commentary to article 14 (which later became article 13) of the draft articles on jurisdictional immunity, in *Yearbook . . . 1984*, vol. II (Part Two), p. 66.

suggest that if a citizen of State B were injured in that State by, for example, pollutants deposited into an international watercourse in State A by a company of State A, that person should be able to bring proceedings against State A in his own courts or tribunals to recover for the injury. Draft article 6 does not go this far, however. It requires only that any recourse against the organs, companies or other entities of the watercourse State of origin that is available to its own citizens and habitual residents should also be available to persons injured outside that State. It may be that there is little distinction in principle between foreseeably causing an injury in State A by an act or omission in that State, and foreseeably causing an injury in State B by an act or omission in State A; but without the benefit of some direction from the Commission, the Special Rapporteur is reluctant to propose that watercourse States of origin be subject to the jurisdiction of their own courts and tribunals in proceedings brought by injured foreign persons, even if they would enjoy jurisdictional immunity in proceedings brought by their own citizens. This reluctance also stems from the decision of the Commission to exclude from the application of article 13 of the draft articles on jurisdictional immunities "cases of transboundary injuries or transfrontier torts or damage, such as letter-bombs or the export of explosives, fireworks or dangerous substances which could explode or cause damage".[112] However, the Commission recognizes that "a court foreign to the scene of the delict might be considered as a *forum non conveniens*" and that "the injured individual would have been without recourse to justice had the ['author'] State been entitled to invoke its jurisdictional immunity".[113] Thus it is possible that the only recourse of a person in State B injured by an act or omission of watercourse State of origin A would be to attempt to convince State B to espouse his or her claim against State A. As explained above (para. 39), it is precisely this kind of politicization of disputes that the procedures under the annex are designed to avoid. The Special Rapporteur would welcome the views of members of the Commission on this point, in particular.

Article 7. Conference of the Parties

1. Not later than two years after the entry into force of the present articles, the Parties to the articles shall convene a meeting of the Conference of the Parties. Thereafter, the Parties shall hold regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present articles. In addition, they may:

(*a*) consider and adopt amendments to the present articles in accordance with article 8 of this annex;

(*b*) receive and consider any reports presented by any Party or by any panel, commission or other body established pursuant to annex II to the present articles; and

(*c*) where appropriate, make recommendations for improving the effectiveness of the present articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(*a*) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(*b*) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

Comments

(1) Several recent conventions relating to the environment or transboundary harm contain provisions for regular meetings of a "conference of the parties".[114] In general, these agreements provide for institutionalized and regular collective action by the contracting parties. This technique permits the parties to review, on a regular basis, the effectiveness of the convention in question and to monitor its implementation. Other multilateral agreements have made effective use of similar devices as an element of their dispute-settlement mechanisms.[115]

(2) Draft article 7 is based on article XI of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 2 March 1973, which provides as follows:

[112] Paragraph (7) of the commentary to article 14 (*ibid.*, p. 67). While the text of article 13 does not require that the injury must have been sustained in the forum State, paragraph (7) of the commentary to that article leaves no doubt on the question.

[113] *Ibid.*, p. 66, paragraph (3) of the commentary.

[114] See, for example, the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, art. XXVI; the Convention on Long-range Transboundary Air Pollution of 13 November 1979, art. 10 (concerning the "Executive Body"); the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985, art. 6; and the Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, art. 11 (providing for ordinary meetings to be held in conjunction with the conference of the parties to the underlying Vienna Convention, previously cited, and extraordinary meetings to be held at the request of at least one third of the parties).

[115] See especially the General Agreement on Tariffs and Trade (GATT), art. XXIII. Relevant GATT procedures are discussed in chapter IV below, on the settlement of disputes.

Article XI. Conference of the Parties

1. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of the present Convention.

2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one third of the Parties.

3. At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:

(*a*) make such provision as may be necessary to enable the Secretariat to carry out its duties;

(*b*) consider and adopt amendments to appendices I and II in accordance with article XV;

(*c*) review the progress made towards the restoration and conservation of the species included in appendices I, II and III;

(*d*) receive and consider any reports presented by the Secretariat or by any Party; and

(*e*) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(*a*) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(*b*) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, these observers shall have the right to participate but not to vote.

(3) Article XII of the same Convention provides that "a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme" upon the entry into force of the Convention. While it would clearly be useful to have a secretariat to perform such functions as convening and servicing meetings of the conference of the parties and conducting studies and research at the request of the parties to the present articles, the Special Rapporteur is hesitant to propose the establishment of a permanent institution in connection with what is envisaged as a framework agreement. If a convention is eventually concluded on the basis of the present draft articles, the parties may certainly establish such an institution if they so desire.

Article 8. Amendment of the articles

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of this article, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

Comments

(1) The Special Rapporteur believes that it is important to provide for the amendment of the articles in order to enable the parties to take into account changing developments. For example, rapid increases in the pollution of fresh water and the intensification of such problems as drought and desertification might prompt the parties to update the provisions of the articles concerning those subjects.

(2) Draft article 8 is based on article XVII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. That article provides as follows:

Article XVII. Amendment of the Convention

1. An extraordinary meeting of the Conference of the Parties shall be convened by the Secretariat on the written request of at least one third of the Parties to consider and adopt amendments to the present Convention. Such amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties which have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

(3) The only material respects in which draft article 8 departs from article XVII are the provisions concerning the secretariat in paragraphs 1 and 2 of the latter and the depositary in paragraph 3. The matter of a secretariat is addressed in the comments on draft article 7 of the present annex. As to the depositary, it could be a Government, the Secretary-General of the United Nations, or the head of another appropriate body such as UNEP or FAO. The remaining provisions of article XVII were considered appropriate by the Special Rapporteur for use in the context of the present draft articles. He would welcome comment, in particular, with regard to the provisions of paragraph 3 concerning entry into force of amendments.

CHAPTER IV

Settlement of disputes

A. Introduction

40. The subject of settlement of disputes has been treated by the previous two Special Rapporteurs, both of whom have proposed articles on this subtopic (see below, paras. 86 *et seq.*). It is indeed an integral part of a set of draft articles on the law of the non-navigational uses of international watercourses, but for reasons somewhat different from those that would apply in most of the other fields of international law. Chief among these reasons is the general and flexible nature of some of the most fundamental provisions of the draft articles (such as article 6, "Equitable and reasonable utilization and participation"). The very same generality and flexibility of these provisions that make them so well suited to a framework instrument on international watercourses may also make them difficult to apply with precision in some cases. Furthermore, the operation of many of the provisions of the draft articles depends upon certain key facts. To the extent that the watercourse States concerned do not know or agree upon these facts, their legal obligations will not be clear. Some means of objectively establishing the operative facts will therefore be necessary in such cases.

41. It has been seen in this and previous reports that watercourse States frequently entrust the gathering of data and information concerning international watercourses to technical experts, who often operate within the context of a joint commission or other institutional arrangement. As indicated in chapter I above, where such joint commissions have been established they are often in the best position to engage in fact-finding and to resolve any questions that may arise with regard to the respective obligations of the watercourse States concerned. Even where such bodies have not been formed, State practice and the works of experts who have studied the question[116] indicate that, wherever possible, it is advisable to attempt resolution of any differences at the technical level before proceeding to invoke more formal dispute-resolution procedures.

42. In the light of these considerations, the Special Rapporteur proposes in the present chapter a process for the avoidance and settlement of watercourse disputes that consists of a graduated series of stages. The proposals are based on several propositions: first, that it will often be necessary in this field to rely heavily on technical expertise; secondly, that a non-binding expert report, possibly accompanied with a recommended course of action, will frequently result in resolution of an actual or potential dispute without the need to have recourse to a procedure that results in a binding settlement; and thirdly, that procedures of the latter kind should be resorted to only after attempts to settle differences at the technical level have failed.

43. It will be evident from the foregoing discussion that, notwithstanding the title of the present chapter, the proposals it contains are not confined to the "settlement of disputes" as that expression is generally understood. The expression "international water law dispute" has been defined as

> . . . an international dispute between two or more than two international drainage basin states . . ., with respect to
>
> (i) the conservation, use, sharing (including sharing of benefits), control, development or management of the water resources of an international drainage basin, [or]
>
> (ii) the interpretation of the terms of any agreement relating to the conservation, use, sharing (including sharing of benefits), control, development and management of such water resources or the implementation of such an agreement including all matters rising out of the implementation of such an agreement.[117]

This definition focuses on the usual subject-matter of disputes relating to international watercourses. While it does not refer expressly to factual questions, they are often at the root of the matters mentioned. However, procedures such as fact-finding also concern implementation of the articles (and to this extent could have been dealt with in the preceding chapter) and avoidance of disputes. It is only when questions have not been resolved in earlier stages of the process that the proposed procedures for the settlement of disputes become applicable.

44. In section B of this chapter, the Special Rapporteur will review briefly the principal means of international dispute settlement and cite examples of their use by States in the context of disputes involving international watercourses. In section C he will illustrate the use by States and international organizations of experts to assist in the avoidance and resolution of watercourse and other disputes. In section D he will survey the work of international organizations concerning the settlement of such disputes, and in section E the proposals of previous Special Rapporteurs relating to this subtopic will be recalled. Finally, in section F the Special Rapporteur will submit for the Commission's consideration a set of draft articles on fact-finding and the settlement of disputes.

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[116] See in particular *Management of international water resources . . .* (footnote 4 (*c*) above), chap. V, "Accommodation procedures and dispute settlement", especially paras. 455 and 457-458. See also, for example, Smith, *op. cit.* (footnote 7 above), p. 152 (principles 6 and 7); F. J. Berber, *Rivers in International Law* (London, Stevens, 1959), p. 271; and C. B. Bourne, "Mediation, conciliation and adjudication in the settlement of international drainage basin disputes", *The Canadian Yearbook of International Law, 1971* (Vancouver), vol. IX, p. 114. See generally Bourne, "Procedure in the development of international drainage basins: The duty to consult and to negotiate", *The Canadian Yearbook of International Law, 1972*, vol. X, p. 212; R. B. Bilder, *The Settlement of International Environmental Disputes* (Madison, Wisc., University of Wisconsin, 1976); UNITAR, *Protecting the Human Environment: Procedures and Principles for Preventing and Resolving International Controversies*, by A. L. Levin (United Nations publication, Sales No. E.77.XV.PS/9); R. E. Stein, "The settlement of environmental disputes: Towards a system of flexible dispute settlement", *Syracuse Journal of International Law and Commerce* (Syracuse, N.Y.), vol. 12 (1985), p. 283; and the sources cited in the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), footnotes 776 and 778.

[117] B. R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins* (Berlin, Erich Schmidt, 1981), pp. 96-97. Chauhan includes in this definition disputes between a "drainage basin state" and a political subdivision of a State (such as the German Länder), since the latter have on occasion entered into agreements concerning international watercourses (*ibid.*, p. 97 and footnote 45).

B. Means of dispute settlement and their application by States in their relations concerning international watercourses

45. It would far exceed the scope and purpose of this chapter to essay an in-depth examination of the subject of the pacific settlement of disputes, especially in view of the fact that the general principles of international dispute settlement are well known to the members of the Commission.[118] This section has a much more limited purpose, namely to provide a backdrop against which to consider the material that follows.

46. Mr. Evensen has characterized as the "obvious starting-point" for any treatment of the settlement of disputes the principles formulated in the Charter of the United Nations, and specifically in Article 2,[119] paragraph 3 of which lays down the obligation of Member States to settle "international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". The first article in Chapter VI of the Charter, on the pacific settlement of disputes, is Article 33, paragraph 1 of which lists the following peaceful means of dispute settlement: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice". Article 33 requires the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security", to seek a solution of the dispute, "first of all", by those means.

47. While some of the means of peaceful settlement listed in Article 33 will be relied upon in the procedures proposed in the present chapter, the latter procedures are intended to apply even if the continuance of a dispute concerning an international watercourse would *not* "endanger the maintenance of international peace and security". Indeed, Article 2, paragraph 3, of the Charter requires Member States to settle international disputes by peaceful means so that, *inter alia*, "justice" is not endangered. This could presumably be the case even if there were no threat to "international peace and security".[120]

48. According to William Bishop, direct *negotiation* between the parties is the "simplest" of the means of peaceful settlement,

> . . . although probably the one by which the larger number of day-to-day differences are adjusted . . . Through an exchange of views, usually via diplomatic channels, agreement is reached in a mutual process of give-and-take.[121]

Manfred Lachs has written that

> . . . States resort to negotiations very frequently, probably owing to the fact that they are rather anxious to retain control to the very end over the decisions arising out of differences which divide them. There are of course many international disputes and problems which cannot be solved otherwise . . .[122]

While recognizing that "diplomacy . . . has its limits", Lachs notes that "the obligation to negotiate . . . does not imply an obligation actually to reach agreement. The obligation is only to try one's best."[123] Or, as the ICJ put it in the *North Sea Continental Shelf* cases:

> . . . the parties are under an obligation to enter into negotiations with a view to arriving at an agreement . . .; they 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.[124]

49. Although it is probable that the great majority of disputes concerning international watercourses have been either avoided or settled through negotiation, very few of

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[118] In fact, such an examination is currently being conducted in the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. Specifically, the Secretariat is preparing a draft handbook on the peaceful settlement of disputes between States. See, for example, the report of the Secretary-General on the progress of work on the draft handbook (A/AC.182/L.61), and generally the report of the Special Committee (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 33* (A/44/33)), especially chap. V, "Peaceful settlement of disputes between States".

For a more detailed treatment of the different means of dispute settlement discussed in this section, with particular reference to international watercourses, see Chauhan, *op. cit.* (footnote 117 above), pp. 321-367.

[119] See Mr. Evensen's first report, document A/CN.4/367 (see footnote 3 above), para. 200.

[120] According to a commentary on the Charter: "It is not enough that peace and security should be safeguarded; the principles of justice must also be respected." (L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd ed. (Boston, World Peace Foundation, 1949), p. 102.) See also the third edition of this work, by L. M. Goodrich, E. Hambro and A. P. Simons (New York, Columbia University Press, 1969), p. 41. For a discussion of the circumstances in which international peace and security might be endangered by a dispute between watercourse States, see Bourne, "Mediation, conciliation . . .", *loc. cit.* (footnote 116 above), p. 157. Water disputes have given rise to charges of aggression, for example the dispute between Bolivia and Chile concerning the River Lauca (see L. M. Lecaros, "International rivers: the Lauca case", *The Indian Journal of International Law* (New Delhi), vol. 3 (1963), pp. 148-149; and the second report of the Special Rapporteur (*Yearbook . . . 1986*, vol. II (Part One), p. 112, document A/CN.4/399 and Add.1 and 2, para. 94). Further, Israel and its neighbouring Arab countries have each declared that they would consider unilateral diversion of the Jordan as an act of aggression (see K. B. Doherty, "Jordan waters conflict", *International Conciliation* (New York), No. 553 (May 1965), pp. 35 and 65; and the second report of the Special Rapporteur, document A/CN.4/399 and Add.1 and 2, para. 96). See generally the sources cited in the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), footnote 778; and the article by Bourne referred to above, "Mediation, conciliation . . .", *loc. cit.*, pp. 154-155.

[121] W. W. Bishop, *International Law: Cases and Materials*, 2nd ed. (Boston, Little, Brown, 1962), p. 58. The Manila Declaration on the Peaceful Settlement of International Disputes describes negotiations as "a flexible and effective means" of dispute settlement (General Assembly resolution 37/10 of 15 November 1982, annex, sect. I, para. 10).

[122] M. Lachs, "The law and the settlement of international disputes", in K. V. Raman, ed., *Dispute Settlement Through the United Nations* (Dobbs Ferry, N.Y., Oceana Publications, 1977), p. 288.

[123] *Ibid.*, p. 289.

[124] Federal Republic of Germany *v.* Denmark and Federal Republic of Germany *v.* the Netherlands, Judgment of 20 February 1969 (*I.C.J. Reports 1969*, p. 47, para. 85 (*a*)). Attention should be drawn to the fact that the ICJ, in its judgment on those cases (*ibid.*, pp. 47-48, para. 87), referred to the advisory opinion of the PCIJ of 15 October 1931 in the case of *Railway Traffic between Lithuania and Poland* (*P.C.I.J., Series A/B, No. 42*, p. 116). The *North Sea Continental Shelf* cases and other cases concerning the obligation of States to resolve their differences through good-faith negotiations aimed at reaching an equitable result are discussed in the Special Rapporteur's third report (*Yearbook . . . 1987*, vol. II (Part One), pp. 25-26 and 37-38, document A/CN.4/406 and Add.1 and 2, paras. 48-50 and chap. III, sect. B.5, comments on draft article 12, paras. (3)-(7)). And finally, the Manila Declaration (see footnote 121 above) contains language to the same effect as that of the ICJ in the *North Sea Continental Shelf* cases: "When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties." (Sect. I, para. 10.)

these cases have been reported.[125] In this study on the subject, Chauhan lists 25 treaties containing express provisions for utilizing negotiation as a method of settlement of water disputes[126] and refers to an additional 47 agreements that call for the resolution of water-related controversies through diplomatic channels.[127]

50. According to the 1907 Hague Convention (I) for the Pacific Settlement of International Disputes, *inquiry* is a process for settling "disputes . . . arising from a difference of opinion on points of fact . . . elucidating the facts by means of an impartial and conscientious investigation" (art. 9). The Convention calls for the parties to such a dispute to form a commission of inquiry, whose task it would be to investigate and report on the facts. The commission's report was to have "in no way the character of an award", and the parties were to be free to decide what effect, if any, they would give it (art. 35).[128]

51. In the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, attention has been focused anew on the potential of *fact-finding* as a procedure for avoiding and resolving disputes. In a working paper submitted to the Special Committee at its 1990 session, it is stated that "fact-finding means any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security" (para. 2) and that "fact-finding should be comprehensive, objective and impartial" (para. 3).[129] Fact-finding as envisaged in the draft articles of annex II, below, could come into play well before any threat to international peace and security arose, and indeed prior to the emergence of a "dispute".[130] In the context of international watercourses, fact-finding is often undertaken by joint commissions. State practice in this regard is referred to below in connection with the discussion of conciliation.

52. According to Brierly, in the case of *good offices*, *mediation* and *conciliation*,

> . . . the intervention of a third party aims, not at *deciding* the quarrel *for* the disputing parties, but at inducing them to decide it for themselves. The difference between [good offices and mediation] is not important; strictly a state is said to offer "good offices" when it tries to induce the parties to negotiate between themselves, and to "mediate" when it takes a part in the negotiations itself, but clearly the one process merges into the other. . . .[131]

Conciliation is similar to the process of inquiry, except that the commission has the task not only of finding the facts but of making "a report containing proposals for a settlement, but which does not have the binding character of an award or judgment".[132] The procedure had its genesis in a series of "treaties for the advancement of peace which embodied the so-called 'Bryan peace plan'", concluded by the United States of America in 1913 and 1914.[133] These "Bryan treaties", 48 of which were eventually concluded, called for the establishment of international commissions of inquiry and permanent commissions. Brierly explains that

> The method of the "Bryan treaties" was extensively adopted in later developments of international organization, and as it is essentially different from the method of arbitration on the one hand, and not precisely the same as that of mediation on the other, it is convenient to refer to it as "conciliation".[134]

53. According to Chauhan:

> The use of good offices and mediation of the World Bank which stretched over a period of more than nine years in [the] case of [the] Indus Waters Dispute between India and Pakistan and which were wound up successfully through the conclusion of the Indus Waters

[125] One does encounter occasional reports of diplomatic exchanges concerning international watercourse questions. While, strictly speaking, these cases fall into the category of settlement through diplomatic channels, the Special Rapporteur will, for present purposes, treat them as being cases of settlement by negotiation *lato sensu*. See, for example, the cases discussed in his second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 78-99; and in his fifth report (*Yearbook . . . 1989*, vol. II (Part One), pp. 16-18, document A/CN.4/421 and Add.1 and 2, paras. 54-65).

[126] Chauhan, *op. cit.* (footnote 117 above), pp. 377-380.

[127] *Ibid.*, pp. 381-386. See also the draft American Declaration on the Environment prepared in 1989 by the Inter-American Juridical Committee (OAS, document, CJI/RES.II-10/89), in which the Committee proposes an interesting procedure, combining bilateral discussions with the utilization of technical experts. The draft Declaration also provides for the formation of a joint commission consisting of two delegates from each State involved (para. 12).

[128] See also Brierly, *op. cit.* (footnote 39 above), p. 374. The *Dogger Bank* case of 1904 between Great Britain and Russia is an instance in which such a commission was used effectively (see J. B. Scott, ed., *The Hague Court Reports* (New York, Oxford University Press, 1916), p. 403).

[129] A/AC.182/L.66, reproduced in *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 33* (A/45/33), para. 68; as subsequently revised, this text formed the basis of a draft declaration on "Fact-finding by the United Nations in the field of the maintenance of international peace and security". See the discussion of this working paper in the comments on article 1 of annex II, below.

On fact-finding as a form of "investigation" by the Security Council under Article 34 of the Charter, Raman writes:

> "If broadly conceived, investigatory functions can facilitate the establishment of disputed questions of fact (fact-finding in a narrow sense), and also enable the parties to establish an objective basis for their future relationships. . . ." ("The ways of the peace-maker: A study of the procedural concepts of United Nations intermediary assistance in the peaceful settlement of disputes", in Raman, ed., *op. cit.* (footnote 122 above), p. 412.)

See also the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964, examining "international inquiry as a peaceful means of settling disputes or adjusting situations" (para. 5).

[130] The PCIJ and the ICJ have had several occasions to consider the meaning of the term "dispute" and to determine whether a "dispute" existed between parties to a case that had been brought before them. See, for example, the following cases: *The Mavrommatis Palestine Concessions*, Judgment of 30 August 1924 (*P.C.I.J., Series A, No. 2*), pp. 11-12; *The Electricity Company of Sofia and Bulgaria*, Judgment of 4 April 1939 (*P.C.I.J., Series A/B, No. 77*), pp. 64, 83; *Northern Cameroons*, Judgment of 2 December 1963 (*I.C.J. Reports 1963*), pp. 33-34; *Nuclear Tests*, Judgment of 20 December 1974 (*I.C.J. Reports 1974*), pp. 260, 270-271. That question will not be pursued further in the present report.

[131] Brierly, *op. cit.* (footnote 39 above), p. 373.

[132] Oppenheim, *op. cit.* (footnote 60 above), p. 12. According to Bishop, conciliation

> ". . . involves the reference of a dispute to a commission of persons whose task is to find the facts and make a report containing recommendations for a settlement, which each party to the dispute remains free to accept or reject as it chooses, without legal obligation and without obloquy for failure to comply with the recommendations." (*Op. cit.* (footnote 121 above), p. 59.)

[133] G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. VI (1943), p. 5. See also the discussion of the Bryan treaties in the 1964 report of the Secretary-General (footnote 129 above *in fine*), paras. 62-78.

[134] Brierly, *op. cit.* (footnote 39 above), pp. 374-375; see also Bishop, *op. cit.* (footnote 121 above), p. 59. The numerous agreements concluded between the two world wars that provided for conciliation are reviewed in *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations publication, Sales No. 1949.V.3), and M. Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (Cambridge, Mass., 1931).

Treaty [1960] . . . represents the most striking recent illustration of the utilization of these methods specifically for settlement of an international water law dispute.[135]

The same author identifies five treaties in which States "have expressly accepted 'good offices' and 'mediation' as methods of settlement of water law disputes"[136] and an additional 68 agreements that entrust joint commissions with functions of conciliation.[137]

54. *Arbitration* contrasts with the foregoing methods in that it involves the application of rules of international law to the facts of the case and leads to a binding settlement of a dispute. The 1907 Hague Convention (I) provides:

Article 37

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

International arbitration has a long history, which can be traced as far back as ancient Greece.[138] It differs from *adjudication* chiefly in that the parties to an arbitration "must agree upon the constitution of the tribunal and the procedure which it will employ", while adjudication entails bringing a dispute "before an existing tribunal operating under an established procedure".[139]

55. Most of the widely reported cases involving international watercourse disputes have been arbitrations. Perhaps the best known of these is the 1957 *Lake Lanoux* arbitration (France-Spain),[140] but the 1968 *Gut Dam* arbitration (Canada-United States)[141] has also received significant attention.[142]. Also noteworthy are the arbitral awards of 1872 and 1905 in the *Helmand River delta* case (Afghanistan-Persia), the award of 1888 in the *San Juan River* case (Costa Rica-Nicaragua), the award of 1893 in the *Kushk River* case (Great Britain-Russia) and the award of 1903 in the *Faber* case (Germany-Venezuela).[143] The two judgments of the PCIJ involving watercourse disputes are the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder*[144] and the case concerning *The Diversion of Water from the Meuse*,[145] both of which were handed down in the first half of the present century. Chauhan lists 116 agreements in which the parties have expressly agreed to resolve water-related disputes by recourse to arbitration[146] and 46 that contain provisions concerning judicial settlement.[147]

56. The modest objective of the foregoing survey has merely been to recall that there is a variety of procedures available to States wishing to clarify facts, to adjust their relations, or to avoid or settle disputes. Examples of the use of certain of these procedures in State practice relating to the avoidance and settlement of international watercourse and other disputes are reviewed in section C below.

C. Recourse to expert advice

57. As indicated at the beginning of this chapter (paras. 41-42), the Special Rapporteur has concluded on the basis of his study of State practice in this field that international watercourse disputes can often be most effectively avoided or resolved by referring questions to experts for investigation and report. In the present section, the Special Rapporteur will offer selected illustra-

[135] Chauhan, *op. cit.* (footnote 117 above), p. 325. Other such efforts have met with varying success. The President of the United States was able to achieve positive results in the Tacna-Arica dispute between Chile and Peru (*Supplement to the American Journal of International Law* (Washington, D.C.), vol. 23 (1929), p. 183), as was ECAFE in the case of the lower Mekong River (W. R. D. Sewell and G. F. White, "The lower Mekong", *International Conciliation* (New York), No. 558 (May 1966)). However, the efforts of a United States mediator, Eric Johnston, to achieve agreement among Syria, Lebanon, Jordan and Israel on the use of the Jordan River ultimately came to naught (Doherty, *loc. cit.* (footnote 120 above)).

[136] Chauhan, *op. cit.*, p. 326.

[137] *Ibid.*, pp. 331-339.

[138] See, for example, J. H. Ralston, *International Arbitration from Athens to Locarno* (Stanford University Press, 1929), pp. 153-189; and L. Henkin and others, *International Law: Cases and Materials*, 2nd ed. (St. Paul, Minn., West Publishing Co., 1987), pp. 589 *et seq.*

[139] Bishop, *op. cit.* (footnote 121 above), pp. 60-61.

[140] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.* This case is discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 111-124), and fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 84.

[141] This case, which was brought by Canada and the United States of America before the Lake Ontario Claims Tribunal, concerned claims by United States citizens for flooding and erosion damage allegedly caused by the Gut Dam. The report of the Agent of the United States before the Claims Tribunal, containing excerpts of the decisions of 15 January, 12 February and 27 September 1968, is reprinted in *International Legal Materials* (Washington, D.C.), vol. VIII (1969), pp. 118 *et seq.* See the discussion of this case in the Special Rapporteur's fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 86, and fifth report, document A/CN.4/421 and Add.1 and 2 (see footnote 125 above), paras. 94-101.

[142] See the discussion of this case in G. Handl, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law* (Washington, D.C.), vol. 74 (1980), p. 538; and J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto, University of Toronto Press, 1979), p. 165.

[143] On these four cases, see *Yearbook . . . 1974*, vol. II (Part Two), pp. 188 *et seq.*, document A/5409, paras. 1034-1048.

[144] Judgment of 10 September 1929, *P.C.I.J., Series A, No. 23.* The parties to the case were, on the one hand, Poland and, on the other, the rest of the members of the International Commission (Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden). The case is discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 102-105.

[145] Judgment of 28 June 1937, *P.C.I.J., Series A/B, No. 70.* This case is summarized in *Yearbook . . . 1974*, vol. II (Part Two), document A/5409, paras. 1022 *et seq.*, and discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2, paras. 106-107.

[146] Chauhan, *op. cit.* (footnote 117 above), pp. 344-355. See also B. M. Clagett, "Survey of agreements providing for third-party resolution of international waters disputes", *The American Journal of International Law* (Washington, D.C.), vol. 55 (1961), p. 645; this survey covers both watercourse agreements and general dispute-settlement treaties concluded up to 1961. According to Clagett:

> "The survey shows that disputes regarding the regulation and use of a very high proportion of the international (boundary and successive) watercourses of the world are covered by formal agreements providing for compulsory adjudication or other third-party determination. . . . at least sixty-six states have made such commitments with one or more co-riparian states. . . ." (P. 646.)

[147] Chauhan, *op. cit.*, pp. 361-366, and Clagett, as quoted in footnote 146 above.

tions of the practice of States and international organizations in this regard. With a view to providing the Commission with a broad range of possible models, the Special Rapporteur has not confined the following brief survey to practice under agreements concerning international watercourses.

58. As noted in chapter I, a technique for the resolution of international watercourse-related questions that has proved successful is the reference of such matters to joint institutions established by the parties. Provisions for referrals of this kind may be found in a number of international watercourse agreements,[148] such as the 1909 Boundary Waters Treaty between Great Britain and the United States of America[149] and the Indus Waters Treaty 1960 between India and Pakistan.[150] Practice under such arrangements has demonstrated the value of attempting in the first instance to resolve questions at the technical level.

59. The use of joint institutions to assist watercourse States in resolving questions concerning international watercourses has proved particularly successful under the 1909 Boundary Waters Treaty.[151] When the parties refer a question to the International Joint Commission (IJC) under article IX of that agreement, IJC generally establishes a board of experts to undertake a technical assessment of the situation.[152] These boards may, in turn, set up technical committees to assist them in their work.

60. This practice was followed, for example, in the case of a proposed coal-mine at Cabin Creek, on a tributary of the Flathead River. The Flathead flows from the Canadian province of British Columbia into the state of Montana in the United States, where it forms the western boundary of Glacier National Park. That park is considered an important wilderness recreation and natural heritage area, subject to several "special" designations, such as UNESCO International Biosphere Reserve status and nomination as a "world heritage site".[153] In 1984 and 1985, IJC was requested by the United States and Canada to examine and report on the water quality and quantity of the Flathead River, with respect to the transboundary water quality and quantity implications of the proposed coal-mine at Cabin Creek.

61. In order to respond to this request, IJC established a study board, the Flathead River International Study Board, to undertake a technical assessment as a basis for its deliberations. The Board included experts of various disciplines and consisted of an equal number of members from the United States and from Canada. After more than three years of determined work and consensus building, the Board forwarded to IJC a number of reports, which formed an important technical basis for the assessment of the matter.[154] Relying upon the findings of the Study Board, IJC recommended, in order that Governments might ensure that the provisions of article IV of the 1909 Boundary Waters Treaty[155] were honoured in the matter of the proposed coal-mine at Cabin Creek in British Columbia, that:

(1) The mine proposal as currently defined and understood not be approved;

(2) The mine proposal not receive regulatory approval in the future unless and until it could be demonstrated that:

(*a*) The potential transboundary impacts identified in the report of the Flathead River International Study Board had been determined with reasonable certainty and would constitute a level of risk acceptable to both Governments;

(*b*) The potential impacts on the sport-fish populations and habitat in the Flathead River system would not occur or could be fully mitigated in an effective and assured manner; and

(3) The Governments consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin.

62. IJC has followed similar procedures in other cases.[156] This practice of Canada and the United States illustrates clearly the value of initially referring questions to experts for fact-finding and reporting on technical matters. As in the Flathead River case, a consensus as to such questions may be reached more readily by experts

[148] See Chauhan, cited above in paragraph 53 and footnote 137.

[149] See especially articles VIII-X of the Treaty, quoted above (chap. I, sect. E) in the comments on draft article 26, para. (3) (*c*).

[150] See especially article 8, para. 4, of the Treaty, *idem*, para. (3) (*b*).

[151] Mr. J. Blair Seaborn, former Canadian Chairman of the International Joint Commission, stressed the importance of fact-finding and the value of the work of technical experts in avoiding and resolving international watercourse disputes, in remarks made at a panel discussion on transfrontier environmental damage held during the annual meeting of the American Society of International Law, on 28 March 1990.

[152] It is noted in its activities report for 1983-1984 that:

"The Commission does not maintain a large technical staff but depends largely on its boards and committees to carry out its functions. Governments have empowered it to select and use the most experienced and competent people in both countries on its boards. Engineers, scientists, and others, usually from government agencies, are organized into international boards to carry out the required technical studies and field work in connection with study References, and in the case of Orders of Approval to monitor compliance with the Orders.

"The Commission is assisted in its work by a variety of advisory boards, study boards, and control boards." (IJC, *1983-1984 Activities Report*, p. 8.)

[153] See IJC, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, December 1988 (hereinafter, the "Flathead Report").

[154] These reports are summarized in a report of the Board included in the Flathead Report as appendix B.

[155] Article IV of the Treaty provides that boundary waters "shall not be polluted on either side to the injury of health or property on the other".

[156] See, for example, the procedures followed by IJC with regard to questions referred to it concerning the following boundary waters: the Skagit River (Ross Dam) (IJC, *1983-1984 Activities Report*, p. 10); the Poplar River (IJC, *Report to December 1982*, p. 17, and fourth report of the Special Rapporteur, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 87); Richelieu River-Lake Champlain (IJC, *Report to December 1982*, p. 18); Osoyoos Lake (*ibid.*, p. 19); the St. Croix River (*ibid.*, p. 20, IJC, *Activities Report 1985*, p. 16, IJC, *Activities Report 1986*, p. 13, and IJC, *Activities 1987-1988*, p. 24); St. Mary's Rapids (IJC, *Activities Report 1985*, p. 13); Lake of the Woods and Rainy Lake (IJC, *Activities Report 1986*, p. 13, and IJC, *Activities 1987-1988*, p. 24); and, of course, the Great Lakes, which are addressed in virtually every report prepared by IJC. See also the discussion of the role played by IJC with regard to the Columbia River dispute in Bourne, "Mediation . . .", *loc. cit.* (footnote 116 above), pp. 119-122.

than would have been the case had the same questions been taken up initially at the diplomatic level. The report of the expert group may then form the basis of an agreed resolution of the question between the watercourse States involved. These considerations may also have inspired the framers of the Indus Waters Treaty 1960, which establishes institutions and procedures akin to those provided for in the 1909 Boundary Waters Treaty.

63. The Indus Waters Treaty 1960 between India and Pakistan[157] calls, in article VIII, for the establishment of a Permanent Indus Commission[158] consisting of one Commissioner from each State. Article VIII provides that the Commissioners are to be "high-ranking engineer[s] competent in the field of hydrology and water-use" (para. 1). The Commission is much more than a forum for the settlement of disputes; the Commissioners represent their respective Governments with regard to all matters arising out of the Treaty and "serve as the regular channel of communication on all matters relating to the implementation of the Treaty" (para. 1).

64. Article IX of the Treaty is entitled "Settlement of differences and disputes". It provides that the Permanent Indus Commission shall endeavour to resolve "[a]ny question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty" (para. 1). If the Commission cannot resolve the question, a "difference" is deemed to have arisen (para. 2). Either Commissioner may then refer the matter to a "Neutral Expert" under the provisions of annexure F of the Treaty, providing that the issue, in the opinion of the Commissioner making the referral, falls within one of the 23 categories set forth in that annexure. The neutral expert is to be a highly qualified engineer (annexure F, part 2, para. 4).

65. Under article IX, a "dispute" is deemed to have arisen only if the question does not pertain to one of the 23 categories set forth in annexure F or if the neutral expert decides that the "difference" should be treated as a "dispute" (para. 2(*b*)). "Disputes" are to be dealt with in accordance with paragraphs 3, 4 and 5 of article IX. Paragraph 4 provides for the parties to enter into negotiations on the basis of a report submitted to them by the Commission and, if they so agree, to appoint mediators to assist them. Under paragraph 5, the dispute may be referred to a court of arbitration, established in accordance with annexure G of the Treaty, if the parties agree to do so, or at the request of either party on the ground that the dispute is not likely to be resolved by negotiation or mediation or that the other party is unduly delaying the negotiations.

66. The procedures envisaged under the Indus Waters Treaty 1960 thus consist of a series of stages, beginning—as is the case under the 1909 Boundary Waters Treaty—with efforts to resolve questions within its Commission, a body composed of experts in the field. The next phase of the process also involves an expert, in this case a neutral one. Negotiations, and ultimately arbitration, are envisaged only as a last resort.

67. A third agreement which is of interest for the present study, though it does not concern international watercourses, is the International Plant Protection Convention of 6 December 1951. It also relies heavily upon experts to resolve questions concerning its interpretation or application, and it contains provisions concerning dispute settlement that are worthy of consideration by the members of the Commission. The purpose of the Convention, according to article I, is to secure "common and effective action to prevent the introduction and spread of pests and diseases of plants and plant products and to promote measures for their control" (para. 1). Article IX of the Convention provides as follows:

Article IX. Settlement of disputes

1. If there is any dispute regarding the interpretation or application of this Convention, or if a contracting Government considers that any action by another contracting Government is in conflict with the obligations of the latter under [certain articles] of this Convention, . . . the Government or Governments concerned may request the Director-General of FAO to appoint a committee to consider the question in dispute.

2. The Director-General of FAO shall thereupon, after consultation with the Governments concerned, appoint a committee of experts which shall include representatives of those Governments. This committee shall consider the question in dispute, taking into account all documents and other forms of evidence submitted by the Governments concerned. This committee shall submit a report to the Director-General of FAO who shall transmit it to the Governments concerned, and to other contracting Governments.

3. The contracting Governments agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the Governments concerned of the matter out of which the disagreement arose.

4. The Governments concerned shall share equally the expenses of the experts.

68. In this case it is a third party, the Director-General of FAO, rather than a standing commission, who is to appoint the group of experts. Such an approach is also conceivable in the context of international watercourses and might be given consideration by the Commission. In the case of the present draft articles, the third party could be the Director-General of FAO (who could draw upon his experience under the International Plant Protection Convention), the Director-General of UNEP, the Secretary-General of the United Nations or another neutral individual or organization.

69. A second point worthy of note is that article IX of the International Plant Protection Convention, which embodies the entire dispute-resolution process, does not envisage ultimate recourse to binding arbitration or adjudication. Instead, a non-binding report containing recommendations is transmitted to the parties concerned, and to the other parties to the Convention. The parties to the dispute are then to give "renewed consideration" to the matter giving rise to the disagreement on the basis of the recommendations of the expert committee. This approach could encourage States to have recourse to the procedure, since it does not result in a binding decision. At the same time, it could provide some incentive to the States involved to resolve their differences on the basis of the committee's recommendations. The incentive would de-

[157] See the provisions of this Treaty, especially article VIII, para. 4, quoted above (chap. I, sect. E) in the comments on draft article 26. See also the discussion of the Treaty and, in particular, its provisions of present interest, in R. R. Baxter, "The Indus Basin", *in* Garretson, Hayton and Olmstead, eds., *op. cit.* (footnote 14 above), pp. 471 *et seq.*

[158] The late Richard R. Baxter has surmised that "the Indus Commission was inspired by the International Joint Commission, United States-Canada" (*ibid.*, p. 471).

rive not only from the parties' undertakings in paragraph 3, but also from the fact that the committee's recommendations would have been brought to the attention of the Director-General and the other contracting parties. A similar system is employed by the parties to the General Agreement on Tariffs and Trade.

70. In the General Agreement on Tariffs and Trade, dispute settlement is dealt with in articles XXII and XXIII. The procedures contained in these articles have been "improved and refined" in an understanding adopted by the Contracting Parties to the General Agreement in November 1979.[159]

71. Under article XXII (Consultation) of the General Agreement, the parties are required to "accord sympathetic consideration to, and . . . afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement" (para. 1). The article also provides that if it has not been possible to find a satisfactory solution to any matter through consultation, a party may request that the parties to the General Agreement, acting jointly, "consult with any contracting party or parties" with regard to such matter (para. 2).

72. Article XXIII (Nullification or impairment) provides, in paragraph 2, for conciliation of any differences between the parties that have not been settled bilaterally. Specifically, a party may refer the question to the Contracting Parties, which are to investigate it and "make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". In practice, parties to a dispute have generally requested that a panel of experts be established to investigate and report on the matter. GATT panels are composed of three to five individuals who are selected by the Director-General of GATT[160] and who serve in their individual capacities.[161] The 1979 Understanding provides that "the members of a panel would preferably be governmental", but that they should not be citizens of countries parties to the dispute.[162] However, experts who are not government representatives are increasingly being called upon to serve on panels, owing in part to the increase in recourse to GATT dispute-settlement procedures and the resulting need to enlarge the pool of experts.

73. According to the 1979 Understanding,

> . . . a panel should make an objective assessment of the matters before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and . . . should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[163]

Indeed, encouraging the parties to develop a mutually satisfactory solution is the basic object of the GATT dispute-settlement procedures. The panel is to submit its report first to the parties concerned and then to the Contracting Parties. The latter, acting through the GATT Council, normally adopt the report of the panel, making recommendations or rulings as appropriate. The Contracting Parties then "keep under surveillance any matter on which they have made recommendations or given rulings".[164]

74. Article XXIII further provides, in paragraph 2, that where the Contracting Parties

> . . . consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. . . .[165]

Such "retaliatory" measures have, however, been authorized only once in the history of GATT.[166] Panel reports are generally accepted by the parties to the dispute or serve as the basis for a negotiated settlement.

75. Like the agreements reviewed previously in this section, the GATT dispute-settlement procedures consist of a series of stages, or echelons, and rely heavily on expert reports and recommendations. A feature of the GATT process that is unique among the instruments reviewed is the provision for the Contracting Parties, acting jointly, to approve panel reports, make recommendations or rulings, and authorize enforcement measures. This use of what amounts to a conference-of-the-parties procedure[167] lends added authority to the otherwise non-binding panel reports. While it does not go as far, the 1951 International Plant Protection Convention also strengthens the incentive to comply with expert committee reports through the means of keeping all the parties to the Convention informed of them.

76. Another agreement that should be mentioned here is the Convention relating to the Development of Hydraulic Power Affecting More than One State of 9 December 1923.[168] The Convention provides in essence, in art-

[159] "Understanding regarding notification, consultation, dispute settlement and surveillance", decision of 28 November 1979 (GATT, *Basic Instruments and Selected Documents, Twenty-sixth Supplement* (Sales No. GATT/1980-3), pp. 210 *et seq.*).

[160] The 1979 Understanding provides in its paragraph 13:

"13. In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. . . ." (*Ibid.*, p. 212.)

[161] See paragraph 14 of the 1979 Understanding, which provides that:

". . . Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." (*Ibid.*, p. 213.)

[162] The 1979 Understanding, para. 11 (*ibid.*, p. 212).

[163] The 1979 Understanding, para. 16 (*ibid.*, p. 213).

[164] The 1979 Understanding, para. 22 (*ibid.*, p. 214).

[165] Paragraph 2 goes on to provide that a party that is the object of responsive measures shall be free to withdraw from the General Agreement on 60 days' notice.

[166] See the resolution on United States import restrictions on dairy products, adopted by the Contracting Parties on 8 November 1952 (GATT, *Basic Instruments and Selected Documents, First Supplement* (Sales No. GATT/1953-1), p. 31).

[167] Such a procedure is provided for in draft article 7 of annex I (see chap. III, sect. B, above).

[168] In the 1963 report of the Secretary-General on "Legal problems relating to the utilization and use of international rivers", this Convention was the only one listed in the category of "General conventions concerned exclusively with the utilization and use of international rivers" (*Yearbook . . . 1974*, vol. II (Part Two), p. 57, document A/5409, para. 68).

icle 12, for referral of disputes to a technical body established by the League of Nations for an advisory opinion:

Article 12

If a dispute should arise between Contracting States as to the application or interpretation of the Convention, and if such dispute cannot be settled either directly between the parties or by some other amicable method of procedure, the Parties to the dispute may submit it for an advisory opinion to the body established by the League of Nations as the advisory and technical organization of the Members of the League in matters of communications and transit, unless they have decided or shall decide by mutual agreement to have recourse to some other advisory, arbitral or judicial procedure.

. . .

Thus, like other agreements reviewed in the present section, this 1923 Convention provides for the submission of disputes to a group of experts for an objective, non-binding opinion. This confirms that even relatively early in this century, States recognized the importance of involving experts in the process of avoiding and resolving disputes concerning international watercourses.

77. A final item of interest in the present context, although it does not involve the practice of States *per se*, is the procedure followed by the World Bank in its consideration of proposed projects on international waterways. After notification of the proposal is provided to other riparian States by the State proposing the project or by the Bank, the other States are given a reasonable period of time within which to respond.[169] If these other States raise objections to the proposed project, the Bank may seek an opinion from independent experts in appropriate cases. The experts do not have any decision-making role with regard to the processing of the project but if their advice is sought the staff of the Bank must review their report and conclusions before making a decision on whether to proceed further.[170]

78. Since many of the most significant international watercourse projects will involve World Bank financing, these procedures constitute a particularly effective means of avoiding disputes between watercourse States with regard to proposed projects or, in the language employed in the present draft articles, planned measures. For the purposes of the present survey, it is therefore of interest to note that the procedures followed by the Bank in deciding on project proposals provide for the possibility of expert advice, presumably in recognition of the usefulness of the assistance of technical experts in structuring a solution to actual or potential conflicts over uses of international watercourses.

79. The particular value of standing, rather than *ad hoc*, expert bodies should not be lost sight of, however. Permanent joint commissions can form working relationships over time, build trust, establish effective lines of communication and acquire more perspective and a more detailed knowledge of the characteristics and circumstances of the international watercourse system concerned than is possible in the case of an *ad hoc* body. This may mean the difference between success and failure in an individual case. For example, Bourne notes that the non-acceptance by Afghanistan and Iran of the report of the Helmand River Delta Commission may have been attributable in part to the composition of that commission (engineers from disinterested countries) and the short time it had taken to produce its report:[171]

. . . Was the Commission, doubtless very efficient and sound from the engineering viewpoint, the sort of body with the training, the inclination and particularly the time to reconcile deepseated political differences? . . . The experience of the Helmand River Delta Commission suggests that a permanent joint commission composed of nationals of the co-basin states concerned may be a more effective instrument in reconciling differences.[172]

Further support for this conclusion may be found in the materials presented in chapter I of the present report concerning joint institutional management.[173]

80. The foregoing review of the practice of certain States and international organizations provides illustrations of methods for avoiding and resolving disputes which, in the judgment of the Special Rapporteur, are particularly well suited to questions concerning the utilization and protection of international watercourses. This is so because the answers to such questions often depend on the establishment of facts and the application of science and technology, and these processes can usually be carried out most effectively by experts. Some of the procedures employed in the agreements reviewed in this section will accordingly be adapted for use in the draft articles of annex II (see sect. F below). Those draft articles also draw upon the work of international organizations in this field, which will be reviewed briefly in the following section.

D. The work of international organizations

81. As in the case of the other issues dealt with in the present draft articles, international organizations have made a valuable contribution to the codification and progressive development of the law and institutions in the field of the settlement of watercourse disputes. The Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development emphasized in its report the importance of examining questions concerning the utilization of international watercourses initially at the technical level and pointed out that the use of existing joint institutions for this purpose is particularly advantageous,

. . . because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations. . . . Moreover, the influence of extraneous considerations, including political considerations where these are unrelated to the problem at hand, can best be minimized when substantial decision-making author-

[169] This notification and response procedure is strikingly similar to that which is embodied in part III of the present draft articles, entitled "Planned measures" (*Yearbook . . . 1988*, vol. II (Part Two), pp. 45 *et seq.*).

[170] World Bank, *Operational Manual*, "Operational directive 7.50: Projects on international waterways" (Washington, D.C., April 1990).

[171] The Commission, which was established by an agreement between Afghanistan and Iran signed on 7 September 1950, published its report in February 1951 (see *Yearbook . . . 1974*, vol. II (Part Two), p. 190, document A/5409, paras. 1036-1037).

[172] Bourne, "Mediation . . .", *loc. cit.* (see footnote 116 above), p. 122.

[173] See also the conclusions of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, quoted in paragraph 81 below.

ity is delegated, at least in the first instance, to the experts directly involved. . . . In this way, work on international water resources projects or programmes is least likely to be delayed or disrupted and the merits of the matter least likely to be distorted or misconstrued. . . .[174]

This points to the importance of building "into the institutional relationships between or among system States the opportunity and procedures for avoidance of conflict".[175]

82. In its resolution on "Utilization of non-maritime international waters (except for navigation)", which it adopted at Salzburg in 1961,[176] the Institute of International Law addressed dispute settlement principally in the context of new works or uses. According to article 3 of that resolution, disagreements over the scope of rights of utilization are to be settled by States "on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances". Article 6 provides that, in the event of an objection to a work or utilization, "the States will enter into negotiations with a view to reaching an agreement within a reasonable time" and that, for this purpose, "it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned". In article 8, the Institute recommends that States failing to reach agreement within a reasonable time submit the question to judicial settlement or arbitration. Finally, article 9 of the resolution provides as follows:

Article 9

It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise.

Thus the Institute recognizes in this resolution the value both of having recourse to expert advice and of establishing joint institutions for the management of international watercourses as well as for the avoidance and settlement of disputes.

83. The International Law Association addressed the subject of "Procedures for the prevention and settlement of disputes" in chapter 6 of the Helsinki Rules on the Uses of the Waters of International Rivers.[177] The chapter, which contains 12 articles (arts. XXVI-XXXVII), applies to "all uses including navigation, timber-floating, and consumptive uses, of the waters of international drainage basins and to the pollution of such waters."[178] It is supplemented by an annex entitled "Model rules for the constitution of the conciliation commission for the settlement of a dispute", which implements article XXXIII.[179] Since these articles have been set forth *in extenso* in Mr. Schwebel's third report,[180] they will merely be summarized here.

84. After recalling the obligation of Article 2, paragraph 3, of the Charter of the United Nations, the articles note the "primary obligation" of States to resort to means of dispute resolution contained in the applicable treaties (art. XXVIII). There follows a set of recommended procedures designed to prevent disputes (art. XXIX) which, except for their non-binding nature, are very similar to the procedures contained in part III of the draft articles on the present topic adopted by the Commission at its fortieth session. The ensuing six articles establish a graduated series of means of dispute resolution that are recommended to the parties. ILA recommends that the States concerned first seek a solution by negotiation (art. XXX) or by referring the question to a joint agency (art. XXXI). If the dispute persists, it is recommended that the parties seek the good offices or mediation of a third State, a qualified international organization or a qualified person (art. XXXII). If these methods fail to resolve the dispute, it is recommended that the States concerned form a commission of inquiry or an *ad hoc* conciliation commission, the latter to be constituted as provided in the annex mentioned above (art. XXXIII). Finally, it is recommended that the parties submit the dispute to an *ad hoc* or permanent arbitral tribunal or to the ICJ in any of the following cases: if the parties are unable to form a commission; if a commission is formed but is not able to find a solution; if a recommended solution is not accepted by the parties; or if an agreement is not otherwise reached (art. XXXIV).

85. The value of a procedural system involving several "echelons" for the resolution of watercourse disputes, as recommended in the Helsinki Rules, has been emphasized by experts[181] and previous special rapporteurs.[182] But it has been suggested that before they resort to third-party assistance, States should make every effort to resolve questions bilaterally.[183] Specifically, they should provide for the possibility of "review" within joint institutions, or at least by professionals, of conclusions reached at lower levels. There is precedent in State treaty practice for

[174] *Management of international water resources . . .* (see footnote 4 (*c*) above), para. 457. The following observations of Bourne concerning the Columbia River dispute involving Canada and the United States of America bear out the Panel's conclusions:

". . . the history of the Columbia River dispute suggests that one of the valuable aspects of a joint commission is that it provides a forum where co-basin states may dispute each other's claims vigorously without involving their governments at a high level. There was in fact no serious controversy about the Columbia River between the governments of Canada and of the United States . . . The issues were hammered out in the [International Joint] Commission and agreement was ultimately reached there on the principles that became the foundation of the 1961 Treaty." ("Mediation . . .", *loc. cit.* (footnote 116 above), p. 122.)

[175] Third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), para. 474.

[176] See *Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, part II, pp. 381-384; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

[177] ILA, *Report of the Fifty-second Conference . . .*, *op. cit.* (footnote 38 above), pp. 478 *et seq.*; reprinted in *Yearbook . . . 1974*, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

[178] First paragraph of the comments on article XXVI (ILA, *Report of the Fifty-second Conference . . .*, p. 517).

[179] *Ibid.*, p. 531.

[180] Document A/CN.4/348 (see footnote 2 above), para 494.

[181] See generally *Management of international water resources . . .* (footnote 4 (*c*) above), chap. V, "Accommodation procedures and dispute settlement", especially para. 455.

[182] See Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), paras. 478-479.

[183] See Mr. Schwebel's third report, paras. 478-479; *Management of international water resources . . .*, chap. V; and the discussion of the Helmand River Delta Commission case in paragraph 79 above.

such use of various echelons in the bilateral context.[184] These considerations probably led two previous special rapporteurs to propose dispute-settlement procedures that entail a series of stages. Their proposals will be summarized in the following section.

E. Proposals of previous Special Rapporteurs

86. Draft article 16 submitted by Mr. Schwebel in his third report is entitled "Principles and procedures for the avoidance and settlement of disputes".[185] The article begins by stating the obligation of States to settle disputes peacefully (para. 1) and proceeds to set forth a number of substantive principles that are to govern the resolution of differences and disputes (para. 2). The States concerned are then called upon to use their best efforts to adjust their differences with a view to avoiding the emergence of disputes (para. 3). If consultations and negotiations fail to produce a solution within a reasonable period, any of the States concerned may "call for the creation of an international commission of inquiry to investigate and report upon the facts relevant to the unresolved difference" (para. 4(*a*)). However, another State may delay the establishment of such a commission by up to six months by "convok[ing] a special period of intensified negotiations" (para 4(*b*)).

87. Draft article 16 then provides that if an international commission of inquiry is constituted, its report is to form the basis of renewed negotiations between the States concerned, which are to "endeavour to arrive at a just and equitable resolution of the difference" (para. 4(*d*)). In the event that the States are unable to resolve the difference through these negotiations within six months, the matter may be referred to conciliation (para. 4(*e*)). Finally, if conciliation fails to resolve the difference, and unless there is an applicable and binding agreement to arbitrate or adjudicate disputes between the States concerned, any of the States concerned may "declare the matter to be an international dispute and call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles" (para. 4(*f*)).

88. Chapter V of the draft articles submitted by Mr. Evensen in his first report is entitled "Settlement of disputes" and comprises eight articles (arts. 31-38).[186] Article 31 enjoins States to settle disputes by peaceful means and to "seek solutions by the means indicated in Article 33, paragraph 1, of the Charter" (para. 1). It goes on to preserve the effect of any separate agreement for the settlement of disputes (para. 2). Article 32 provides, as the first stage of dispute settlement, for consultations and negotiations aimed at "arriving at a fair and equitable solution to the dispute" (para. 1); the States concerned may conduct consultations and negotiations directly, or through any pre-existing joint management commission, or through "other regional or international organs or agencies agreed upon between the parties" (para. 2). Under article 33 the States concerned may "establish a board of inquiry of qualified experts for the purpose of establishing the relevant facts . . . in order to facilitate the consultations and negotiations" (para. 1); they may also by agreement request mediation by a third party to assist them in their consultations and negotiations (para. 2).

89. Article 34 deals with the next stage, that of conciliation, to which the parties may agree to submit the dispute (para. 1), and sets forth procedures for composing a conciliation commission (paras. 2-4). Article 35 lays down the functions and tasks of the commission, and article 36 the effects of the commission's report and the manner in which the relevant costs are to be apportioned. Article 37 deals with the final stage of dispute resolution, which is "adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal", provided that the parties to the dispute agree to the procedure. Article 38 provides that a decision of one of the named bodies is binding and final.

90. The Special Rapporteur believes that the Commission could profitably consider either of the systems of dispute resolution proposed by Mr. Schwebel and Mr. Evensen. However, he would be inclined not to include in the provisions on dispute resolution themselves either substantive principles and rules[187] or procedures for establishing commissions or other bodies and rules governing their functions.[188] In the view of the Special Rapporteur, the latter are matters of detail that are best left to any conference at which the present draft articles may be considered. The proposals of Mr. Evensen in this regard will, of course, provide a valuable basis from which to proceed. The basic approaches of the two sets of provisions are believed to be sound, however, and the Special Rapporteur will accordingly draw upon them heavily in the draft articles he proposes in the following section.

F. The proposed annex

ANNEX II

FACT-FINDING AND SETTLEMENT OF DISPUTES

A. Fact-finding

Article 1. Fact-finding

1. Fact-finding shall be undertaken at the request of any watercourse State for the purpose of establishing facts necessary to the fulfilment of the obligations of watercourse States under the present articles.

[184] The practice of the Canada-United States International Joint Commission (see paras. 59-62 above) in effect permits this kind of review: reports of technical "boards" are forwarded to the Commission for its action. See also the Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano, which provides in article VI for the establishment of a joint supervisory commission; and the review authority granted the Supreme Frontier Water Commission in respect of decisions of the Frontier Water Commission in the Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier (arts. 2 and 3). (Interestingly, under the latter agreement, decisions on regulations for the upkeep of frontier waters adopted unanimously by the Frontier Water Commission are not subject to appeal (art. 6).)

[185] Document A/CN.4/348 (see footnote 2 above), para. 497.

[186] Document A/CN.4/367 (see footnote 3 above), paras. 207-231.

[187] Cf. article 16, para. 2, proposed by Mr. Schwebel.

[188] Cf. articles 34 and 35 proposed by Mr. Evensen.

2. The fact-finding referred to in paragraph 1 may be conducted by a competent joint organization established by the watercourse States or, in the absence thereof, by an *ad hoc* expert commission established by agreement of the watercourse States concerned.

3. In the absence of a joint organization competent to conduct fact-finding, and if the watercourse States concerned are unable to agree upon the establishment of an *ad hoc* expert commission within six months of the initial request for fact-finding, they shall establish a commission of inquiry at the request of any of them [in accordance with the procedures contained in the appendix].

4. The commission of inquiry shall determine its own procedure, the place or places where it shall sit and all other administrative matters.

5. Watercourse States shall furnish any body conducting fact-finding pursuant to the present article with all the means and facilities required for its investigation and report. In particular, they shall grant it free access to their territories for the purpose of carrying out its task.

Comments

(1) Article 1 of the present annex provides for fact-finding—that is, the establishment of factual information necessary to permit the watercourse States to fulfil their obligations under the draft articles. In contrast to the approaches followed by his predecessors, the Special Rapporteur has placed this article in a separate part of the annex because its applicability is not restricted to cases in which a "dispute"[189] has arisen. Indeed, it is envisaged that the availability to watercourse States of fact-finding machinery will often prevent disputes from arising by eliminating any questions as to the nature of the relevant facts.

(2) Fact-finding as a means of maintaining international peace and security has received considerable attention of late in the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.[190] In a working paper submitted to the Special Committee on "Fact-finding by the United Nations in the field of the maintenance of international peace and security",[191] fact-finding is defined, for the purpose of that paper, as "any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security" (para. 2). It is stated in this paper that fact-finding "should be comprehensive, objective and impartial" (para. 3) and that "Fact-finding missions should perform their task in an impartial way. Their members shall not seek or receive instructions from any Government or from any authority other than the competent United Nations organ" (para. 25). According to the working paper, "the purpose of fact-finding missions should be to gain objective and detailed knowledge of the facts" (para. 5). Further, the decision "to undertake fact-finding should always contain a clear mandate and precise requirements for the report. The report should be limited to a statement of facts" (para. 12). It is recommended that fact-finding missions "enjoy all freedoms and facilities needed for discharging their mandate" (para. 22), as well as "the privileges and immunities specified in the Convention on the Privilegs and Immunities of the United Nations" (para. 23). Finally, "The Secretary-General should be encouraged to prepare and update lists of experts in various fields so as to have them available at any time for fact-finding missions. He should also maintain and develop, within existing resources, capabilities for the event of emergency fact-finding missions" (para. 30).

(3) As indicated in paragraph (1) of these comments, article 1 is intended to be applicable even where no "dispute" has yet arisen between watercourse States; it follows that it would be applicable well before there was any threat to international peace and security. However, all the other features identified in the preceding paragraph are applicable, *mutatis mutandis*, in the case of fact-finding under the present draft articles.

(4) *Paragraph 1* provides for the right of any watercourse State to request fact-finding. As noted earlier, this process may be necessary to establish factual foundations for the application of the legal rules contained in the draft articles.

(5) The watercourse States making the request for fact-finding under paragraph 1 could be restricted to those that are affected by the fact or facts sought to be established. But such a requirement could itself give rise to questions as to whether the requesting State was indeed "affected" by the facts involved. In order to avoid this problem, and since it would be unusual for non-affected watercourse States to make such requests in any event, the Special Rapporteur decided not to introduce such an additional requirement.

(6) *Paragraphs 2 to 5* deal with the body that will undertake the fact-finding requested pursuant to paragraph 1. They provide that the inquiry may be performed by a joint organization that has been established by the watercourse States concerned (as envisaged under article 26, submitted above (chap. I, sect. E)), so long as this body is competent under its constituent instrument to carry out such functions. Failing such a competent joint organization, fact-finding is to be conducted by an *ad hoc* commission of experts established by agreement of the watercourse States concerned. As stated in the schematic outline being followed by the Commission in its work on international liability for injurious consequences arising

[189] The obligation of Members of the United Nations to settle their differences by peaceful means under Article 2, paragraph 3, of the Charter applies only to "disputes"; other kinds of disagreements or questions are not governed by this provision, though they may be subject to other rules of international law. In the *Mavrommatis Palestine Concessions* case the PCIJ, in determining whether it had jurisdiction under article 26 of the Mandate for Palestine, defined the term "dispute" as follows: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (Judgment of 30 August 1924, *P.C.I.J., Series A, No. 2*, p. 11). For other cases concerning the concept of a "dispute", see: *The Electricity Company of Sofia and Bulgaria*, Judgment of 4 April 1939, *P.C.I.J., Series A/B, No. 77*, pp. 64 and 83; *Case concerning the Northern Cameroons*, Judgment of 2 December 1963, *I.C.J. Reports 1963*, pp. 33-34; and *Nuclear Tests*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, pp. 260, 270-271.

[190] See the report of the Special Committee on its 1990 session (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 33* (A/45/33)). See also the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964.

[191] Working paper submitted by Belgium, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Italy, Japan, New Zealand and Spain (A/AC.182/L.66), reproduced in the 1990 report of the Special Committee (see footnote 129 above), para. 68.

out of acts not prohibited by international law, the States concerned have "a duty to co-operate in good faith to reach agreement . . . upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. [The] States shall furnish the inquiry with all relevant and available information."[192] Under the present draft articles, the specific source of the duty of watercourse States to co-operate in fulfilling their obligations under the articles, including the establishment of relevant facts, is article 9 (General obligation to co-operate).

(7) *Paragraph 3* provides for the establishment of a commission of inquiry at the request of any watercourse State concerned. Such a commission is to be constituted only in the event that there is no competent joint organization and the parties are unable to agree upon the establishment of an *ad hoc* expert commission within six months of the initial request for fact-finding. The procedures for the establishment of the commission of inquiry are not included in the article for reasons explained earlier. Such procedures, however, could be envisaged along the following lines:

APPENDIX

PROCEDURES FOR ESTABLISHING COMMISSIONS OF INQUIRY

1. A commission of inquiry shall be composed of three members: one member appointed by the requesting watercourse State or States, one member appointed by the other watercourse State or States concerned and the third member, who shall serve as president, chosen by the parties jointly. The appointments shall be made within two months of the request for the establishment of the commission of inquiry.

2. If no agreement is reached on the choice of president within four months of the request for the establishment of the commission of inquiry, any party may request the Secretary-General of the United Nations to appoint the president.

3. If one of the appointments provided for in paragraph 1 is not made within the stimulated period, the president shall, at the request of any party, constitute a single-member commission of inquiry.

These provisions were inspired in part by articles XIV to XVI of the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972. Article XVI of that Convention contains procedures for the filling of vacancies in the Claims Commission. Such procedures could be added to the present provisions if it were believed to be necessary.

(8) *Paragraph 4* reflects the usual principle that commissions of inquiry and conciliation commissions are to determine their own rules of procedure. The comments on article 35 submitted by Mr. Evensen in his first report lend support to such a provision.[193]

(9) The first sentence of *paragraph 5* is based on a provision typically found in the Bryan treaties.[194] The second sentence is an application of that general obligation to the particular needs of a body conducting fact-finding in relation to international watercourses. Both obligations are also supported by the current work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, described in paragraph (2) of the present comments.[195]

(10) Fact-finding will entail expenses. If it is undertaken by a competent joint organization, associated expenses would presumably be paid from the budget of that organization. If fact-finding is not conducted by such an existing organization, some provision would have to be made for the expenses of the *ad hoc* expert commission or the commission of inquiry. The question of how these expenses should be defrayed is not an easy one to answer and may be beyond the scope of the present draft articles. After considering this question, however, the Special Rapporteur concluded that it might be helpful if he were at least to put forward some tentative proposals that could possibly be discussed and improved upon in the Commission. Depending upon the circumstances of the watercourse States concerned, the expenses of the *ad hoc* expert commission or the commission of inquiry could be defrayed by the States themselves, possibly with the assistance of a multilateral development bank. The schematic outline referred to in paragraph (6) of the present comments provides that the States concerned "shall contribute to the costs of the fact-finding machinery on an equitable basis".[196] This general principle would hold true in the present case as well. It would find support, in particular, in the obligation of "equitable participation" under article 6 of the present draft articles.

B. Settlement of disputes[197]

Article 2. Obligation to settle disputes by peaceful means

1. Watercourse States shall settle their disputes concerning international watercourse[s] [systems] by peaceful means in such a manner that international peace and security, and justice, are not endangered.

[192] Section 2, para. 5, of the schematic outline for the work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law; see the fourth report of R. Q. Quentin-Baxter on the topic (*Yearbook . . . 1983*, vol. II (Part One), p. 224, document A/CN.4/373, annex).

[193] In his comments (document A/CN.4/367 (see footnote 3 above), para. 217), Mr. Evensen cites article 11 of the 1949 Revised General Act for the Pacific Settlement of International Disputes, article 12 of the 1957 European Convention for the Peaceful Settlement of Disputes and article V of the "Model rules for the constitution of the conciliation commission" annexed to the Helsinki Rules. See also the Bryan treaties (para. 52 above), which typically contain a similar provision.

[194] See above, paragraph 52 and footnote 133.

[195] See especially paragraphs 22-23 of the working paper (A/AC.182/L.66) cited in these comments.

[196] Section 2, para. 7, of the schematic outline (see footnote 192 above).

[197] The articles proposed below are based on article 16 (Principles and procedures for the avoidance and settlement of disputes) submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 2 above), para. 498, and on articles 31-36 of chapter V (Settlement of disputes) of the draft submitted by Mr. Evensen in his first report, document A/CN.4/367 (see footnote 3 above), paras. 207-223.

2. In the absence of an applicable agreement between the watercourse States concerned for the settlement of disputes concerning an international watercourse [system], such disputes are to be settled in accordance with the following articles.

Comments

(1) *Paragraph 1* of draft article 2 is based on Article 2, paragraph 3, of the Charter of the United Nations. Similar provisions were proposed by Mr. Schwebel, in paragraph 1 of article 16, and by Mr. Evensen, in paragraph 1 of article 31.

(2) *Paragraph 2* preserves the effect of any applicable procedure for the settlement of disputes that is independent of the present draft articles and binding upon the watercourse States concerned. By "applicable" is meant that the agreement providing for the independent procedure covers, expressly or by implication, disputes concerning international watercourses. Similar provisions may be found in paragraph 2 of article 16 proposed by Mr. Schwebel and in paragraph 2 of article 31 proposed by Mr. Evensen.

Article 3. Consultations and negotiations

1. If a dispute arises between watercourse States concerning the interpretation or application of the present articles, the watercourse States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute.

2. The consultations and negotiations provided for in paragraph 1 may be conducted directly between the watercourse States concerned, through a competent joint organization they have established, or through other regional or international organizations agreed upon by them.

3. To assist them with the consultations and negotiations provided for in paragraph 1, the watercourse States concerned may establish a commission of inquiry in accordance with article 1, paragraph 3, of the present annex.

4. The watercourse States concerned may by agreement request mediation by a third State, an organization or one or more individuals to assist them in the consultations and negotiations provided for in paragraph 1.

5. If the watercourse States concerned have not been able to arrive at a settlement of the dispute through consultations and negotiations within six months, they shall have recourse to the other procedures for the settlement of disputes provided for in the following articles.

Comments

(1) Draft article 3 is based on article 32 proposed by Mr. Evensen, entitled "Settlement of disputes by consultations and negotiations". The same idea is reflected in paragraph 4(*a*) of article 16 proposed by Mr. Schwebel. *Paragraph 1* is based on paragraph 1 of article 32 proposed by Mr. Evensen. The requirement that watercourse States "enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute" is inspired by similar language contained in paragraph 1 of article 17 of the draft articles adopted by the Commission on first reading in 1988.[198]

(2) *Paragraph 2* is based on paragraph 2 of article 32 proposed by Mr. Evensen. As noted above (chap. IV, sect. C), joint organizations are often granted the authority to settle disputes or resolve questions arising between watercourse States. Paragraph 2 also takes into account the need in some cases for indirect procedures, recognized in article 21 of the draft articles adopted by the Commission on first reading in 1988.[199]

(3) *Paragraph 3* is based on paragraph 1 of article 33 proposed by Mr. Evensen. The establishment of relevant facts may be an integral part of any process of consultations and negotiations. The machinery set up under article 1 of the present annex would appear to be suitable for this purpose, even though it is envisaged as being applicable even if no "dispute" has yet arisen.

(4) *Paragraph 4* is based on paragraph 2 of article 33 proposed by Mr. Evensen. In the light of the major role that has been played by mediation in certain important cases concerning international watercourses,[200] this provision seemed worth including in the present draft article, if only as a reminder to the watercourse States concerned of the value of mediation in appropriate situations.

(5) *Paragraph 5* is based on paragraph 3 of article 32 proposed by Mr. Evensen. The "reasonable period" specified in that article has been replaced by a definite period of six months, since that was the period agreed to be a reasonable one in the context of the procedures concerning planned measures contained in part III of the draft articles. While in some cases six months may be too short a period for consultations and negotiations in the context of dispute settlement, the Special Rapporteur believes that a fixed period is necessary to make any subsequent requirement of recourse to compulsory procedures—such as those proposed in article 4 of the present annex—meaningful. Otherwise, resort to such procedures could be delayed, even after it had become clear that consultations and negotiations would not be fruitful, on the ground that a "reasonable" period of time had not elapsed. The Special Rapporteur would welcome the views of the Commission on this question, in particular.

Article 4. Conciliation

1. Any dispute concerning the interpretation or application of the present articles that has not been settled in accordance with the provisions of article 3 of the present annex shall be submitted by the watercourse States concerned to conciliation as provided in the present article. Conciliation may be initiated by any of the watercourse States concerned by written notification to the other party or parties to the dispute, unless the parties otherwise agree.

2. The conciliation commission shall be constituted in accordance with the procedures set forth in the apppendix to the present article. It shall determine its own procedure,

[198] See *Yearbook . . . 1988*, vol. II (Part II), p. 51.

[199] *Ibid.*, p. 54.

[200] See especially the discussion of the role of IBRD in the Indus waters controversy (para. 53 above).

the place or places where it shall sit and all other administrative matters.

3. The conciliation commission shall file its report with the parties within twelve months of its constitution unless the parties otherwise agree. The commission shall also transmit a copy of the report to the conference of the parties established in article 7 of annex I of the present articles. The report shall indicate the findings of the commission concerning questions of law and fact pertinent to the matter in dispute and shall record any agreement reached between the parties or, failing such agreement, the recommendations of the commission concerning the settlement of the dispute.

4. The report of the conciliation commission shall not be binding upon the parties to the dispute unless they otherwise agree.

5. The fees and costs of the conciliation commission shall be borne by the parties on an equitable basis.

6. If they have not been able to reach an agreed settlement of the dispute during the conciliation process, the parties shall, upon receipt of the report of the conciliation commission, renew their negotiations on the basis of the commission's report.

Comments

(1) Article 4 is based on articles 34 to 36 proposed by Mr. Evensen. Mr. Schwebel also provides for conciliation in paragraph 4(*f*) of his article 16. Unlike those provisions, however, *paragraph 1* of draft article 4 envisages compulsory conciliation—i.e. conciliation to which the parties to a dispute are required to resort, but whose outcome is not binding upon them. This approach was inspired in particular by the practice of GATT, described above (chap. IV, sect. C).

(2) As in the case of draft article 1 of the present annex on fact-finding, *paragraph 2* does not lay down the procedure for constituting the conciliation commission but instead refers to an appendix (to be drafted). An excellent model for such a procedure is contained in paragraphs 2 to 4 of article 34 proposed by Mr. Evensen. The second sentence of paragraph 2 is to the same effect as article 1, paragraph 4, of the present annex. Support for such a provision is noted in the commentary to article 35 proposed by Mr. Evensen.[201]

(3) *Paragraph 3* is based on paragraph 3 of article 35 proposed by Mr. Evensen and on relevant provisions of the Bryan treaties[202] and the 1982 United Nations Convention on the Law of the Sea.[203] However, it also includes a requirement that the report of the conciliation commission be transmitted to the conference of the parties. For the reasons already discussed (chap. IV, sect. C), it is believed that this procedure, while not involving any binding effect of the report, will increase the incentive of the parties to follow the recommendation of the commission. The 1907 Hague Convention (I) for the Pacific Settlement of International Disputes provides that the report of the international commission of inquiry is to be "read at a public sitting" (art. 34), presumably for the same purpose—that of further encouraging the parties to accept the report.

(4) *Paragraph 4* reflects the normal characteristic of reports of conciliation commissions, namely that they are of a recommendatory nature only and are not binding upon the parties.

(5) *Paragraph 5* is based on paragraph 2 of article 36 proposed by Mr. Evensen. Also relevant in this connection is paragraph (10) of the comments on article 1 of the present annex.[204]

(6) *Paragraph 6* is based on provisions commonly found in the Bryan treaties,[205] on the 1951 International Plant Protection Convention[206] and on paragraph 4(*d*) of article 16 proposed by Mr. Schwebel. It is designed to encourage the parties to use the report of the conciliation commission to the best possible advantage prior to resorting to further means of dispute settlement.

Article 5. Arbitration

If after the expiration of six months from the receipt of the report of the conciliation commission provided for in article 4 of the present annex the parties to a dispute have been unable to settle the dispute through negotiations, any of the parties may submit the dispute to binding arbitration by any permanent or *ad hoc* arbitral tribunal that has been accepted by all the parties to the dispute.

Comments

(1) The first clause of article 5 is based on the sources indicated in paragraph (6) of the comments on article 4. The intent of this clause is thus to require the parties to engage in renewed negotiations for a period of at least six months before resorting to binding dispute settlement.

(2) Article 5 does not require the parties to submit their dispute to binding arbitration. The Special Rapporteur agrees with his two predecessors that recourse to previously accepted means of dispute settlement or to an *ad hoc* procedure agreed upon by the parties is more likely to be generally acceptable and to produce a result that will be accepted by the parties to the dispute. The corresponding provision proposed by Mr. Schwebel (art. 16, para. 4(*f*)) provides that the parties may "call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles". This is an approach that the Commission may also wish to consider.

[201] See footnote 193 above.

[202] See, for example, article V of the Treaty to Avoid or Prevent Conflicts between the American States of 3 May 1923 (Gondra Treaty).

[203] See article 7, para. 1, of annex V to the Convention.

[204] See especially the excerpts from the schematic outline referred to in that paragraph.

[205] See, for example, article VII of the 1923 Treaty to Avoid or Prevent Conflicts between the American States.

[206] See the provisions of this Convention quoted in paragraph 67 above.

ANNEX

Treaties cited in the present report*

ABBREVIATIONS

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

Multilateral treaties

	Source
Cameroon, Chad, Niger and Nigeria: Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, Chad, 22 May 1964)	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. 8; summarized in A/CN.4/274, paras. 51-56.
Mali, Mauritania and Senegal: Convention establishing the Organization for the Development of the Senegal River (Nouakchott, Mauritania, 11 March 1972)	United Nations, *Treaties concerning the Utilization of International Watercourses . . .*, p. 21.
Cameroon, Chad, Niger and Nigeria: Agreement establishing a development fund for the Chad Basin Commission (Yaoundé, Cameroon, 10 October 1973)	*Ibid.*, p. 29.
Gambia, Guinea and Senegal: Convention relating to the Creation of the Gambia River Basin Development Organization (Kaolack, Senegal, 30 June 1978)	*Ibid.*, p. 42.
Benin, Cameroon, Chad, Ivory Coast, Guinea, Mali, Niger, Nigeria and Upper Volta: Convention creating the Niger Basin Authority (Faranah, Guinea, 21 November 1980)	*Ibid.*, p. 56; to appear in United Nations, *Treaty Series*, as No. 22675.

Bilateral treaties

United Arab Republic and Sudan: Agreement for the full utilization of the Nile waters (Cairo, 8 November 1959) *and*	United Nations, *Treaty Series*, vol. 453, p. 51; summarized in A/5409, paras. 108-113.
Protocol concerning the establishment of the Permanent Joint Technical Commission (Cairo, 17 January 1960)	*Legislative Texts*, p. 148.

AMERICA

Multilateral treaties

United States of America, Argentina, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela: Treaty to Avoid or Prevent Conflicts between the American States [Gondra Treaty] (Santiago, Chile, 3 May 1923)	League of Nations, *Treaty Series*, vol. XXXIII, p. 25.

Bilateral treaties

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)	*British and Foreign State Papers, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260; summarized in A/5409, paras. 154-167.

ASIA

Bilateral treaties

	Source
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.
Bangladesh and India: Agreement on sharing of the Ganges waters and on augmenting its flows (Dacca, 5 November 1977)	United Nations, *Treaty Series*, vol. 1066, p. 3.

EUROPE

Multilateral treaties

Bulgaria, Czechoslovakia, Hungary, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia: Convention concerning the Regime of Navigation on the Danube (Belgrade, 18 August 1948)	United Nations, *Treaty Series*, vol. 33, p. 181; summarized in A/5409, paras. 470-473.
European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957)	United Nations, *Treaty Series*, vol. 320, p. 243.
Federal Republic of Germany, France, Luxembourg, Netherlands and Switzerland: Agreement on the International Commission for the Protection of the Rhine against Pollution (Berne, 29 April 1963)	*Ibid.*, vol. 994, p. 3; summarized in A/CN.4/274, paras. 138-141.
Denmark, Finland, Norway and Sweden: Convention on the Protection of the Environment [Nordic Convention] (Stockholm, 19 February 1974)	United Nations, *Treaty Series*, vol. 1092, p. 279.
Federal Republic of Germany, France, Luxembourg, Netherlands, Switzerland and European Economic Community: Agreement for the Protection of the Rhine against Chemical Pollution (Bonn, 3 December 1976)	*Ibid.*, vol. 1124, p. 375.

Bilateral treaties

Austria-Hungary and Venice: Treaty for the Establishment of Limits (Vaprio, 17 August 1754)	C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana Publications, 1969), vol. 40, p. 215.
Austria and Netherlands: Definitive Treaty (Fontainebleau, 8 November 1785)	*Ibid.*, vol. 49, p. 369.
Denmark and Germany: Agreement for the settlement of questions relating to watercourses and dikes on the German-Danish frontier (Copenhagen, 10 April 1922)	League of Nations, *Treaty Series*, vol. X, p. 201; summarized in A/5409, paras. 556-563.
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.
Switzerland and Italy: Convention concerning the use of the water power of the Spöl (Berne, 27 May 1957)	*Legislative Texts*, p. 859, No. 235; summarized in A/5409, paras. 849-854.
France and Switzerland: Convention on the Emosson hydroelectric project (Sion, 23 August 1963)	*Revue générale de droit international public* (Paris), vol. LXIX (1965), p. 279; summarized in A/CN.4/274, paras. 228-236.

General conventions

Convention (I) for the Pacific Settlement of International Disputes (The Hague, 18 October 1907)	J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1918), p. 41.
Convention (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), *and* Regulations respecting the Laws and Customs of War annexed to this Convention	*Ibid.*, pp. 100 and 107 respectively.
Convention relating to the Development of Hydraulic Power Affecting More than One State (Geneva, 9 December 1923)	League of Nations, *Treaty Series*, vol. XXXVI, p. 75; summarized in A/5409, paras. 68-78.
General Agreement on Tariffs and Trade (Geneva, 30 October 1947)	GATT, *Basic Instruments and Selected Documents*, vol. IV, *Text of the General Agreement* (as in force on 1 March 1969) (Sales No. GATT/1969-1).

	Source
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	United Nations, *Treaty Series*, vol. 71, p. 101.
International Plant Protection Convention (Rome, 6 December 1951)	*Ibid.*, vol. 150, p. 67.
Convention concerning Settlement of Conflicts between the Law of Nationality and the Law of Domicile (The Hague, 15 June 1955)	Hague Conference on Private International Law, *Collection of Conventions (1951-1980)*.
Convention on International Liability for Damage Caused by Space Objects (opened for signature at London, Moscow and Washington on 29 March 1972)	United Nations, *Treaty Series*, vol. 961, p. 187.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	*Ibid.*, vol. 993, p. 243.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, p. 3.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	*Ibid.*, p. 609.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	E/ECE/1010.
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.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) *and* Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	UNEP, Nairobi, 1985 and 1987.

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

[Agenda item 7]

DOCUMENT A/CN.4/428 and Add.1*

Sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[Original: English/Spanish]
[15 March 1990]

CONTENTS

* Incorporating documents A/CN.4/428/Corr.1, 2 and 4.

Introduction

A. The first 10 draft articles

1. The debates in the International Law Commission at its last session[1] and in the Sixth Committee at the forty-fourth session of the General Assembly[2] on international liability for injurious consequences arising out of acts not prohibited by international law deserve some comment. First of all, it should be pointed out that many of the suggestions made during those debates could be reflected in the final texts of the first articles that were submitted then. Furthermore, the rewording of articles 1 to 9 as proposed at the last session by some members of the Commission is, by and large, an improvement on the original texts. Those texts were the product of successive drafts incorporating ideas stemming from various quarters, and it is clear that the desire to remain true to these ideas has, at times, resulted in cumbersome or clumsy juxtapositions which must be remedied. The Drafting Committee will have available to it the "official" version of the first 10 draft articles[3] which were referred to it for consideration in 1988.[4] In addition, it will have before it the texts of the first nine draft articles which were submitted by the Special Rapporteur in his fifth report, in 1989,[5] in which he attempted to incorporate the comments made during the debate on the original 10 draft articles.[6] It will also be able to take into account the many comments on those nine articles and the useful drafting suggestions made during the debate in 1989. In the annex to the present report, which contains the texts of the 33 draft articles submitted thus far, the Special Rapporteur has added, in footnotes to some of the first nine articles, texts for the Drafting Committee's use in which he has incorporated what he considers to be the comments most worthy of consideration, and even some of the drafting suggestions, made during the debate in 1989. Naturally, this does not prevent the Committee from also considering the other amendments proposed or even others which it may wish to suggest.

2. If the amendments now being submitted to the Commission for consideration are accepted, it will be necessary to change the original numbering of the articles, as proposed in the annex. If the introduction of the principle of "non-discrimination", which is the subject of draft article 10, proves acceptable, chapters I and II of the draft will again contain 10 articles. Two types of change will have to be made in article 2, concerning the use of

[1] See *Yearbook . . . 1989*, vol. II (Part Two), pp. 88 *et seq.*, paras. 335-376.

[2] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly" (A/CN.4/L.443), paras. 175-200.

[3] See *Yearbook . . . 1988*, vol. II (Part Two), p. 9, para. 22.

[4] *Ibid.*, p. 21, para. 101.

[5] *Yearbook . . . 1989*, vol. II (Part One), p. 134, document A/CN.4/423, para. 16.

[6] These 10 articles are now reduced to nine, as a result of the deletion of article 8, on participation, considered by the Commission to be unnecessary (*Yearbook . . . 1988*, vol. II (Part Two), p. 20, para. 91).

terms: first, amendments needed to adapt the article to the new technique for defining dangerous activities (new subparagraphs (*a*) to (*d*)); secondly, amendments arising from the comments made during the latest debates and from further consideration of the topic (subparagraphs (*f*), (*g*) (last sentence), (*h*) and (*k*) to (*n*)).

B. Activities involving risk and activities with harmful effects

3. The question whether activities involving risk and activities with harmful effects should be considered separately has already been dealt with. The conclusions drawn by the Special Rapporteur following further examination of the question are not very different from the preliminary conclusions outlined in his summary of the discussion on the topic in the Commission at the last session.[7] In his view, the two kinds of activity have more features in common than they have distinguishing features, so much so that one might consider the possibility of dealing with their consequences in a similar manner—that is to say, bringing them together under a single legal régime. The Council of Europe's draft rules on compensation for damage caused to the environment[8]—which in fact deal with liability for dangerous activities[9]—also cover activities which cause harm as a result of continuous pollution, without apparently differentiating between the legal treatment accorded to such activities and that accorded to activities which cause pollution accidentally.[10]

4. The other model which could be followed would be that of the legal principles and recommendations on environmental protection and sustainable development drawn up by the Experts Group on Environmental Law of the World Commission on Environment and Development.[11] This model distinguishes between activities that create a risk of "substantial" transboundary harm and those which *actually cause* "substantial" transboundary harm, and the two are accorded different legal treatment. The former would, broadly speaking, correspond to the "activities involving risk" in the draft articles under consideration, the latter to what have been called, for want of a better term, "activities with harmful effects". In order that they may be considered an exception to the general rule set forth in article 10 of the above-mentioned principles,[12] which establishes simply the obligation of the State of origin to "prevent or abate any transboundary environmental interference or a significant risk thereof which causes substantial harm—i.e. harm which is not minor or insignificant" (that is to say, a rule prohibiting the causing of transboundary harm or the creation of a risk thereof), the cost of preventing or reducing the harm or risk, as the case may be, originating in such activities must outweigh the benefits which such prevention or abatement would entail.

5. Article 11 of the same principles, therefore, deals with activities involving risk and states:

> 1. If one or more activities create a *significant risk of substantial harm** as a result of a transboundary environmental interference, and if the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk far exceeds in the long run the advantage which such prevention or reduction would entail, the State which carried out or permitted the activities shall ensure that compensation is provided should substantial harm occur in an area under national jurisdiction of another State or in an area beyond the limits of national jurisdiction.
>
> 2. A State shall ensure that compensation is provided for substantial harm caused by transboundary environmental interferences resulting from activities carried out or permitted by that State notwithstanding that the activities were not initially known to cause such interferences.[13]

This article envisages so-called "ultrahazardous activities" and imposes strict international liability on the State which authorized such activities.

6. The Experts Group finds the basis for such strict liability in a number of treaties, such as the 1972 Convention on International Liability for Damage Caused by Space Objects[14] and the 1973 Treaty between Argentina and Uruguay concerning the La Plata River and its maritime limits[15] (art. 51 on pollution of the waters). It points out, however, that the State of origin may fulfil its obligation by imposing strict liability upon the developer or operator, and in support of this solution it quotes numerous conventions which have already been cited several times in reports of the Special Rapporteur and in the debates of the Commission: the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface;[16] the conventions on liability for nuclear damage—the 1960 Paris Convention and its 1964 Additional Protocol,[17] the 1963 Brussels Convention supplementary to the 1960 Paris Convention,[18] and the 1963

[7] *Yearbook . . . 1989*, vol. I, p. 189, 2121st meeting, para. 32.

[8] Draft prepared by the Committee of Experts on Compensation for Damage caused to the Environment for the attention of the European Committee on Legal Co-operation. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

[9] The draft rules were entitled "Rules on compensation for damage to the environment", but since they do not deal exclusively with that type of harm, the Committee of Experts wondered whether their most appropriate title should not be "Rules on compensation for damage resulting from dangerous activities" (*ibid.*, para. 17).

[10] During the debate on this question in the Committee of Experts:

> "It was also wondered if the régime for civil liability proposed in the draft rules should apply only to damage resulting from accidents or other sudden incidents, or if it should apply also to damage resulting from continuous pollution. Advocates of the first approach, in a minority, maintained that except in the case of accidents, it would be very difficult to establish a causal link between damage and an incident attributable to an operator or a number of operators . . .
>
> "Although the compensation for some types of damage arising from continuous or synergic pollution may not be obtained by virtue of the rules, unless it was possible to establish a sufficient link with the activities of one or several operators, it was decided in the end that this one circumstance did not justify excluding non-accidental damage." (*Ibid.*, para. 15.)

[11] See *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (London, Graham & Trotman, 1987).

[12] *Ibid.*, p. 75.

[13] *Ibid.*, p. 80.

[14] United Nations, *Treaty Series*, vol. 961, p. 187.

[15] INTAL, *Derecho de la Integración* (Buenos Aires), vol. II, No. 15, March 1974, p. 231; *International Legal Materials* (Washington, D.C.), vol. 13 (1974), p. 251.

[16] United Nations, *Treaty Series*, vol. 310, p. 181.

[17] Convention on Third Party Liability in the Field of Nuclear Energy (Paris, 1960) (*ibid.*, vol. 956, p. 251) and Additional Protocol (Paris, 1964) (*ibid.*, p. 325).

[18] IAEA, *International Conventions relating to Civil Liability for Nuclear Damage*, Legal Series, No. 4, rev. ed. (Vienna, 1976), p. 43.

Vienna Convention[19]—the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships;[20] the 1969 International Convention on Civil Liability for Oil Pollution Damage;[21] and the 1976 London Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources.[22] The Experts Group also stated that:

> . . . It is typical for the treaties concerning the peaceful use of nuclear energy that they provide for a subsidiary and supplementary liability of the installation State or flag State—that is subsidiary and supplementary to the primary liability of the operator or owner of the installation or vessel—to guarantee the indemnification of nuclear damage up to the maximum limit of liability envisaged in the treaty. . . .[23]

That is to say—and this is an important precedent for the strict liability (*responsabilidad causal*) of the State at the international level—that the State puts itself exactly in the place of the private operator and assumes strict liability at the international level for certain amounts of money which the operator is unable to pay. The Experts Group also mentions a large number of countries which have incorporated the concept of strict liability into their domestic law and says that this is evidence of an emerging principle of national law recognized in the manner stated in article 38, paragraph 1 (*c*), of the Statute of the ICJ. (All of these are arguments which have been advanced at the appropriate moment in developing the present topic.)

7. Article 12 of the principles adopted by the Experts Group deals with another type of activity:

> 1. If a State is planning to carry out or permit an activity which will entail a transboundary environmental interference causing harm which is substantial but far less than the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such interference, such State shall enter into negotiations with the affected State on the equitable conditions, both technical and financial, under which the activity could be carried out.
>
> 2. In the event of a failure to reach a solution on the basis of equitable principles within a period of 18 months after the beginning of the negotiations or within any other period of time agreed upon by the States concerned, the dispute shall at the request of any of the States concerned, and under the conditions set forth in paragraphs 3 and 4 of article 22, be submitted to conciliation or thereafter to arbitration or judicial settlement in order to reach a solution on the basis of equitable principles.[24]

In its comments on article 12 the Experts Group states that:

> The transboundary environmental interference envisaged in the present article may be an instance of pollution involving substantial harm which can only be avoided by the entire termination or forgoing of the, in itself, highly beneficial activity, which gives rise to the interference. . . .[25]

8. The different legal treatment accorded to the two types of activity seems to be based on the following: activities involving risk are considered legal, provided that all obligations have been met concerning *due diligence* in the prevention of an accident, and compensation is paid for harm actually caused. In its comments on article 12 the Experts Group states further:

> As noted, the type of risk involving activities dealt with in paragraph 1 of article 11 may be regarded lawful provided all possible precautionary measures have been taken in order to minimize the risk. As we have also seen, the State who carries out or permits the ultrahazardous activities must ensure that compensation is provided should substantial extraterritorial harm occur. This is, in fact, nothing else than the fair and equitable price which ought to be paid for the lawful continuation of an ultrahazardous activity which, on balance, must still be regarded as predominantly beneficial. . . .[26]

Here there would be no obligation for the interested parties to formulate a special régime, since provision for one has already been made in the proposed articles: if all precautions of due diligence are taken and damage results even so, then such damage will be compensated through strict liability. On the other hand, with regard to activities in which the damage results from normal operation, the Experts Group comments:

> . . . Thus, in spite of the fact that the activity would cause substantial extraterritorial harm, it is not regarded either as clearly unlawful, or as clearly lawful. Instead a duty to negotiate on the equitable conditions under which the activity could take place has been provided for.[27]

There is not only a duty to negotiate but also a mechanism that, if followed, would be bound to lead to the creation of a régime between the parties to regulate the activity, and, according to what is implied in article 12, such a régime would have to establish compensation for the harm caused.

9. The articles referred to here seem to be based on the aforesaid philosophy, which can be briefly summarized as follows: there would seem to be sufficient basis in international practice for formulating a general régime regarding strict liability which would govern activities involving risk, without the States concerned having to formulate a régime for each individual activity. In the case of the other activities, sufficient basis would not appear to exist:

> . . . the application of the principle of strict liability—and the idea of balancing of interests which it implies—to activities *definitely* causing substantial extraterritorial harm, is generally regarded as considerably more revolutionary than the application of that principle to activities which "merely" involve a significant risk of harm as envisaged in paragraph 1 of article 11.[28]

Accordingly, it is stated by the Experts Group in its comments that article 12 does not go as far as this and merely establishes the obligation for the parties to negotiate a régime and a corresponding mechanism—this notwithstanding the fact that it had earlier stated that there appeared to be convincing support for the application of the principle of strict liability in such situations, since it, too, could be considered a general principle of national law recognized by civilized nations within the meaning of article 38, paragraph 1 (*c*) of the Statute of the ICJ.[29]

10. None the less, the above cannot be taken to mean that that set of norms looks more kindly upon activities with harmful effects than on activities involving risk simply because as a general rule it would not apply a

[19] Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 1963) (United Nations, *Treaty Series*, vol. 1063, p. 265).

[20] IAEA, *op. cit.* (footnote 18 above), p. 34.

[21] United Nations, *Treaty Series*, vol. 973, p. 3.

[22] UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 474.

[23] *Environmental Protection . . .*, *op. cit.* (footnote 11 above), p. 82.

[24] *Ibid.*, pp. 85-86.

[25] *Ibid.*, p. 86.

[26] *Ibid.*

[27] *Ibid.*, p. 87.

[28] *Ibid.*

[29] *Ibid.*

régime of strict liability to the former. Quite the contrary: whereas activities involving risk are lawful in so far and so long as the measures dictated by *due diligence* are taken, activities with harmful effects are not legal until a consensual régime is in effect between the parties. Hence the need to find a mechanism to resolve any difference that may arise between the parties and to determine in a more or less automatic fashion the creation of a régime for such activity.

11. The Special Rapporteur is open to whatever preference the Commission may express. He finds, on the one hand, that it is difficult for States to agree to a binding dispute-settlement mechanism such as that proposed in the above-mentioned article 12—a veritable Procrustean bed—as a prerequisite for the lawfulness of activities under their jurisdiction or control. The reluctance of States to accept this type of conditions is an obstacle which arises so frequently in international relations that it is not worth dwelling on, and some members of the Commission were not in favour of burdening the State of origin with too many legal formalities at the start of possible activities referred to in article 1 of the present draft articles. On the other hand, as he indicated in his previous report, he would have some reservations about qualifying as "dangerous" an activity which is certain to cause harm, not as a result of an accident but in the course of normal operation, as the Council of Europe's draft rules[30] seem to do, and he points out that those draft rules deal exclusively with liability, not with prevention, which is where the main differences between the two types of activity are to be found.

12. In fact, the main difference between the two types of activity is in the sphere of prevention. There are two types of preventive measures: (*a*) measures (or appropriate means) to prevent an incident from occurring, and (*b*) measures designed to contain or minimize the effects once an incident has occurred, as will be seen in greater detail below. In type (*a*) there is, as yet, no harm and no incident; in type (*b*) there is an accident (activities involving risk) or harmful effects have already been triggered (activities with harmful effects), but the harm is not yet quantifiable because measures can be taken to contain or reduce the effects, so that ultimately the harm may be less than it would have been if steps had not been taken to combat the original effects. In the two types of activity under consideration, the difference is in that first stage, for in the case of activities involving risk, preventive measures are taken even though it is known that the accident may occur anyway. The harm occurs as a result of an accident: it escapes the operator's control even though the operator takes due precautions. In the case of activities with harmful effects, if appropriate preventive measures are taken the effect does not occur, nor, consequently, does the harm, in principle.

13. This, in outline, is what happens with both activities in the first stage or aspect of prevention. In the second stage—that is to say, when the accident has occurred or the effects have been triggered—there would seem to be no difference between the two activities. One possibility, inspired to some extent by the Council of Europe's draft rules, would be to differentiate between the two types of activity referred to in article 1 and to establish, in the case of activities with harmful effects, a genuine obligation to negotiate a régime setting forth the conditions on which the activity may be pursued, or, as stated earlier, "a duty to negotiate on the equitable conditions under which the activity could take place".[31]

14. The other possibility would be to compare the two types of activity and their practical effects, given the great similarity between them, and to state that there is in both cases a need for notification, information and consultation between the States concerned, with or without the participation of international organizations depending on the case, but that the "hard" obligations arise only when the harm has occurred and can be imputed causally to the activity in question. This seems justifiable in the area of prevention because, although there are differences between the two types of activity, it is virtually unthinkable to require prior international approval for the conduct of an activity; likewise, it is virtually unthinkable to leave it in limbo in so far as its lawfulness is concerned. While awaiting better times, the solution might be to impose a simple obligation on the parties to consult one another in the event that an activity shows signs of having harmful effects, as is done in the present draft articles in the case of activities involving risk. In so far as liability as such is concerned, it seems that it should be the same as in the case of activities involving risk, for after all the draft articles do not automatically impose strict liability but merely the obligation to negotiate compensation for harm caused. That is the least one can ask for in the case of both forms of activity.

[30] See footnote 8 above.

[31] Excerpt from the commentary of the Experts Group on Environmental Law, quoted in paragraph 8 above (see footnote 27).

CHAPTER I

Activities involving risk

A. List of activities

15. It will be remembered that some speakers, both in the Commission and in the Sixth Committee, were in favour of including a list of the activities covered by article 1. In view of certain objections, some expressed a preference for a flexible list, which could be revised from time to time by a group of experts and any amendments to which would be submitted to Governments for approval. Others suggested drawing up a list for guidance purposes only. The incomparable advantage of a list is that it would define the scope of the draft precisely,

making it much more acceptable to States, which would know the limits of their future liability. The tenor of subsequent debates in which this concept was discussed shows that the idea of a list continues to come up and has many supporters in the Commission and the General Assembly. Arguments are still being raised against it, however. For instance, the draft rules on compensation for damage caused to the environment, prepared for the Council of Europe, which, as noted above (para. 3), are basically draft rules on civil liability for dangerous activities, recently discarded the possibility of drawing up a list of activities. On the other hand, they define these activities mainly in relation to the concept of dangerous substances,[32] a list of which is annexed to the rules, and what is done with them: handling, storage, production (including residual production), discharge and other similar operations. Also included are: activities using technologies which produce hazardous radiation; the release into the environment of dangerous genetically altered organisms or dangerous micro-organisms; and the operation of a waste disposal facility or site.[33] The draft rules then define dangerous substances as those which create a significant risk (it should be noted that, as in the draft articles under consideration, the expression *significant risk* denotes the acceptance of a threshold of risk) to persons or property or the environment, such as flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances as indicated in annex A to the rules under discussion. A number of other substances are listed in annex B. The draft rules also state that the designation of a substance as dangerous may be restricted to certain quantities or concentrations, certain risks or certain situations in which that substance may occur.[34] They then define both genetically altered organisms which present risk and dangerous micro-organisms.

16. This model is interesting, and perhaps better suited to a global convention than a list of activities such as that contained in the ECE draft framework agreement on environmental impact assessment in a transboundary context.[35] It offers greater flexibility and yet allows for considerable precision in the scope of the articles. It also removes some ambiguities which are inevitable in the kind of convention on which the Commission has been working until now. For example, in the draft articles under consideration "appreciable" (or "significant") has two meanings in relation to "risk": it means either a risk that presents a higher than normal probability of causing transboundary harm or a risk that can be detected simply by examining the facts. In short, "appreciable" describes a risk which is not only higher than normal in a human activity but also easily perceptible, or foreseeable. With a list of substances, there would be no need to refer to the second meaning, because the mere fact that he is handling a dangerous substance serves to warn the operator—and hence the State of origin—that he may be subject to certain obligations, and makes it necessary to conduct an examination and an evaluation which hitherto were required only if the risk was "appreciable" on simple examination. With regard to the first meaning, things are made considerably easier by establishing the relationship between the concept and the dangerous substance handled in the activity to which the term "dangerous" applies, for the situation is such that the likelihood of transboundary harm is, in principle, greater than in other activities.

17. On the question of greater flexibility, it should be noted that the listing of dangerous substances is not exhaustive. On the one hand, if substances are included that cast suspicion on the activities in which they are used, it remains to be seen whether the risk of *transboundary* harm is real. On the other hand, there may be other substances which are not listed but which are also known to cause the same effects, in which case the activities in which they are used could be considered as falling under article 1.

B. Amendments to article 2 which the new formulation would entail

18. In order to visualize more clearly how the system of a list of dangerous substances would operate, the amendments that would be required if such a list were included in the general provisions of the draft articles under consideration are enumerated below. In the new article 2 (Use of terms), the first four subparagraphs incorporate the systems of defining "activities involving risk" as described above. Other subparagraphs are then adapted as explained above. It goes without saying that these texts are only provisional, since their final wording will have to be drafted in consultation with experts. However, they have an authoritative precedent in the Council of Europe's draft rules, which help us to make more practical use of the concepts.

19. There would be no problem in introducing certain amendments into the text of article 2 since in any case, according to opinions expressed in the Commission and not contradicted, the article is open to the introduction of new terms and the adaptation of existing ones to subsequent developments. The introduction of a list would have no effect on article 1. In general, the wording of the first four subparagraphs of article 2 follows that of the Council of Europe's draft rules, except that "the operation of a waste disposal installation or site" is not included in the concept of dangerous activity, since it seems to be already contained in the general idea of the

[32] The Council of Europe's draft is based on other instruments, particularly those in the field of carriage:

> "As for other instruments, in particular in the field of carriage, the nucleus is made of operations on dangerous substances. These substances are here deemed dangerous on account of some properties (toxicity, . . .) defined in internationally accepted classifications. . . ." (CDCJ (89) 60 (see footnote 8 above), para. 12.)

[33] Both hazardous radiation and dangerous genetically altered organisms or dangerous micro-organisms, and doubtless also the waste handled in such facilities, could come under the broad category of substances, but it was deemed preferable to put them in a separate category. In short, the activities are dangerous because they involve handling either substances, micro-organisms, genetically altered organisms or waste.

[34] This idea is not unlike the one contained in article 2 (*a*) of the draft articles under consideration: things which engender risk, either because of their intrinsic properties or because of the place, medium or manner in which they are used. The concentration of 200,000 tons of petroleum in a ship is dangerous because of the way in which it is handled—in other words, in a vessel which can be shipwrecked or have an accident, with disastrous consequences for the sea and for the nearest coastline.

[35] ENVWA/AC.3/4 (26 May 1989), subsequently adopted as the Convention on Environmental Impact Assessment in a Transboundary Context, signed at Espoo, Finland, on 25 February 1991 (E/ECE/1250).

handling of dangerous substances, of which waste is obviously one. Moreover, this concept of "dangerous substances" was, of course, devised for the European region, whose predominant activities have their own particular characteristics. It would therefore be necessary to adapt this technique to the global level in consultation with experts. This could perhaps be done in two ways: by authorizing the Special Rapporteur to engage in the relevant consultations, or by leaving only the general concept in the text so that a future conference on codification could appoint a committee of experts for that purpose, as was done in the case of the law of the sea.

20. Subparagraph (*a*) of article 2 defines activities involving risk. Subparagraph (*a*) (i) relates them to dangerous substances such as those included in the list and is very general in nature: handling, storage, production, discharge or other similar operation. Carriage was excluded from the Council of Europe's draft rules because it was felt that it was already covered, in the case of Europe, by existing conventions and drafts. It could be included in the draft articles under consideration because article 4 would give precedence to specific conventions over general ones, without prejudice to the application, in such circumstances, of whatever principles of the framework convention were compatible with those of the specific instrument. With respect to subparagraphs (*a*) (ii) and (iii), although the term "substances" could be interpreted broadly as "anything used in the activity" or "anything with which the activity is chiefly concerned" and could therefore also encompass hazardous radiation or even genetically altered organisms and dangerous micro-organisms, it was deemed preferable to categorize such cases separately in the draft under consideration.

21. New subparagraph (*b*) defines "dangerous substances", new subparagraph (*c*) "dangerous genetically altered organisms" and new subparagraph (*d*) "dangerous micro-organisms". These four subparagraphs (*a*) to (*d*) will be necessary if the idea of defining the scope of the draft in a new way is accepted. The new subparagraph (*e*) is an amended version of the former subparagraph (*a*) (ii), in which the concept of risk was defined specifically in relation to the substances used in an activity, and that is redundant in view of the new definition of dangerous substances. In the new subparagraph (*e*) "appreciable" or "significant" risk is defined within the meaning used in the draft, i.e. as that presenting either a higher than normal probability of causing merely "appreciable" or "significant" transboundary harm, or a low or very low probability of causing very considerable or disastrous harm. This follows the ECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[36] in which "risk" is defined as "the combined effect of the probability of occurrence of an undesirable event and its magnitude" (art. I(*f*))—corresponding, in short, to the former subparagraph (*a*) (ii), minus the concept of "appreciable [significant] risk" as being risk that is easily perceptible, as noted above. Now, the mere fact of handling a dangerous substance makes the risk appreciable, although, of course, one would have to use one's own judgment in determining whether a given risk could cause "transboundary" harm: not every activity involving an explosive substance, for instance, will be liable to cause transboundary harm. An explosives factory situated far from the border, while it might be dangerous for persons living in the vicinity, would not appear to present an "appreciable [significant] risk" of causing transboundary harm. In subparagraph (*f*) activities with harmful effects can be defined as they were in the former subparagraph (*b*) but, in response to criticisms of the phrase "throughout the process", the latter could be changed to "in the course of their normal operation". These then are the amendments which would have to be made to article 2 to bring the draft articles into line with the approach of determining its scope through a definition of dangerous substances and a list.

C. Other amendments to article 2 and other general provisions

22. The other provisions of article 2 proposed below are not related to the foregoing but are, rather, the result of further reflection on the topic and of suggestions made during the debate at the last session. First, an attempt has been made to give a more precise definition of the key concept of "transboundary harm" by including the cost of preventive measures taken *after* an accident has occurred in the case of activities involving risk, or *after* a harmful effect has arisen in the case of activities with harmful effects, while there is still time to contain or minimize the harm. It seems obvious that if such measures are taken by the affected State in order to protect its territory, or by a third party which is in a position to do so on its behalf, they should be treated as part of the harm and their cost compensated. This is the position taken in a number of recent conventions and drafts. The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities[37] provides, in article 8, paragraph 2, that:

> 2. An Operator shall be strictly liable for:
>
> . . .
>
> (*d*) reimbursement of reasonable costs by whomsoever incurred relating to necessary response action, including prevention, containment, clean-up and removal measures . . .

Article 8, paragraph 1, states that an operator

> . . . shall take necessary and timely response action, including prevention, containment, clean up and removal measures, if the activity results in or threatens to result in damage to the Antarctic environment or dependent or associated ecosystems. . . .[38]

The 1989 Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)[39] provides, in article 1, paragraph 10(*d*), that:

> 10. "Damage" means:
>
> . . .
>
> (*d*) the costs of preventive measures and further loss or damage caused by preventive measures.

[36] Adopted by ECE by its decision C (45) of 27 April 1990. For the text, see *Code of Conduct on Accidental Pollution of Transboundary Inland Waters* (United Nations publication, Sales No. E.90.II.E.28).

[37] Signed at Wellington on 2 June 1988 (*International Legal Materials*, vol. XXVII (1988), p. 868), hereinafter "1988 Wellington Convention".

[38] "Prevention" as used in these instances means measures intended to limit the effects of an incident that has already occurred.

[39] Adopted on 10 October 1989 under the auspices of ECE. For the text, see *Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CRTD)* (United Nations publication, Sales No. E.90.II.E.39), hereinafter "1989 CRTD Convention".

and, in article 1, paragraph 11, that:

> 11. "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage.

The IMO draft convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea (1984)[40] provides, in article 1, paragraph 6, that "Damage includes the costs of preventive measures and further loss or damage caused by preventive measures". Lastly, in the Council of Europe's draft rules it is stated, in rule 2, paragraph 10, that "preventive measures" means "Any reasonable measures taken by any person after an incident has occurred to prevent or minimize damage". Moreover, in rule 2, paragraph 8, the definition of "damage" includes "the costs of preventive measures and further loss or damage caused by preventive measures".

23. A separate category must also be established for harm to the environment, which essentially concerns the State, as opposed to harm caused directly to individuals or their property. Reparation for harm to the environment must be made by restoring the conditions that existed *prior to* the occurrence of the harm, and the cost of such operations must be borne by the State of origin if they were carried out by the affected State or, at its request, by a third party. If it is not possible to return to the *status quo ante*, the monetary value of the impairment suffered should somehow be estimated and the affected State should be compensated with an equivalent sum, or given such other compensation by the State of origin as may be negotiated between the parties concerned. It should be added that if the domestic channel is to be used, the only party entitled to bring proceedings is the affected State. On the other hand, the repercussions of harm to the environment may also be prejudicial to individuals: a hotel owner who loses his customers because the tourist area in which his establishment is located was harmed by a leak of radioactivity experiences a loss of income for which he must somehow be compensated, and he would be in a position to institute proceedings in the manner which will be described below. This solution is supported by recent practice. It is the solution adopted by the 1988 Wellington Convention, which, in article 8, paragraph 2(*d*), quoted above (para. 22), makes the operator liable for the "response action" mentioned and provides in that same paragraph 2 that:

> 2. An Operator shall be strictly liable for:
>
> (*a*) damage to the Antarctic environment or dependent or associated ecosystems arising from its Antarctic mineral resource activities, including payment in the event that there has been no restoration to the *status quo ante*,
>
> . . .

The 1989 CRTD Convention includes within the meaning of damage, defined in article 1, paragraph 10:

> (*c*) loss or damage by contamination to the environment caused by the dangerous goods, provided that compensation for impairment of the environment other than for loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

The Council of Europe's draft rules[41] give the following definition in paragraph 9 of rule 2:

> 9. *Measures of reinstatement* means:
>
> Any appropriate and reasonable measures aiming to reinstate or restore damaged or destroyed natural resources or where appropriate or reasonable to introduce the equivalent of these resources into the environment.

and include the following within the concept of "damage" in paragraph 8 of the same rule:

> . . .
>
> loss or damage by contamination of the environment caused by the dangerous substances or waste, provided that compensation for impairment of the environment other than loss of profit shall be limited to costs of measures of reinstatement actually undertaken or to be undertaken.

In such cases, in which it is difficult to assess the harm and the corresponding compensation, the best compensatory measure would logically seem to be the cost of restoring the environment to its *status quo ante*, and only if this is not possible or not fully possible would monetary or other compensation by the State of origin, to be agreed on with the affected State, be used to restore the balance of interests between the parties which was upset by the harm to the environment.

24. In subparagraph (*g*) of article 2, the Special Rapporteur has added to the definition of transboundary harm the idea that it also includes the cost of *ex post facto* preventive measures, and in subparagraph (*h*) he has attempted to give a brief definition of "appreciable [significant] harm". That is no easy task, and the Special Rapporteur is open to suggestions in this regard. The Council of Europe's draft rules provide, in rule 3, paragraph 4(*d*), that :

> 4. No liability shall attach to the operator if he proves that:
>
> . . .
>
> (*d*) the damage was caused by pollution at tolerable levels to be anticipated under local [relevant] circumstances.

The Special Rapporteur has also attempted to define the concept of "incident" in a new subparagraph (*k*) of article 2. In this connection, the question arises first of all whether it is better to use the word "accident" or "incident". The *Diccionario de la Real Academia Española* defines the word *accidente*, in its second meaning, as a "fortuitous occurrence or action the involuntary result of which is harm to persons or things". In other words, it is a condition *sine qua non* for an accident that it be unintentional; indeed, in activities involving risk, the accident would have to be against the operator's will, since negligence could imply a violation of the general obligation of due diligence. In activities with harmful effects, while there may be no specific intent to cause harm, it seems clear that the operator is aware of such harm and none the less goes ahead with his activity and thus with the generation of its normal effects, which are by definition harmful. In some of the conventions and drafts that have been mentioned in this chapter, there appears to be a preference for the word "incident" in English. While it has something in common with the meaning of the Spanish word *accidente*, there are also differences, as is illustrated by the fact that one meaning of *accidente* is: "fortuitous occurrence which upsets the normal order of things", and this definition would not be appropriate for activities with harmful effects, in which harm occurs as a consequence of the normal operation of the activity. It might, however, be appropriate to use the term *incidente* (incident) in the draft under consideration

[40] IMO, document LEG/CONF.6/3 (13 January 1984).

[41] See footnote 8 above.

to refer both to an accident in the strict sense, when things are beyond the operator's control, and to a certain effect which "arises in the course of a matter or business and is somehow linked to it"—according to the definition of *incidente* given in the *Diccionario de la Real Academia Española*; this would enable us to avoid having to deal with the concept of "due diligence", as it is enough to know that the effect has arisen for there to be legal consequences. In any event, in the Council of Europe's draft rules the term "incident" is defined, in rule 2, paragraph 12, as follows:

12. *Incident* means:

Any sudden or continuous occurrence such as an explosion, fire, leak or emission or any series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

and in the 1989 CRTD Convention "incident" is defined, in article 1, paragraph 12, as follows:

12. "Incident" means any occurrence or series of occurrences having the same origin, which causes damage or creates a grave and imminent threat of causing damage.

The latter might be the most appropriate definition for the draft articles under consideration.

25. The new subparagraph (l) of article 2 defines restorative measures and is consistent with the provisions of the conventions and drafts already considered; the new subparagraph (*m*) defines preventive measures, including *ex post facto* preventive measures. Lastly, the new subparagraph (*n*) provides that States of origin and affected States will be referred to as "States concerned". Articles 3, 4 and 5 remain unchanged.

CHAPTER II

Principles

26. The principles set forth in draft articles 6 to 10 would not be affected by the introduction of the concept of dangerous substances and a list of such substances. The additions proposed here have to do with the introduction of certain concepts which have been considered in connection with article 2 (paras. 22-25 above).

A. Article 8 (Prevention)

27. Article 8 should contain a provision incorporating the concept of *ex post facto* preventive measures—in other words, measures to contain and minimize the harmful transboundary effects of activities. The Special Rapporteur has chosen to speak of "harmful effects" rather than "harm" in relation to prevention, since a harmful effect may or may not ultimately translate into harm, depending on whether or not certain preventive measures are taken. If measures are taken to reduce or eliminate harm which has already occurred, for instance by attempting to restore the conditions that existed prior to the harm, it would no longer be a question of preventive measures but one of reparation.

B. Article 9 (Reparation)

28. Article 9 would not be affected, although a new text that takes into account comments made in the debate is provided for the benefit of the Drafting Committee.

C. Article 10 (Non-discrimination)

29. In order to sound out views in the Commission, an additional principle, that of non-discrimination, is being tentatively proposed and would be the subject of article 10. There are two aspects to this principle, and they are formulated separately by the Experts Group on Environmental Law in articles 13 and 20 of their "Principles specifically concerning transboundary natural resources and environmental interferences".[42] Article 13, on non-discrimination between domestic and transboundary environmental interferences,[43] refers to the obligation of a State of origin to

. . . take into account the detrimental effects which are or may be caused by the environmental interference without discrimination as to whether the effects would occur inside or outside the area under their national jurisdiction.

In its comments on article 13 the Experts Group states:

According to this principle States are obliged *vis-à-vis* other States, when considering under their *domestic* policy or law the permissibility of environmental interferences or a significant risk thereof, to treat environmental interferences of which the detrimental effects are or may be mainly felt outside the area of their national jurisdiction in the same way as, or at least not less favourably than, those interferences of which the detrimental effects would be felt entirely inside the area under their national jurisdiction.[44]

The Experts Group considers this to be an "emerging principle" of international environmental law, and the texts it cites to support this thesis include article 30 of the 1962 Agreement concerning Co-operation between Denmark, Finland, Iceland, Norway and Sweden,[45] article 2 of the 1974 Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden ("Nordic Convention"),[46] the recommendations of intergovernmental organizations and other bodies, in particular OECD, and, above all, principle 13 of the UNEP principles of conduct in the field of the environment.[47] This principle of non-discrimination is without prejudice to the fact that a *minimum international standard* may be required of a State of origin which is higher than that established by its domestic legislation within its own jurisdiction. Referring to the OECD Council recommendation C(77)28 on implementation of a régime of equal

[42] *Environmental Protection . . ., op. cit.* (footnote 11 above), pp. 72 *et seq.*

[43] *Ibid.*, p. 88.

[44] *Ibid.*

[45] United Nations, *Treaty Series*, vol. 434, p. 145.

[46] *Ibid.*, vol. 1092, p. 279.

[47] 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 (UNEP, *Environmental Law: Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978)).

right of access and non-discrimination in relation to transfrontier pollution,[48] the Experts Group observed:

> . . . Indeed, the principle of non-discrimination was intended to provide a *minimum* level of protection below which OECD Member States were not supposed to come. . . .[49]

30. The other aspect of the principle of non-discrimination, which is set forth in article 20 (Non-intergovernmental proceedings)[50] of the principles mentioned above (para. 29), applies to the relationship between States and private individuals. That article provides:

> States shall provide remedies for persons who have been or may be detrimentally affected by a transboundary interference with their use of a transboundary natural resource or by a transboundary environmental interference. In particular, States of origin shall grant those persons equal access as well as due process and equal treatment in the same administrative and judicial proceedings as are available to persons within their own jurisdiction who have been or may be similarly affected.

In its comments on article 20,[51] the Experts Group differentiates between the principle contained in article 13 and the one formulated in article 20. It points out that article 13 simply provides that a State of origin may not discriminate between the effects of what is referred to as an "environmental interference" that are felt mainly in its own territory and those felt mainly in another jurisdiction, and that it does not deal with the legal remedies available to affected or potentially affected aliens (individuals or non-governmental entities). Article 20, on the other hand, establishes that States must provide such remedies for persons who have been or may be detrimentally affected by a "transboundary environmental interference". This question will be considered in more detail, but the foregoing should suffice to justify the inclusion in the draft under consideration of a principle encompassing both of the aspects mentioned, the second of which seems to be a specific aspect of the first, which it supplements with an appeal to States parties to grant appropriate legal remedies in their legislation and to apply them without discrimination.

[48] Adopted on 17 May 1977 by the OECD Council (*OECD and the Environment* (Paris, OECD, 1979), pp. 115 *et seq.*).

[49] *Environmental Protection . . ., op. cit.* (footnote 11 above), p. 90.

[50] *Ibid.*, pp. 119-120.

[51] *Ibid.*, pp. 120 *et seq.*

CHAPTER III

The revised procedure

A. Preliminary considerations

31. During its consideration of draft articles 10 to 17 at its last session, the Commission felt that the procedure put forward in relation to some aspects of co-operation and prevention needed to be simplified and made more flexible.[52] The Special Rapporteur has attempted to do so, in particular by eliminating the period for reply to notification (former articles 13 and 14), simplifying the procedure for protecting national security or industrial secrets (former article 11) and replacing the obligation to negotiate a régime (former article 16) by a simple obligation to hold consultations. It is also made clear in the new article 18 that failure to comply with the obligations contained in chapter III of the draft does not constitute grounds for the affected State to institute jurisdictional protective proceedings.

B. Comments on the proposed articles 11 to 20

1. ARTICLE 11 (ASSESSMENT, NOTIFICATION AND INFORMATION)

(a) *Paragraph 1*

32. The Special Rapporteur believes that the general duty to assess, notify and inform in the case of certain activities which cause, or create the risk of causing, transboundary harm is reasonably well established in international practice, as he attempted to demonstrate in his fifth report.[53] The cases cited in support of that view do not, however, appear to contain obligations proper, a breach of which would give rise to international penalties. The new article 11 provides that the State of origin must notify the State or States likely to be affected of any activity referred to in article 1 that is being, or is about to be, carried on under its jurisdiction or control. This obligation would be analogous to that in former article 10, but if the new definition of the activities referred to in article 1 is adopted (together with the list of dangerous substances in the corresponding annexes), the scope of the present article will become rather more restrictive and precise with respect to activities involving risk. The observation made at the last session to the effect that the obligations of the State of origin should not be too burdensome would then lose some of its weight. In any event, it must be borne in mind that the population of the State of origin is itself generally threatened by the risks or harm presented by activities referred to in article 1 and that the so-called "overburdening" of such States is thus nothing more than a duty which they must or should in any case fulfil for the protection of their own citizens, and that there are, besides, no penalties for non-compliance. As a result, if a State chooses to take responsibility for pursuing an activity which causes, or creates the risk of causing, transboundary harm, without assessing its effects or notifying or informing anyone, it may do so, but it will of course have to pay the corresponding compensation if harm occurs.

[52] See *Yearbook . . . 1989*, vol. II (Part Two), pp. 93-94, paras. 377-381.

[53] Document A/CN.4/423 (see footnote 5 above), paras. 79-95. See also the ECE draft framework agreement on environmental impact assessment in a transboundary context (ENVWA/AC.3/4) (see footnote 35 above).

(b) *Paragraph 2*

33. Paragraph 2 of article 11 envisages situations in which the transboundary effect causing the harm may extend to more than one State, and it establishes the obligation to call in an international organization com-

petent in the area. This plurality of States would create a situation in which the interest goes beyond the bilateral sphere or the sphere of a series of bilateral relations (State of origin with each of the affected States) and becomes, as it were, a public interest. This would also happen if there were more than one affected State and the State of origin had no way of identifying them. Of course, if the activity is governed by a specific convention which provides for an international organization to intervene even when there is only one affected State, the specific convention will prevail.

2. Article 12 (Participation by the international organization)

34. Article 12 sets forth the functions of the international organization in the cases specified in paragraph 2 of article 11, when those functions are not specified in the organization's own statutes or rules. Any technical assistance which the organization may provide to developing countries which do not have the necessary technology to assess the transboundary effects of the activity will be very helpful.

3. Article 13 (Initiative by the presumed affected State)

35. If a State has serious reason to believe that an activity in another State is causing it transboundary harm, or creating a risk of causing it such harm, and it warns the alleged State of origin accordingly, the State of origin will have a duty to fulfil the requirements of paragraph 1 of article 11. If the activity in question is indeed one of those referred to in article 1, the State of origin will have to reimburse the costs incurred by the affected State. This seems fair since, by examining the activity in question and giving the State of origin the corresponding information, the affected State will have done most of that State's work for it.

4. Article 14 (Consultations)

36. In the cases specified in earlier articles, the States concerned will consult among themselves with a view to finding a régime for the activity which reconciles their interests. They will have to do so in good faith and in a spirit of co-operation so as to resolve the matter satisfactorily. If there is more than one affected State, there may be multilateral meetings in addition to any bilateral meetings which may be held by the State of origin. This confers a degree of public status on the matters under discussion which would appear to be beneficial.

5. Article 15 (Protection of national security or industrial secrets)

37. As suggested at the last session, the Special Rapporteur proposes, in article 15, a simplified version of the former article 11, drafted along the lines of the principles concerning transfrontier pollution annexed to OECD Council recommendation C(74)224,[54] principle 6, paragraph 2, of the UNEP principles of conduct in the field of the environment[55] and article 20 of the draft articles on the law of the non-navigational uses of international watercourses (hereinafter referred to as the "draft articles concerning international watercourses").[56]

6. Article 16 (Unilateral preventive measures)

38. Regardless of the status of discussions—or the state of affairs if there are no discussions—if the State of origin is aware of the potential for transboundary harm of an activity under its jurisdiction or control it will have to take the precautionary measures indicated in article 8—unless, of course, it has reason to believe that the nature of the activity is not what some are claiming. In any case, if, in such circumstances, harm arises that can be attributed causally to the activity,[57] the articles relating to the liability of the State of origin will come into play. Unilateral preventive measures should include making the suspect activity subject to prior authorization by the State of origin and setting up some form of compulsory insurance, other financial safeguards or a public fund to cover liability towards possible affected States. In *ex post facto* prevention, it is also possible that the State may have to intervene through public institutions to halt some harmful effect which is spreading but can still be contained or diminished. It may sometimes be necessary to call in the fire brigade or even the army, to mobilize forest rangers or to do something else along those lines—and this is an obligation of the State, not the operator.

7. Article 17 (Balance of interests)

39. The usefulness of providing some guidelines for the negotiation of a régime has been stressed on various occasions in the Commission and in the Sixth Committee. Those included in article 17 reflect most of the so-called factors described in section 6 of the schematic outline of the topic.[58] The Special Rapporteur must confess to a certain lack of enthusiasm for including such concepts in a body of norms, because they are only recommendations or guidelines for conduct and not genuine legal norms, and because the factors involved in this kind of negotiation are too varied to be forced into a narrow conceptual framework. However, it is not unusual to do so,[59] and their inclusion in the present articles, apart from lending some substance to the concept of "balance of

[54] Adopted on 14 November 1974 by the OECD Council (*OECD and the Environment* (Paris, OECD, 1986), p. 142).

[55] See footnote 47 above.

[56] See *Yearbook . . . 1988*, vol. II (Part Two), p. 54.

[57] For the sake of argument, let us say that the harm is causally attributable to the activity. Strictly speaking, as the Special Rapporter explained in his fifth report:

> ". . . 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. It cannot, however, be attributed quite so strictly to an 'activity', which consists of a series of acts, one or more successive episodes of human conduct aimed in a certain direction." (Document A/CN.4/423 (see footnote 5 above), para. 13.)

[58] *Yearbook . . . 1982*, vol. II (Part Two), p. 83, para. 109.

[59] See article 7 of the draft articles concerning international watercourses, which contains a list of factors to be taken into account for the "equitable and reasonable" utilization of the waters of an international watercourse (*Yearbook . . . 1987*, vol. II (Part Two), p. 36).

interests",[60] which is, so to speak, behind a number of the proposed texts, and providing guidance to the States concerned, would be of some legal value for assessing the extent to which those States have acted in good faith in the negotiations. It may be useful in this connection to establish whether the State of origin could have conducted an equivalent activity in a less dangerous, if slightly more expensive, way or the extent to which the affected State protects its own nationals from the impact of that or a similar activity. The introductory paragraph of the article is permissive: the parties may take into account the factors indicated, since doing so would be a matter of free will which can yield only to compulsory norms of international law. Furthermore, so great is the variety of circumstances in each particular case that the States concerned could not be required to take into account the factors included in the article, for some other factor that is not listed may be more relevant in that particular instance. Concerning the list itself, the various subparagraphs are self-explanatory and there is no need for further comment.

8. Article 18 (Failure to comply with the foregoing obligations)

40. If the State of origin fails to comply with the obligations just discussed, the affected State will be entitled to institute proceedings only if harm arises. The mechanisms of liability are activated only if the harm can be causally attributed to the activity in question. This solution is in line with views expressed in both the Commission and the Sixth Committee, with which there was no disagreement. It is also in line with the international practice mentioned by the Special Rapporteur in his fifth report.[61] Of course, if any proceedings are envisaged in other conventions in force between the parties, those conventions will apply. In any event, if the State of origin fails to comply with the obligations mentioned, it will have no right to invoke the benefits of article 23.

9. Article 19 (Absence of reply to the notification under article 11)

41. If the State of origin has given the notification required by article 11 and has also voluntarily provided information on the measures it plans to take to prevent harm or minimize risk, and if the State or one of the States likely to be affected has not replied, it will be assumed that the measures proposed are satisfactory to that State; if harm then occurs, it will not be able to allege that the State of origin had not taken sufficient precautions. If a State that has received a notification considers the period for replying to be insufficient or does not have the means to reply on time, it will be able to request an extension. If it is a developing country which needs some assistance in order to make a full assessment of the risks involved, such assistance could be forthcoming from international organizations or from the alleged State of origin itself if that State is able to give it. If a study reveals that the activity is indeed one of those referred to in article 1, the costs of that study will be borne by the State of origin, which is what would have happened if that State had complied with its obligations under article 11. Otherwise the costs will be borne by the affected State.

10. Article 20 (Prohibition of the activity)

42. Article 20 sets limits on the conduct of an activity. It is logical to ban an activity whose effects cause transboundary harm that cannot be avoided or adequately compensated, as would be the case with some kinds of harm to the environment which are irreversible. In order to be able to pursue the activity, the operator must find a way of converting it into a less harmful one or into one whose effects can be controlled, and the State of origin would have to propose this to the operator requesting the corresponding authorization.

[60] This expression is very difficult to define. In a general way, it may be found that certain paragraphs of international judgments come close to this idea. For example, in the *Lake Lanoux* case the arbitral tribunal stated:

> ". . . The Tribunal is of the opinion that, according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own." (*International Law Reports 1957*, vol. 24 (1961), p. 139.)

And in the case relating to the *Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ stated:

> ". . . This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others." (Judgment No. 16 of 10 September 1929, *P.C.I.J., Series A, No. 23*, p. 27.)

[61] Document A/CN.4/423 (see footnote 5 above), paras. 79-95.

Chapter IV

Liability

A. General considerations

43. Chapter IV expands on the principle set forth in article 9 and deals with the liability of the State of origin, i.e. the *primary* obligations that arise from causing the harm. As noted above, liability may be incurred regardless of whether or not the harm is the result of a failure to comply with the obligation of prevention; the consequences may be somewhat different, however, as will be explained below. In brief, when harm occurs that is causally attributable to an activity referred to in article 1, the State of origin is bound to negotiate the amount of compensation it must pay in order to restore, in so far as possible, the balance of interests that prevailed before the harm. If it does not fulfil this obligation to negotiate—in other words, if it refuses to sit down and talk, or if it

proceeds in such a way as to preclude genuine negotiation[62]—it will be violating an international obligation and thus incurring responsibility for a wrongful act. Only then, at the end of the entire process, would it incur this type of liability, which enters the realm of *secondary* rules. Needless to say, if the State of origin agrees, as a result of negotiations, to pay a given amount of compensation and then fails to do so, it also incurs the same liability.

B. Reparation and balance of interests

44. The Special Rapporteur had felt that the chapter on liability, which sets forth the primary obligations of the State of origin when transboundary harm has been caused, might introduce a concept of reparation which, as opposed to the classical one involved in responsibility for wrongfulness, did not entail total restitution to eliminate all the consequences of the act which caused the harm. In brief, the idea would be that, using such total reparation as a unit of measurement, certain amounts would be deducted to represent those interests of the State of origin which, before the harm, were not matched by equivalent measures on the part of the affected State. For example, the State of origin may wish to recover amounts spent strictly for the benefit of the affected State, such as those aimed solely at preventing transboundary harm,[63] or it may want the affected State to help defray the cost of an activity from which the latter also benefits, if that can be demonstrated. Likewise, the State of origin may want the affected State to accept lower compensation in consideration of the fact that the same activity is also carried on under the jurisdiction or control of the affected State, in which case compensation would be paid in both directions. Of course, if the affected State does not obtain any benefit from the activity in question, or if the same activity or a similar one is not carried on under its jurisdiction or control, the situation would be different and one would have to think in terms of full compensation.

45. The Special Rapporteur still thinks that that would be the ideal situation, as it would allow for distributive justice in the economic aspects of an activity which benefits both States. Several examples may be found in domestic and international law to support this idea: when liability for occupational accidents is objective or strict, there is usually a ceiling which in most cases does not compensate for the harm caused but does allow for rapid payment and may even preserve the viability or economic soundness of the company which has to make payment. To explain briefly the *raison d'être* of this institution, it might be said that ideal justice is sacrificed for the sake of the social utility of, for example, manufacturing activities. In international law, some conventions authorize a ceiling on compensation, normally in cases where the harm is of considerable magnitude. This is due, in international law also, to the social utility of the activity and, consequently, to acceptance of the price that must be paid for not interrupting technological progress, although perhaps the most practical reason might be that it is difficult to obtain insurance for the extremely high amounts that are at stake in such activities.

46. In trying to put this idea into practice, however, the Special Rapporteur has come up against some arguments for not adopting it in the framework of a convention as broad as the one at present under consideration, which envisages all the activities referred to in article 1. The first objection is that the most appropriate time to discuss such a solution would seem to be during negotiations concerning the régime for a specific activity. It is in the course of negotiations on the terms under which an activity may be pursued in the State of origin that such considerations can best be identified and quantified. This becomes more difficult after harm has occurred.

47. In addition, no matter how attractive such a concept might be, there is no example in international practice of deductions being made in the way suggested above (para. 44). In many cases, a ceiling is indeed placed on the amount to be paid by the operator; this was mainly due, at the outset, to the impossibility of obtaining the necessary insurance. This problem has, however, been gradually overcome as ceilings have been raised, firstly as a result of higher amounts of insurance being made available, and secondly as a result of the establishment of funds either by the operators themselves or by States. One clear example of this is the 1963 Brussels Convention supplementary to the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy[64] which, in order to provide the greatest possible coverage for damage caused by nuclear activity, raises the ceiling for compensation through the use of public funds. Lastly, the 1972 Convention on International Liability for Damage Caused by Space Objects,[65] which establishes State liability, provides, in article XII, for full compensation:

> . . . such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred.

48. Another feature of the draft articles under consideration that must be remembered is that they are basically, *faute de mieux*, of a residual nature. They are aimed primarily at encouraging States to consult with each other in order to try to find a legal régime that covers the specific activity which has given rise to the problem, and to get them to accept the principles set forth therein as a guide for their negotiations. The idea is not to create a perfect system which would operate permanently, but rather to provide a kind of safety net, like those used by acrobats, which would be available if an activity referred to in article 1 were to cause harm without there being any specific legal régime to cover such a case. In these circumstances, it seems best to try to develop a system that works rather than one that guarantees perfect justice. For all these reasons, the Special Rapporteur has decided to suggest some deductions for the situations mentioned above (para. 44), to be mode if the State of origin so requests and if they are reasonable in each case, leaving it up to the affected State to agree to them or not.

[62] On the obligation to negotiate, see the fifth report of the Special Rapporteur, document A/CN.4/423 (see footnote 5 above), paras. 126-147.

[63] Costs incurred to prevent harm to the population of the State of origin should, however, be deducted from accident-prevention costs, leaving only those additional costs, if any, which are incurred to prevent a transboundary effect; this considerably complicates the calculations.

[64] Brussels Convention of 31 January 1963 (see footnote 18 above) supplementary to the Paris Convention of 29 July 1960, amended by the Additional Protocol of 28 January 1964 (see footnote 17 above) and by the Protocol of 16 November 1982.

[65] See footnote 14 above.

C. Comments on the proposed articles 21 to 27

1. Article 21 (Obligation to negotiate)

49. The obligation to negotiate has already been discussed several times in connection with the Commission's work on the present topic. There is no point in elaborating on it, except for purposes of clarification in this particular context. The obligation of the States concerned consists, in the first place, of sitting down to negotiate; this applies to both States, not just to the State of origin. Both States are also required to conduct their negotiations in good faith, with a view to achieving a concrete result, which is to determine the amount to be paid by the State of origin in order to restore matters either to the situation that existed before the harm occurred (*status quo ante*) or to the situation which most probably would have existed had the harm never occurred (*Chorzów Factory* case[66]). Of course, put this way, there would not be much to negotiate, and that is why article 21 is worded somewhat more loosely: it provides that the legal consequences of the harm must be determined and that the harm must, *in principle*, be fully compensated. It is here that the considerations set forth in article 23 apply, so that, within reasonable limits, a compromise can be reached on (normally) an amount of money that satisfies the interests of both parties. The amount, therefore, would be determined through negotiations, the guidelines for which are given in articles 20 and 23.

2. Article 22 (Plurality of affected States)

50. If the harm occurs in a situation envisaged in article 11 (*b*), an international organization may intervene. If an international organization has already been called in as a result of the consultations envisaged in article 14, it may also intervene in this case, at the request of any of the States concerned. Its role will be to co-operate, and to facilitate co-operation on the part of the States concerned, in determining the amount to be paid by the State of origin. It will act with the same powers as those envisaged in article 12—that is to say, in keeping, generally, with the mandates of its own statutes or rules or using its good offices—in order that a consensus may be reached on the amount of compensation to be paid by the State of origin; in any event, it will provide to such States as may request it—presumably developing countries—such technical assistance as may be necessary in order better to ascertain the nature of the harm caused and the best way to make reparation for it. It did not seem necessary to include a final paragraph on the possibility of convening joint meetings; in such cases, when the interests under discussion could be of considerable magnitude and when an international organization is involved, no one is likely to question the right of any of the States concerned or of the international organization involved to call for joint meetings.

3. Article 23 (Reduction of compensation payable by the State of origin)

51. Article 23 does not include precise definitions either of the harm or of the compensation due from the State of origin; rather, it gives guidelines for negotiations. It would seem reasonable, as stated under section 5, paragraph 3, of the schematic outline,[67] to say that:

> 3. In so far as may be consistent with the preceding articles, an innocent victim should not be left to bear his loss or injury; the costs of adequate protection should be distributed with due regard to the distribution of the benefits of the activity. . .

Thus, if the State of origin can demonstrate that its prevention costs were increased in order to prevent transboundary harm, i.e. that prevention of transboundary harm represented a certain proportion of the costs above and beyond those necessary for internal prevention, it might seem reasonable that this increase in costs should be shared proportionately and equitably with the affected State or States. In cases where the State of origin could show, although without establishing any exact amounts, that the affected State benefited from the activity in question, for example from some of its generally beneficial aspects, it would be impossible to quantify *a priori*, or even *a posteriori*, the amounts or proportions involved. All this would be established as a result of negotiations, which then might or might not result in the establishment of a figure that would somehow permit a restoration of the balance of interests at stake. This holds true when a claim is made through the diplomatic channel. When a claim is made through the domestic channel, the applicable law would be the national law, in which considerations of this kind rarely prevail, although there may be other considerations, such as the limitation of liability to a maximum amount.

4. Article 24 (Harm to the environment and resulting harm to persons or property)

(a) *Paragraph 1*

52. Article 24 concerns specifically harm to the environment. International practice seems to point unequivocally to the solution proposed in paragraph 1 of the article. Various conventions and draft instruments provide that harm to the environment requires that the State of origin restore the *status quo ante* and therefore that the affected State, or anyone who carries out the necessary work to restore the environment on behalf of that State, is entitled to reimbursement, provided that the restoration operation is reasonable, in other words that it is within reason and its cost is not manifestly disproportionate to the harm done. If it is impossible to restore fully the environmental conditions existing prior to the harm, the parties must agree on compensation by the State of origin which is deemed equivalent to the deterioration actually suffered. Harm to the environment should be considered separately from harm to persons or private property, or from the State itself, since harm to the environment is more difficult to quantify: it involves harm to things such as air, water and space which cannot be appropriated, which are shared and used by everyone and do not belong to anyone in particular. Environmental harm may also be far more extensive than the other kinds of harm mentioned, however, and the priority is to attempt to restore the conditions that existed prior to the occurrence of the harm. One of the main reasons for the attempt being made within IAEA to amend the 1960 Paris Convention and the 1963 Vienna Convention concerning liability for

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

[67] See footnote 58 above.

nuclear damage[68] is that they do not deal with harm to the environment over and above harm to persons or property.

(b) *Paragraph 2*

53. Paragraph 2, by contrast, covers precisely the other eventuality: that of harm to persons (including, of course, death or injury to the health or physical integrity of persons) or to property belonging to individuals or companies or to the State itself which is not caused directly (as in the case envisaged in article 21) but arises as a consequence of harm to the environment or of impairment of the use or enjoyment of areas under the jurisdiction of the affected State. A typical case would be that of a hotel owner who, as a result of environmental damage to the woodlands of the mountain area in which his hotel is located, is harmed by the loss of his customers. This is a case of *lucrum cessans* which must be compensated for.

(c) *Paragraph 3*

54. Paragraph 3 gives the affected State the possibility of agreeing to a reduction in its compensation on the grounds given in article 23. This happens when the diplomatic channel is used, but not when claims are brought by individuals through the domestic channel, in which case, as we have seen, the national law of the competent court will have to apply. In such circumstances, the compensation may be somewhat different from that which the same individual would have obtained had he resorted, through his State, to the diplomatic channel. The national law may set a limit on liability which affects the share due to each party or there may, in general, be another way of evaluating the harm, etc. This, however, arises from the diversity of national systems and it would be pointless to attempt to unify them under one convention, however multilateral. As will be noted a little further on, the draft articles under consideration impose certain rules on the national law: that it give the courts of the country concerned jurisdiction to hear the claims lodged by those persons, that it provide a remedy that gives prompt and satisfactory compensation in such cases, and that it not discriminate on grounds of nationality, domicile, residence or other basic concepts. It may not be appropriate, however, to impose any further rules on domestic law, as this may give rise to unforeseen complications.

5. Article 25 (Plurality of States of origin)

55. Article 25 covers cases in which there may be more than one State of origin responsible for transboundary harm, and two alternatives are offered. Under alternative A, a claim for the entire harm may be brought against any State of origin (joint and several liability) and this State of origin may of course claim from the other State of origin reimbursement of the proportionate share due from that State under article 23. This is the solution adopted by the 1972 Convention on International Liability for Damage Caused by Space Objects,[69] and it offers advantages to the affected State, which can recover its losses from any of the States of origin. There are some drawbacks, however: the other State may invoke exceptions and, in general, the solution appears more suited to legal proceedings than to a claim through the diplomatic channel. The Special Rapporteur therefore also submits alternative B, bearing in mind that article 21 provides for a joint procedure under which each State of origin may put forward its procedural position.

6. Article 26 (Exceptions)

56. The existence of special cases in which there is no liability, or in which liability is not applicable to certain persons in certain circumstances, is common to most of the conventions on liability for harm resulting from specific activities, whether it is civil liability or State liability, even if the liability is objective or strict. Thus, the 1972 Convention on International Liability for Damage Caused by Space Objects,[70] which establishes the liability of the State for such damage, provides, in article VI, paragraph 1, that:

> . . . exoneration from absolute liability shall be granted to the extent that a launching State establishes that the damage has resulted either wholly or partially from gross negligence or from an act or omission done with intent to cause damage on the part of a claimant State or of natural or juridical persons it represents.

These are the only grounds for exoneration from liability envisaged in that Convention.

57. The other conventions incorporate more grounds for exoneration. They are based on the "channelling" of strict liability towards the operator, who is made solely responsible for the harm. Before proceeding, it should be made clear that the operator's State is liable for any amounts over and above the capacity to pay of the operator or of his insurers and, in that case, fully replaces the operator and appears to be as much the subject of strict liability for those amounts as the operator himself. The 1963 Vienna Convention on Civil Liability for Nuclear Damage[71] provides, in article IV, paragraph 2, for an exception similar to the one referred to above in cases involving "gross negligence" or an "act or omission . . . done with intent to cause damage" on the part of the apparent victim but leaves it up to the court to grant this exception, provided that it is in keeping with the national law. On the other hand, the same Convention, under article IV, paragraph 3, allows an unrestricted exception in respect of nuclear damage caused by a nuclear incident directly due to (*a*) "an act of armed conflict, hostilities, civil war or insurrection" or (*b*) "a grave natural disaster of an exceptional character". The 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy[72] establishes, in article 9, an exception for damage caused by a nuclear incident due to:

> . . . an act of armed conflict, hostilities, civil war, insurrection or, except in so far as the legislation of the Contracting Party in whose territory his nuclear installation is situated may provide to the contrary, a grave natural disaster of an exceptional character.

The 1988 Wellington Convention[73] provides, in article 8, paragraph 4, that:

[68] See footnotes 17 and 19 above.

[69] See footnote 14 above.

[70] *Ibid.*

[71] See footnote 19 above.

[72] See footnote 17 above.

[73] See footnote 37 above.

4. An Operator shall not be liable . . . if it proves that the damage has been caused directly by, and to the extent that it has been caused directly by:

(*a*) an event constituting in the circumstances of Antarctica a natural disaster of an exceptional character which could not reasonably have been foreseen; or

(*b*) armed conflict, should it occur notwithstanding the Antarctic Treaty, or an act of terrorism directed against the activities of the Operator, against which no reasonable precautionary measures could have been effective.

and in paragraph 6 of the same article provides that:

6. If an Operator proves that damage has been caused totally or in part by an intentional or grossly negligent act or omission of the party seeking redress, that Operator may be relieved totally or in part from its obligation to pay compensation in respect of the damage suffered by such party.

58. Several important drafts under consideration in various forums also make similar exceptions. Thus, in the Council of Europe's draft rules on compensation for damage caused to the environment,[74] rule 3, concerning the liability of the operator, provides in paragraph 4 that:

4. No liability shall attach to the Operator if he proves that:

(*a*) the damage resulted exclusively from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;

(*b*) the damage was exclusively caused by an act done with the intent to cause damage by a third party, despite safety measures appropriate to the type of dangerous activity in question;

(*c*) the damage was exclusively caused by an act performed in compliance with an express order or provision of a public authority;

. . .

59. The 1989 CRTD Convention[75] states, in article 5, paragraph 4:

4. No liability shall attach to the carrier if he proves that:

(*a*) the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(*b*) the damage was wholly caused by an act or omission with the intent to cause damage by a third party;

. . .

and in article 5, paragraph 5:

5. If the carrier proves that the damage resulted wholly or partially either from an act or omission with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the carrier may be exonerated wholly or partially from his liability to such person.

7. Article 27 (Limitation)

60. It is also common to set a time-limit after which proceedings in respect of liability lapse. The conventions cited as the basis for the preceding article may also be invoked here. The 1972 Convention on International Liability for Damage Caused by Space Objects[76] establishes time-limits in article X:

Article X

1. A claim for compensation for damage may be presented to a launching State not later than one year following the date of the occurrence of the damage or the identification of the launching State which is liable.

2. If, however, a State does not know of the occurrence of the damage or has not been able to identify the launching State which is liable, it may present a claim within one year following the date on which it learned of the aforementioned facts; however, this period shall in no event exceed one year following the date on which the State could reasonably be expected to have learned of the facts through the exercise of due diligence.

. . .

61. The 1960 Paris Convention and the 1963 Vienna Convention concerning liability for nuclear damage[77] establish, in article 8 and article VI respectively, a time-limit of 10 years from the date of the nuclear incident which caused the damage. Rule 9 of the Council of Europe's draft rules[78] establishes a time-limit of three or five years (still to be decided) from the date on which the affected party knew or ought reasonably to have known of the damage and of the identity of the operator; in no case can proceedings be brought after 30 years from the date of the incident. Article 18 of the 1989 CRTD Convention sets a time-limit of three years from the date at which the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the carrier.

[74] See footnote 8 above.

[75] See footnote 39 above.

[76] See footnote 14 above.

[77] See footnotes 17 and 19 above.

[78] See footnote 8 above.

Chapter V

Civil liability

A. General considerations

62. Up to now, the liability envisaged in the present articles has been regarded as the exclusive responsibility of the State, for reasons which were given at the appropriate time[79] and which, briefly, were: (*a*) although private-law remedies are useful in giving various choices to the parties, they fail to guarantee prompt and effective compensation to innocent victims, who, after suffering serious injury, have to take proceedings against foreign entities in the courts of other States; (*b*) private-law remedies by themselves will not encourage States to take more effective preventive measures in relation to activities conducted within their territory which give rise to injurious transboundary consequences. Without discarding these arguments, the Special Rapporteur feels that the possibility that the articles might make this local remedy more accessible and thus easier to choose for victims who, for whatever reason, prefer it to the protection of their

[79] See *Yearbook . . . 1987*, vol. I, p. 186, 2023rd meeting, para. 25.

own State should be considered. Of course there is nothing, as things are at present, to prevent an individual who has been the victim of transboundary harm from trying to go directly to the courts of the State of origin to obtain compensation for such injury without seeking protection from his own State, which, moreover, may or may not be forthcoming. The affected State itself might in some cases even find it useful to resort to this remedy in order to defend its own interests. The present articles therefore would simply attempt to ensure a minimum degree of uniformity in the treatment of these private individuals or the affected State by the courts and any applicable laws, as well as certain substantive guarantees and due process of law.

B. Comments on the proposed articles 28 to 33

1. Article 28 (Domestic channel)

63. Different degrees of international regulation of the domestic legal channel can be envisaged. As a minimum, the present articles could establish a system based in part on that of the 1972 Convention on International Liability for Damage Caused by Space Objects.[80] One initial provision for ensuring peaceful coexistence of the domestic channel with the international channel would be to establish, as does article XI, paragraph 1, of the 1972 Convention, that presentation of a diplomatic claim to the State of origin would not require the prior exhaustion of any local legal remedies that might be available to the claimant State or to natural or juridical persons it represents. At the same time, it would have to be established, as in paragraph 2 of the same article, that nothing in the convention would prevent a State, or a natural or juridical person it might represent, from pursuing a claim in the courts or agencies of the State of origin, or indeed in the courts or agencies of the affected State, as suggested in article 29 of the present draft. In that case, the affected State would not be able to use the diplomatic channel to present a claim in respect of harm for which compensation was being sought through the domestic channel. The system established by the 1972 Convention goes no further than this, but the Commission might prefer a greater degree of regulation, through an international convention, of access to the domestic channel and some other aspects. The solution provided by the 1972 Convention is understandable in an instrument of that kind, in the drafting of which strategic and security considerations prevailed over other considerations, especially economic considerations, in relation to an activity which at the time was seen as the exclusive responsibility of States.[81]

[80] See footnote 14 above.

[81] As stated in a recent study:

"When in 1966, based upon the primary agreement of the two superpowers, the Outer Space Treaty was adopted, it was agreed, within the political context of the legal régime on outer space, that there should be a tight régime based on international responsibility of the controlling state not only for activities on its own behalf but also for private activities carried out under its authority. The stipulation of the international liability of the controlling state corroborates its obligation continuously to supervise and control governmental, as well as private, space enterprises. It has to be seen in the framework of the space régime and not as a mere technical question of how to adjust the economic risk involved in space activities." (G. Doeker and T. Gehring, "Private or international liability for transnational environmental damage: The precedent of conventional liability régimes", *Journal of Environmental Law* (Oxford), vol. 2, No. 1 (1990), p. 13.)

2. Article 29 (Jurisdiction of national courts)

(a) *Paragraph 1*

64. A greater degree of regulation of civil liability could be achieved by imposing certain obligations on the parties, beginning with their obligation under paragraph 1 of article 29 to grant unrestricted access to their courts to victims of transboundary harm caused by activities under their jurisdiction or control. For this purpose the parties would have to adapt their domestic legislation so as to give their courts the necessary jurisdiction to deal with claims submitted by individuals or legal entities living or residing in another country. This is the solution advised in the ECE Code of Conduct on Accidental Pollution of Transboundary Inland Waters,[82] article VII, paragraph 3, of which reads:

> 3. Countries should endeavour, in accordance with their legal systems and, where appropriate, on the basis of mutual agreements, to provide physical and legal persons in other countries who have been or may be adversely affected by accidental pollution of transboundary inland waters with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdiction who have been or may be similarly affected.

A similar provision is to be found in article 19, paragraph 3, of the 1989 CRTD Convention.[83]

(b) *Paragraph 2*

65. Paragraph 2 of article 29 reflects a greater degree of regulation because, even if they had access to the courts of the State of origin, victims of transboundary harm would still be completely dependent on the solution provided by the national law of the competent court in all areas not regulated by the present articles. Domestic law may not grant any remedies even to nationals of the country in the event of such harm, or it may grant remedies which fall short of the "prompt and adequate compensation" referred to in paragraph 2. As the Special Rapporteur sees it, this does not mean that the liability of the party which caused the harm need necessarily be strict—although many international conventions and domestic legal systems envisage this kind of liability for the operator in the case of activities such as those referred to in article 1—and the formula is sufficiently flexible to permit the application of a domestic law which might reasonably satisfy the claimant. In a case where the applicable law does not recognize no-fault liability, the claimant will have to prove the existence of the conditions stipulated by the local law if his claim is to be admitted. A precedent for this solution is to be found in article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea:[84]

> 2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

(c) *Paragraph 3*

66. Paragraph 3 of article 29, if acceptable, would give victims of transboundary harm an important option by

[82] See footnote 36 above.

[83] See footnote 39 above.

[84] *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.

enabling them to choose between the competent court of the State of origin and that of the affected State. It has been argued that the court of the State of origin is more appropriate since that is where the causal chain leading to the harm originated and, therefore, where evidence can more easily be gathered. That is true, but it must be remembered that one of the objections raised against the domestic channel was that the victim had to take proceedings in a foreign country, with all the attendant drawbacks: ignorance of substantive law and legal procedures, travel costs, possibly a different language, etc. Under paragraph 3, the claimant could, if he prefers, lodge a claim with a court in his own country. Evidence can be gathered by sending letters rogatory to the judge of the place where the incident which caused the harm occurred, but the important thing is that the claimant can institute proceedings in his own country. Such a solution is provided for in the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters[85] and in the decision of the Court of Justice of the European Communities of 30 November 1976.[86] Similarly, the 1989 CRTD Convention,[87] in article 19, paragraph 1, establishes the jurisdiction of courts of contracting States:

(*a*) where the damage was sustained as a result of the incident; or

(*b*) where the incident occurred; or

(*c*) where preventive measures were taken to prevent or minimize damage; or

(*d*) where the carrier has his habitual residence.

If the affected State wished to go to court to pursue a claim for its own interests (for instance, for damage to its environment), it would have to do so in the courts of the State of origin, not in its own courts, in order to avoid any suspicion of partiality and because the State has means of litigation which are not available to individuals. In any case, this is a progressive provision and might not be acceptable in a global instrument such as the one now under consideration.

[85] United Nations, *Treaty Series*, vol. 1262, p. 153.

[86] *Handelskwekerij G. J. Bier BV* v. *Mines de Potasse d'Alsace S.A.* (case 21/76) (Court of Justice of the European Communities, *Reports of Cases before the Court, 1976-8* (Luxembourg), p. 1735).

[87] See footnote 39 above.

3. Article 30 (Application of national law)

67. Article 30 provides for application of the national law in all matters not specifically regulated by the present articles. Both the national law and these articles will have to be applied in such a way as to comply with the principle of non-discrimination provided for in draft article 10. The basis for this is to be found in articles 13 and 14 of the 1960 Paris Convention.[88]

4. Article 31 (Immunity from jurisdiction)

68. Article 31, which prevents a State against which proceedings have been instituted under the present articles from claiming immunity from jurisdiction, except in respect of enforcement measures, has precedents in article 13(*e*) of the 1960 Paris Convention[89] and article XIV of the 1963 Vienna Convention[90] and would appear necessary for the functioning of the system provided for in the present articles.

5. Article 32 (Enforceability of the judgment)

69. Article 32 deals with the enforceability of the judgment and is based on article 13(*d*) of the 1960 Paris Convention,[91] article XII of the 1963 Vienna Convention[92] and article 20 of the 1989 CRTD Convention.[93] In any global framework convention such as the one under consideration, it is necessary to allow for the fact that different countries have different conceptions of public policy, as well as the other possibilities listed in the article.

6. Article 33 (Remittances)

70. Article 33 is self-explanatory and is designed to facilitate the operation of the preceding provisions among the parties to the future convention.

[88] See footnote 17 above.

[89] *Ibid.*

[90] See footnote 19 above.

[91] See footnote 17 above.

[92] See footnote 19 above.

[93] See footnote 39 above.

Chapter VI

Liability for harm to the environment in areas beyond national jurisdictions (global commons)

A. Preliminary considerations

71. At the last session the Special Rapporteur undertook to explore the possibility of extending the present topic to harm caused to the so-called "global commons",[94] which might perhaps be rendered in Spanish by *espacios públicos internacionales*, by analogy with areas in common use which, under domestic law, are said to be in the "public domain" of the State. It is necessary to clarify what is meant by "extending the topic" to cover harm to the global commons, for it is not a question of drafting an entire body of environmental law through the legal institution of liability, but rather of applying the concept of liability in all the areas in which it must be applied. With regard to the draft articles under consideration, the Special Rapporteur will examine three main issues in order to determine whether the draft can be extended to the global commons. These are: (*a*) the concept of harm; (*b*) the concept of affected State; and

[94] Whether the global commons were considered as a *res communis* to all States or as belonging to the eminent domain of the international community as a whole, i.e. as distinct from the sum of its members—in which case it would have to be given legal personality—there would apparently be no major differences in practice. In both cases States would have *common use*, which has been recognized in practice up to now.

(*c*) the applicability of responsibility for wrongfulness or strict liability.

72. A preliminary question which, in the Special Rapporteur's view, is crucial to his investigation is whether, under existing general international law, any State or individual can cause harm to the global commons, or to areas beyond national jurisdictions, without such harm having some kind of consequences for the State or individual that causes it. If the answer is in the affirmative, there is a second question that must be asked: is it conceivable that such a situation can continue, given the conditions in which the international community is now living? It should be borne in mind that the progressive development of international law is one of the tasks assigned to the International Law Commission.

B. Harm

73. In order to answer these questions, the first distinction to bear in mind is whether the harm affects persons or property in areas beyond national jurisdictions (or causes injury to States within the meaning of article 2(*g*) and (*h*) of the draft articles under consideration) or whether it causes injury solely and exclusively to the environment. A study prepared by the Secretariat at the request of the Special Rapporteur[95] finds no conceptual difficulty with the first kind of harm and takes the view that it is covered by article 1 of the present draft. The Special Rapporteur agrees that the first hypothesis should present neither theoretical nor even practical difficulties with regard to the affected State, because there will be an affected State whenever its nationals, its property or the property of its nationals are harmed. With regard to the State of origin, there will be occasions when it will be easily identifiable (for example, in the event of an accident) and others when this may not be so easy. In any case, that would be a matter of proof and would not alter the principle itself.

74. The second hypothesis, that of harm caused solely to the environment of the global commons, presents very real difficulties. In principle, these difficulties would be as follows: (*a*) harm to the environment *per se* is a new element; (*b*) the threshold of harm to the global commons cannot easily be measured, in terms of its impact on persons or property, with sufficient precision to enable a liability régime to be established; and (*c*) it cannot be established with certainty that identifiable harm to the global commons would result in identifiable harm to human beings: all that can be established would be an overall correlation between the quality of the environment and the well-being and quality of life of human beings in the areas concerned.[96] Whatever the difficulties may be, however, the first and fundamental question posed above (para. 72) remains to be answered: are there legal consequences arising out of harm caused to the environment *per se* in areas beyond national jurisdictions? There are, of course, almost no precedents of liability for such harm, except perhaps the 1988 Wellington Convention.[97] Not even such well-worn principles as *sic utere tuo* are applicable to harm to the environment that does not have an appreciable (significant) effect on States or their property, or on the nationals of States or their property.[98] This is of course because the problem is a recent one: until a short time ago, the effects of activities causing environmental pollution beyond national jurisdictions were dispersed over a seemingly infinite area, whose saturation and consequent degradation were not within the foreseeable future. How was anyone to think in terms of liability for the human activities that caused such harmful effects? One preliminary answer to the first of the two questions raised at the outset is that up to now general international law does not appear to have assigned any legal consequences to harm caused to the environment unless such harm affects States or their nationals.

75. However, we have now reached the point where cumulative effects, on the one hand, and major accidents, on the other, are causing harm to the environment which is having an appreciable (significant) impact on States, their nationals and their property. In this situation, there should be no doubt as to the consequent liability, or the need to establish such liability for the future whenever that is materially possible, since we would in fact be dealing with the case referred to in paragraph 73, namely harm to the environment which has an impact on persons or property. The question here, however, refers to harm which does not as yet have consequences for human beings. Before it reaches that stage it is harm which, although it may be significant for the environment, is not yet *significant* for human beings. For harm to the global commons to reach the point of affecting States either directly or through their nationals or the latter's property, the cumulative harmful effects must generally be tremendous. The areas involved are very vast, they are normally uninhabited or sparsely populated, and there is relatively little private or State property there. Moreover, the effects are not usually concentrated in one place: they are dispersed by water or air currents and disappear into the vastness of the seas or the atmosphere. The harm is intangible for now but potentially threatening, and no longer just for the environment but also for mankind itself. As an example one may cite the emission of certain gases produced as a result of human activities which enter the atmosphere and are said to cause the famous "greenhouse effect". It is difficult to know for sure whether the harm so far caused to the atmosphere is *significant* for man, since the global warming of the Earth observed in recent years could be due to another cause of climatic variation and be simply temporary or, perhaps, since the harm so far caused by this global warming, if it has caused any, cannot be measured. There are, however, strong and justified suspicions: if they are confirmed, the harm may prove immense and irreversible for the Earth's inhabitants. This is a different kind of harm from that generally dealt with in law: a potential harm, invisible for now but seen as a definite threat.[99] Somewhat similar situations are not, however, unknown in domestic law,

[95] "The doctrine of liability and harm to the 'global commons'", by Mrs. M. Arsanjani, January 1990 (mimeographed).

[96] *Ibid.*, pp. 16-17.

[97] See footnote 37 above.

[98] The cases on which the Special Rapporteur based his reasoning with regard to transboundary harm, for instance the *Corfu Channel* and *Trail Smelter* cases, refer to harm caused directly or indirectly to specific States, not to property having the characteristics of global commons.

[99] It is also different from the potential harm that could be caused by an activity involving risk: there the harm is contingent, because it may or may not occur, while here harm will inevitably occur if the activities continue to go unregulated.

where cumulative instances of minor harm, taken individually, seem insignificant but assume catastrophic proportions when viewed all together. Closed seasons for hunting, or quotas to protect certain species from extinction would be cases in point.[100] The interesting thing is that in domestic law such prohibitions are primarily penal or correctional in intent; the penalty is not necessarily proportional to the harm caused, and any compensation is of a purely incidental nature.

C. Harm and liability

76. The presumable, or foreseeable, inevitability of harm to mankind now makes it necessary to think about regulating activities referred to in article 1 in some way *before* the threat they pose to the environment materializes and the resulting environmental degradation translates into appreciable or significant harm to people. The legal rules governing such activities will, of necessity, have to impose on States that cause harm either the obligation to provide some kind of safeguard or compensation to cover such harm or some other obligation the breach of which would have certain consequences.[101] In other words, States will have to be held liable or responsible in some way. There is no need to elaborate further on this point, because the truth of this statement appears to be self-evident and it is inconceivable that irresponsible, systematic assaults on the environment of the global commons should be allowed to continue. The answer to the second question, therefore, would be that if there is no current liability whatsoever under international law for this type of harm to the environment in areas beyond national jurisdictions, then there definitely ought to be. That being the case, what liability régime would be most appropriate? Before this important issue is dealt with, it may be noted that the Secretariat study referred to above suggests that the trend in international practice is towards applying responsiblity for wrongfulness to activities with harmful effects, i.e. activities which cause harm through their normal operation, and strict liability to activities involving risk which cause harm through accidents.[102] In both cases, however, there are certain problems in using existing legal concepts to determine which of these forms of responsibility or liability applies to the global commons.

77. One problem has to do with the fact, mentioned earlier, that it is impossible to establish with certainty whether identifiable harm to the environment beyond national jurisdictions ultimately causes identifiable harm to human beings. As a result, if it is virtually impossible to measure harm to persons or property, it is equally difficult to assess the compensation or payment which the State of origin owes for having caused the harm, if indeed it is possible to identify the State of origin (consider the degradation caused by chlorofluorocarbons, carbon dioxide, methane and other substances which are emitted in vast amounts by millions of factories, electric-power plants, private homes, cars, etc.). If the harm cannot be assessed, if there is no identifiable affected State and if responsibility must nevertheless be assigned to the extent that the source of the harm can be traced—as noted in the answer to the first question—it would seem that further thought must be given to certain basic legal concepts of responsibility and liability.

D. Harm and responsibility for wrongfulness

78. According to part 1 of the draft articles on State responsibility for internationally wrongful acts,[103] responsibility derives from the breach of an international obligation and not from harm done; in any case, the harm need be nothing more than the simple violation of a subjective right by a party bound by that obligation.[104] The problem is solved by environmental protection conventions, by general prohibitions against harming the environment—which, for the reasons given above, are very difficult to enforce—or by banning the emission of cer-

[100] This is also the object of some international conventions which attempt to protect common resources, such as certain animal species.

[101] To keep to the two kinds of liability we are familiar with: responsibility for wrongfulness and strict liability (*responsabilidad causal*).

[102] In the last part of the Secretariat study (see footnote 95 above) it is stated in regard to the question what legal régime could be applied to harm to the global commons:

"... there seemed to be a trend in identifying specific activities or items that cause harm to the global commons and making them subject to a legal régime restricting their conduct or banning their use. With all the deficiencies in the existing legal régime, a considerable number of regulatory measures and legal instruments imposing obligations on States not to harm the global commons continue to develop. ...

"In terms of policy, when dealing with an activity which *continuously* and *repeatedly* causes harm to the global commons, it is preferable either to modify it or to ban it altogether. The trend indicates support for this policy and there seems to be a preference and consensus in the international community to *abate* activities that have proven to cause a *continuous* and *repeated significant* harm to the global environment. The trend does not support a policy for allowing the activity to continue and paying compensation for the harm caused. ... This trend indicates a preference for dealing with those activities causing harm to the global commons on a continuous and repeated basis within the framework of State responsibility for wrongful acts." (P. 48.)

This would apply, then, to the activities referred to as "activities with harmful effects". As for activities involving risk, the study goes on to say:

"Leaving aside the main *corpus* of the régime dealing with activities that cause harm to the global environment within the framework of State responsibility, there is a narrower and more limited aspect of that subject which might be appropriate to be dealt with in the context of international liability. That is *accidental* harm to the global environment. Such accidents, for example, include the breaking down of an oil tanker or a tanker carrying other types of wastes on the high seas, etc." (P. 49.)

[103] See *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[104] In his third report on State responsibility, Mr. Ago stated:

"Most of the members of the Commission agreed with the Special Rapporteur regarding the preceding considerations; in particular, they recognized that the economic element of damage referred to by certain writers was not inherent in the definition of an internationally wrongful act as a source of responsibility, but might be part of the rule which lays upon States the obligation not to cause certain injuries to aliens. Furthermore, with regard to the determination of the conditions essential for the existence of an internationally wrongful act, the Commission also recognized that under international law an injury, material or moral, is necessarily inherent in every violation of an international subjective right of a State. Hence the notion of failure to fulfil an international legal obligation to another State seemed to the Commission fully sufficient to cover this aspect, without the addition of anything further. ..." (*Yearbook ... 1971*, vol. II (Part One), p. 223, document A/CN.4/246 and Add.1-3, para. 74.)

tain elements or their emission above certain levels.[105] In any event, this is one way of regulating certain activities in order to protect the atmosphere, climate or marine environment that the Special Rapporteur wholeheartedly supports. But given the difficulties that exist in measuring harm and the consequent compensation, what should responsibility for wrongfulness mean? Under part 1 of the draft articles on State responsibility, a wrongful act brings into play a dual form of legal relationship: the subjective right of an injured State to demand reparation (in the full sense of the term) from the author of the act, or the ability of that same State to impose a penalty on the author of the wrongful act.[106] Given what we have seen regarding the impossibility of making reparation for certain kinds of harm to the environment, in such cases the only option is to impose penalties. On the other hand, when the harm can be identified and somehow quantified, reparation is possible and can take various forms, one of the most practical being restoration of the *status quo ante*, as envisaged in article 24, paragraph 1, of the present draft (see para. 52 above).

E. The affected State

79. By definition, there would be no State that was *directly* injured through its territory, property, nationals or the property of its nationals. However, if the convention that may be concluded on this subject expressly stipulated as much, harm to the environment would affect a collective interest as defined in a multilateral treaty, under the terms of article 5, paragraph 2(*f*), of part 2 of the draft articles on State responsibility for internationally wrongful acts:[107]

> 2. In particular, "injured State" means:
>
> . . .
>
> (*f*) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

In this regard, it is stated in the commentary to article 5:

> (23) Paragraph 2(*f*) deals with still another situation. Even if, as a matter of fact, subparagraph (*e*) (ii) [which represents an attempt to place the injured State in the context of a multilateral treaty or a breach of a rule of customary law] may not apply, the States parties to a multilateral treaty may agree to consider a breach of an obligation, imposed by such treaty, as infringing a collective interest of all the States parties to that multilateral treaty. Actually, and by way of example, the *concept of a "common heritage of mankind", as recently accepted in respect of the mineral resources of the sea-bed and subsoil beyond national jurisdiction, expresses such a collective interest**.
>
> (24) Obviously, in the present stage of development of the international community of States as a whole, the recognition or establishment of a collective interest of States is still limited in application. Accordingly, subparagraph (*f*) is limited to multilateral treaties, and to express stipulations in those treaties.[108]

F. Applicable liability

80. As noted above, harm to the environment of the global commons often cannot be measured or assessed, in which case the consequence of the breach of an obligation is primarily punitive. This is true both in cases where maximum permitted levels for the introduction of certain substances into the environment are exceeded and in cases where general prohibitions are violated, maximum levels and general prohibitions being the two techniques so far used to protect the environment.[109] This explains the difficulties encountered in some conventions in finalizing a chapter on liability, an issue which in all instances has remained unresolved.[110] States normally refuse to accept liability for their conduct and the same difficulties can be expected to arise in the future.

81. In earlier debates we saw that it may be more practical to apply strict liability than responsibility for wrongfulness to regulate a given activity because, ironically, strict liability is less stringent and does not qualify the conduct that gives rise to the liability. We also know that, while they are based on the logic of strict liability, the present draft articles do not in fact apply it strictly because once the causal link between the act in the State of origin and the harm in the affected State has been established, the State of origin is simply under an obligation to *negotiate* with the affected State on compensation for the harm. There are also certain grounds in the draft for exoneration from liability (art. 26). It might therefore be useful to see if it would be possible to subject to the régime of the present draft articles activities which cause, or create an appreciable (significant) risk of causing, harm to the environment of the global commons.

82. First of all, banning the use of certain listed substances above certain levels would not seem to apply, because there would then be nothing to negotiate and the issue would be one of responsibility for wrongfulness. If that method cannot be used, the only possible way to

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[105] The Secretariat study (see footnote 95 above) refers in this connection to a number of conventions, including the 1954 International Convention for the Prevention of Pollution of the Sea by Oil (United Nations, *Treaty Series*, vol. 327, p. 3), the 1963 Agreement on the International Commission for the Protection of the Rhine against Pollution (*ibid.*, vol. 994, p. 3), the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water (*ibid.*, vol. 480, p. 45), the 1969 Agreement for Co-operation in Dealing with Pollution of the North Sea by Oil (*ibid.*, vol. 704, p. 3), the 1972 Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft (*ibid.*, vol. 932, p. 3), the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (*ibid.*, vol. 1046, p. 120), the 1973 International Convention for the Prevention of Pollution from Ships (United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 81), the 1974 Convention between Denmark, Finland, Norway and Sweden on the Protection of the Environment (see footnote 46 above), the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area (UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 3), the 1976 Convention for the Protection of the Mediterranean Sea against Pollution (to be published in United Nations, *Treaty Series*, as No. 16908), the 1979 Convention on Long-range Transboundary Air Pollution (*ibid.*, No. 21623), the 1985 Vienna Convention for the Protection of the Ozone Layer (UNEP, Nairobi, 1985) and the 1982 United Nations Convention on the Law of the Sea (see footnote 84 above).

[106] See Mr. Ago's third report on State responsibility, document A/CN.4/246 and Add.1-3 (footnote 104 above), para. 36.

[107] *Yearbook . . . 1985*, vol. II (Part Two), p. 25.

[108] *Ibid.*, p. 27.

[109] After mentioning a number of conventions which attempt to prevent certain types of harm to the global environment, the Secretariat study (see footnote 95 above) states that "these Conventions either specify the types of pollutants that should not be introduced into the global commons or provide general prohibitions for harming the environment by any type of pollutants" (p. 17).

[110] The 1988 Wellington Convention (see footnote 37 above), while it establishes the strict liability of the operator, and also the liability of the State for that portion of liability not satisfied by the operator or otherwise, promises a future protocol on liability (art. 8, para. 7).

apply the logic of the draft articles to activities with harmful effects is to transform the levels of prohibition into thresholds above which the mechanisms of the draft will come into play. Levels above the threshold would not be banned, but if it was found that a State had exceeded the threshold, any affected State would be able to request consultations with the alleged State or States of origin, possibly with the participation of an international organization. The purpose of such consultations would not be to agree on a régime applicable to the activity in question, since such a régime would already exist,[111] but to find ways of enforcing it, either through co-operation or through some kind of collective pressure such as publishing the request for consultations or some other method which does not amount to a penalty. In any event, if the harm caused can be identified and the environment in question can be restored to its *status quo ante*, this will give rise to strict liability on the part of the State or States of origin which might be covered by chapter V of the draft, dealing with liability *per se*.

83. What about the affected State? By definition, there is no such State because if there were one within the meaning of article 2(*j*) it would be covered by the terms of the present draft articles. The concept of affected State would have to be defined differently, perhaps by drawing on article 5, paragraph 2(*f*), of part 2 of the draft articles on State responsibility (see para. 79 above), not reproducing it word for word but simply saying that any State party to the convention automatically becomes an affected State if transboundary harm affects an expressly protected collective interest of the States parties, as the environment of the global commons would be.

84. If this reasoning is to work it might be necessary to redefine "harm" since, although responsibility for wrongfulness could conceivably arise without material harm actually occurring, as envisaged in part 1 of the draft articles on State responsibility for internationally wrongful acts, that is not so likely when it comes to strict liability (*responsabilidad causal*), which relates primarily to results. The problem seems to lie in the fact that the collective interest suffers harm, but this harm cannot as yet be perceived in people. Some way must therefore be found of distinguishing this type of harm from the tangible and visible harm that is covered by responsibility in general. The text should include a separate section on harm to the environment of the global commons, describing these characteristics[112] and defining the collective interest that is affected, so that harm can automatically be considered to have occurred whenever the quantities above certain stipulated levels are introduced into the environment of the global commons. This would be a somewhat different concept, something like the "threat of harm". The Special Rapporteur believes that harm to the environment must somehow be seen in relation to the people and States that are affected, because in the final analysis it, like any other harm, is of concern to the law only to the extent that if affects people (including their property). There is no harm, and hence no measurement of harm, other than that which is caused to human beings, either to their person or to their property,[113] whether directly or else indirectly through the property of their State. This is clearly the case when the environment of a State is affected, because the State personifies a human society. If the environment affected is that of the global commons, the collective interest of States is affected and, through them, the physical persons who make up their population.

85. More or less the same considerations apply to activities "involving risk", except that here the logic of liability for risk applies naturally, since responsibility for wrongfulness cannot be applied to accidents without creating the problems which, in domestic law, led to the adoption of the concept of strict liability.

86. For both types of activity, the principles governing harm caused to the global commons would be the same, *mutatis mutandis*, as those set forth in chapter II of the present draft articles. One major consideration would, however, have to be borne in mind in applying these principles to developing countries and making provision for their special situation. The developed countries have played a leading role, and the developing countries a far lesser one, in the process which has led to saturation of the atmosphere. Moreover, many developing countries would be totally innocent victims of any consequences of global warming and climatic change, having done little if anything to cause them. Restrictions will therefore have to be imposed mainly on the developed countries, which are the major contributors to the pollution of the environment of the global commons; in cases where limits on production or bans on certain elements inevitably affect the developing countries, the latter will have to be entitled to technical assistance and other types of compensation, while preserving their sovereignty in general and their sovereignty over their natural resources in particular.

87. Of course, the above is only a preliminary analysis of the most important points that will have to be borne in mind in exploring the possibility of extending the topic to the areas under consideration here. Many other changes will have to be made if it is found that this analysis offers at least some basis for pursuing the matter.

[111] It is assumed that, in the context of strict liability of the kind envisaged in the draft under consideration, a convention or specific protocol would exist that established the levels up to which certain elements can be used in specific activities. If there are certain substances which cannot be used at all, the level would be zero and above it there would be an obligation to consult or possibly to negotiate.

[112] In other words, differentiating it from harm caused to persons or property, or even to the environment of a given country, so that it fits the description given above.

[113] In this regard, the judgment in the *Lake Lanoux* case seems to state a profound truth when it says that "the unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities" (*International Law Reports 1957*, vol. 24 (1961), p. 125). In the Secretariat survey of State practice relevant to the present topic, the relevant passage of the judgment is interpreted as follows: "Many variables have been taken into account to determine what constitutes harm. The most important, it seems, is that there must be some *value deprivation for human beings*" (*Yearbook . . . 1985*, vol. II (Part One)/Add.1, p. 37, document A/CN.4/384, para. 156).

ANNEX

Proposed articles

CHAPTER I

GENERAL PROVISIONS

Article 1. Scope of the present articles[a]

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 a risk of causing, transboundary harm throughout the process.

Article 2. Use of terms

For the purposes of the present articles:

(*a*) "Activities involving risk" means activities referred to in article 1, including those carried on directly by the State, which:

(i) involve the handling, storage, production, carriage, discharge or other similar operation of one or more dangerous substances;

(ii) use technologies that produce hazardous radiation; or

(iii) introduce into the environment dangerous genetically altered organisms and dangerous micro-organisms;

(*b*) "Dangerous substances" means substances which present a[n appreciable] [significant] risk of harm to persons, property [, the use or enjoyment of areas] or the environment, for example flammable and corrosive materials, explosives, oxidants, irritants, carcinogens, mutagens and toxic, ecotoxic and radiogenic substances such as those indicated in annex . . . A substance may be considered dangerous only if it occurs in certain quantities or concentrations, or in relation to certain risks or situations in which it may occur, without prejudice to the provisions of subparagraph (*a*);

(*c*) "Dangerous genetically altered organisms" means organisms whose genetic material has been altered in a manner that does not occur naturally, by coupling or natural recombination, creating a risk to persons, property [, the use or enjoyment of areas] or the environment, such as those indicated in annex. . . .;

(*d*) "Dangerous micro-organisms" means micro-organisms which create a risk to persons, property [, the use or enjoyment of areas] or the environment, such as pathogens or organisms which produce toxins;

(*e*) "[Appreciable] [Significant] risk" means risk which presents either the low probability of causing very considerable [disastrous] harm or the higher than normal probability of causing minor, though [appreciable] [significant], transboundary harm;[b]

(*f*) "Activities with harmful effects" means activities referred to in article 1 which cause transboundary harm in the course of their normal operation;

(*g*) "Transboundary harm" means the harm which arises as a physical consequence of the activities referred to in article 1 and which, in the territory or in [places] [areas] under the jurisdiction or control of another State, is [appreciably] [significantly] detrimental to persons, [objects] [property] [, the use or enjoyment of areas] or the environment. In the present articles, the expression always refers to [appreciable] [significant] harm. It includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;[c]

(*h*) "[Appreciable] [Significant] harm" means harm which is greater than the mere nuisance or insignificant harm which is normally tolerated;

(*i*) "State of origin" means the State which exercises jurisdiction or control over an activity referred to in article 1;

(*j*) "Affected State" means the State under whose jurisdiction or control the transboundary harm arises;

(*k*) "Incident" means any sudden event or continuous process, or series of events having the same origin, which causes, or creates the risk of causing, transboundary harm;

(*l*) "Restorative measures" means appropriate and reasonable measures to restore or replace the natural resources which have been damaged or destroyed;

(*m*) "Preventive measures" means the measures referred to in article 8 and includes both measures to prevent the occurrence of an incident or harm and measures intended to contain or minimize the harmful effects of an incident once it has occurred;

(*n*) "States concerned" means the State or States of origin and the affected State or States.

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[a] This article has been subject to many drafting changes, as is evident from the debate at the last session of the Commission. One possible text for use by the Drafting Committee might be the following:

"*Article 1. Scope of the present articles*

"The present articles shall apply with respect to activities carried on under the jurisdiction or [effective] control of a State and that cause, or create a risk of causing, transboundary harm."

There is no need to qualify the risk and the harm as "appreciable" or "significant" since, as article 2 makes clear wherever the terms "risk" and "harm" are used, they are understood to be "appreciable" or "significant".

[b] Subparagraph (*e*) has been changed because activities involving risk are now defined in subparagraph (*a*) of the same article, as a result of the new way of defining the scope of the draft articles in respect of dangerous activities and activities involving risk. The definition of "activities with harmful effects" is now given separately, in subparagraph (*f*).

[c] The following might be an appropriate text for this subparagraph:

"(*g*) 'Transboundary harm' means the harm which arises in areas under the jurisdiction or control of a State as a physical consequence of an activity referred to in article 1. The expression always refers to [appreciable] [significant] harm caused to persons, [objects] [property] [, the use or enjoyment of areas] or the environment and includes the cost of preventive measures taken to contain or minimize the harmful transboundary effects of an activity referred to in article 1, as well as any further harm to which such measures may give rise;".

Article 3. Assignment of obligations[d]

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[e]

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[f]

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[g]

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 [areas] under its jurisdiction or control.

Article 8. Prevention[h]

States of origin shall take appropriate measures to prevent or minimize the risk of transboundary harm or, where necessary, to contain or minimize the harmful transboundary effects of the activities in question. 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[i]

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.

Article 10. Non-discrimination[j]

States Parties shall treat the effects of an activity arising in the territory or under the jurisdiction or control of another State in the same way as effects arising in their own territory. In particular, they shall apply the provisions of the present articles and of their national laws without discrimination on grounds of the nationality, domicile or residence of persons injured by activities referred to in article 1.

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[d] The heading has given rise to objections. In Spanish it could be *responsabilidad*, because the obligations to which it refers arise as a consequence of *responsabilidad* in both meanings of the word: responsibility for seeing to it that an incident does not occur (prevention) and liability in the event that the incident does occur (compensation by the State of origin).

[e] Alternative B proposed for article 5 in the fifth report was chosen because it appeared more to the point.

[f] One possibility for article 6 might be the following:

"*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 under their jurisdiction or control must be compatible with the rights emanating from the sovereignty of other States."

The expression "in their territory" could be deleted since all activities within the territory of a State are under its jurisdiction.

[g] One possibility for article 7 might be the following:

"*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 carried on under their jurisdiction or control from causing transboundary harm. Where possible and reasonable, the affected State shall also co-operate with the State of origin with regard to any harmful effects which have arisen in areas under the jurisdiction or control of the State of origin."

[h] A better alternative for article 8 might be the following:

"*Article 8. Prevention*

"States of origin shall take all appropriate measures to ensure that activities under their jurisdiction or control do not cause transboundary harm, to minimize the risk of their causing such harm or, where appropriate, to contain and minimize the harmful transboundary effects of such activities."

[i] The Special Rapporteur suggests that the title and the text of article 9 might be as follows:

"*Article 9. Compensation by the State of origin*

"To the extent compatible with the present articles, the State of origin shall ensure that [compensation] [reparation] is made for harm caused by an activity referred to in article 1. Such compensation shall be decided between the parties concerned by negotiations, which shall be guided, in principle, by the criteria set forth in the present articles."

[j] This article takes the place of the former article 8, on participation, which has been deleted.

CHAPTER III

PREVENTION

Article 11. Assessment, notification and information

1. If a State has reason to believe that an activity referred to in article 1 is being, or is about to be, carried on under its jurisdiction or control, it shall 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, it shall notify the State or States likely to be affected as soon as possible, providing them with available technical information in support of its finding. It may also inform them of the measures which it is attempting to take to prevent or minimize the risk of transboundary harm.

2. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected as a result of the activity, an international organization with competence in that area shall also be notified, on the terms stated in paragraph 1.

Article 12. Participation by the international organization

Any international organization which intervenes shall participate in the manner stipulated in the relevant provisions of its statutes or rules, if the matter is regulated therein. If it is not, the organization shall use its good offices to foster co-operation between the parties, arrange joint or separate meetings with the State of origin and the affected States and respond to any requests which the parties may make of it to facilitate a solution of the issues that may arise. If it is in a position to do so, it shall provide technical assistance to any State which requests such assistance in relation to the matter which prompted its intervention.

Article 13. Initiative by the presumed affected State

If a State has serious reason to believe that an activity under the jurisdiction or control of another State is causing it harm within the meaning of article 2, subparagraph (*g*), or creating a[n appreciable] [significant] risk of causing it such harm, it may ask that State to comply with the provisions of article 11. The request shall be accompanied by a technical, documented explanation setting forth the reasons for such belief. If the activity is indeed found to be one of those referred to in article 1, the State of origin shall bear the costs incurred by the affected State.

Article 14. Consultations

The States concerned shall consult among themselves, in good faith and in a spirit of co-operation, in an attempt to establish a régime for the activity in question which takes into account the interests of all parties. At the initiative of any of those States, consultations may be held by means of joint meetings among all the States concerned.

Article 15. Protection of national security or industrial secrets

The State of origin shall not be bound by the provisions of article 11 to provide data and information which are vital to its national security or to the protection of its industrial secrets. Nevertheless, the State of origin shall co-operate in good faith with the other States concerned in providing any information which it is able to provide, depending on the circumstances.

Article 16. Unilateral preventive measures

If the activity in question proves to be an activity referred to in article 1, and until such time as agreement is reached on a legal régime for that activity among the States concerned, the State of origin shall take appropriate preventive measures as indicated in article 8, in particular appropriate legislative and administrative measures, including requiring prior authorization for the conduct of the activity and encouraging the adoption of compulsory insurance or other financial safeguards to cover transboundary harm, as well as the application of the best available technology to ensure that the activity is conducted safely. If necessary, it shall take government action to counteract the effects of an incident which has already occurred and which presents an imminent and grave risk of causing transboundary harm.

Article 17. Balance of interests

In order to achieve an equitable balance of interests among the States concerned in relation to an activity referred to in article 1, those States may, in their consultations or negotiations, take into account the following factors:

(*a*) the degree of probability of transboundary harm and its possible gravity and extent, and the likely incidence of cumulative effects of the activity in the affected States;

(*b*) the existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;

(*c*) the possibility of carrying on the activity in other places or by other means, or the availability of alternative activities;

(*d*) the importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;

(*e*) the economic viability of the activity in relation to possible means of prevention;

(*f*) the physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;

(*g*) the standards of protection which the affected State applies to the same or comparable activities, and the standards applied in regional or international practice;

(*h*) the benefits which the State of origin or the affected State derive from the activity;

(*i*) the extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;

(*j*) the willingness of the affected State to contribute to the costs of prevention or reparation of the harm;

(*k*) the extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;

(*l*) the extent to which assistance from international organizations is available to the State of origin;

(*m*) the applicability of relevant principles and norms of international law.

Article 18. Failure to comply with the foregoing obligations

Failure on the part of the State of origin to comply with the foregoing obligations shall not constitute grounds for affected States to institute proceedings unless that is provided for in other international agreements in effect between the parties. If, in those circumstances, the activity causes [appreciable] [significant] transboundary harm which can be causally attributed to it, the State of origin may not invoke in its favour the provisions of article 23.

Article 19. Absence of reply to the notification under article 11

In the cases referred to in article 11, if the notifying State has provided information concerning the measures referred to therein, any State that does not reply to the notification within a period of six months shall be presumed to consider the measures satisfactory. This period may be extended, at the request of the State concerned, [for a reasonable period] [for a further six months]. States likely to be affected may ask for advice from any international organization that is able to give it.

Article 20. Prohibition of the activity

If an assessment of the activity shows that transboundary harm cannot be avoided or cannot be adequately compensated for, the State of origin shall refuse authorization for the activity unless the operator proposes less harmful alternatives.

CHAPTER IV

LIABILITY

Article 21. Obligation to negotiate

If transboundary harm arises as a consequence of an activity referred to in article 1, the State or States of origin shall be bound to negotiate with the affected State or States to determine the legal consequences of the harm, bearing in mind that the harm must, in principle, be fully compensated for.

Article 22. Plurality of affected States

Where more than one State is affected, an international organization with competence in the matter may intervene, if requested to do so by any of the States concerned, for the sole purpose of assisting the parties and fostering their co-operation. If the consultations referred to in article 14 have been held and if an international organization has participated in them, the same organization shall also participate in the present instance, if the harm occurs before agreement has been reached on a régime for the activity that caused the harm.

Article 23. Reduction of compensation payable by the State of origin

For claims made through the diplomatic channel, the affected State may agree, if that is reasonable, to a reduction in the payments for which the State of origin is liable if, owing to the nature of the activity and the circumstances of the case, it appears equitable to share certain costs among the States concerned [, for example if the State of origin has taken precautionary measures solely for the purpose of preventing transboundary harm and the activity is being carried on in both States, or if the State of origin can demonstrate that the affected State is benefiting without charge from the activity that caused the harm].

Article 24. Harm to the environment and resulting harm to persons or property

1. If the transboundary harm proves detrimental to the environment of the affected State, the State of origin shall bear the costs of any reasonable operation to restore, as far as possible, the conditions that existed prior to the occurrence of the harm. If it is impossible to restore those conditions in full, agreement may be reached on compensation, monetary or otherwise, by the State of origin for the deterioration suffered.

2. If, as a consequence of the harm to the environment referred to in paragraph 1, there is also harm to persons or property in the affected State, payments by the State of origin shall also include compensation for such harm.

3. In the cases referred to in paragraphs 1 and 2, the provisions of article 23 may apply, provided that the claim is made through the diplomatic channel. In the case of claims brought through the domestic channel, the national law shall apply.

Article 25. Plurality of States of origin

In the cases referred to in articles 23 and 24, if there is more than one State of origin,

ALTERNATIVE A

they shall be jointly and severally liable for the resulting harm, without prejudice to any claims which they may bring among themselves for their proportionate share of liability.

ALTERNATIVE B

they shall be liable *vis-à-vis* the affected State in proportion to the harm which each one of them caused.

Article 26. Exceptions

1. There shall be no liability on the part of the State of origin or the operator, as the case may be:

(*a*) if the harm was directly due to an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

(*b*) if the harm was caused wholly by an act or omission of a third party done with intent to cause harm.

2. If the State of origin or the operator, as the case may be, prove that the harm resulted wholly or partially either from an act or omission done with intent to cause

harm by the person who suffered the harm or from the negligence of that person, they may be exonerated wholly or partially from their liability to such person.

Article 27. Limitation

Proceedings in respect of liability under the present articles shall lapse after a period of [three] [five] years from the date on which the affected party learned, or could reasonably be expected to have learned, of the harm and of the identity of the State of origin or the operator, as the case may be. In no event shall proceedings be instituted once thirty years have elapsed since the date of the accident that caused the harm. If the accident consisted of a series of occurrences, the thirty years shall start from the date of the last occurrence.

CHAPTER V

CIVIL LIABILITY

Article 28. Domestic channel

1. It is not necessary for all local legal remedies available to the affected State or to individuals or legal entities represented by that State to be exhausted prior to submitting a claim under the present articles to the State of origin for liability in the event of transboundary harm.

2. There is nothing in the present articles to prevent a State, or any individual or legal entity represented by that State that considers that it has been injured as a consequence of an activity referred to in article 1, from submitting a claim to the courts of the State of origin [and, in the case of article 29, paragraph 3, of the affected State]. In that case, however, the affected State may not use the diplomatic channel to claim for the same harm for which such claim has been made.

Article 29. Jurisdiction of national courts

1. States Parties to the present articles shall, through their national legislation, give their courts jurisdiction to deal with the claims referred to in article 28 and shall also give affected States or individuals or legal entities access to their courts.

2. States Parties shall make provision in their domestic legal systems for remedies which permit prompt and adequate compensation or other reparation for transboundary harm caused by activities referred to in article 1 carried on under their jurisdiction or control.

[3. Except for the affected State, the other persons referred to in article 28 who consider that they have been injured may elect to institute proceedings either in the courts of the affected State or in those of the State of origin.]

Article 30. Application of national law

The court shall apply its national law in all matters of substance or procedure not specifically regulated by the present articles. The present articles and also the national law and legislation shall be applied without any discrimination whatsoever based on nationality, domicile or residence.

Article 31. Immunity from jurisdiction

States may not claim immunity from jurisdiction under national legislation or international law in respect of proceedings instituted under the preceding articles, except in respect of enforcement measures.

Article 32. Enforceability of the judgment

1. When a final judgment made by the competent court is enforceable under the laws applied by that court, it shall be recognized in the territory of any other Contracting Party, unless:

(*a*) the judgment has been obtained fraudulently;

(*b*) the respondent has not been given reasonable advance notice and an opportunity to present his case in fair conditions;

(*c*) the judgment is contrary to the public policy of the State in which recognition is being sought, or is not in keeping with the basic norms of justice.

2. A judgment which is recognized to be in accordance with paragraph 1 shall be enforceable in any of the States Parties as soon as the formalities required by the Contracting Party in which enforcement is being sought have been met. No further review of the substance of the matter shall be permitted.

Article 33. Remittances

States Parties shall take the steps necessary to ensure that any monies due to the applicant in connection with proceedings in their courts arising from the preceding articles, and any monies he may receive in respect of insurance or reinsurance or other funds designed to cover the harm in question, may be freely remitted to him in the currency of the affected State or in that of the State of his habitual residence.

CHECK-LIST OF DOCUMENTS OF THE FORTY-SECOND SESSION

Document	*Title*	*Observations and references*
A/CN.4/426/Rev.1	Provisional agenda	Mimeographed. For the agenda as adopted, see *Yearbook . . . 1990*, vol. II (Part Two), chap. I, para. 9.
A/CN.4/427 [and Corr.1] and Add.1	Sixth report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	Reproduced in the present volume (p. 41).
A/CN.4/428 [and Corr.1, 2 and 4] and Add.1	Sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem* (p. 83).
A/CN.4/429 and Add.1-4	Draft Code of Crimes against the Peace and Security of Mankind: observations of Member States received pursuant to General Assembly resolutions 43/164 and 44/32	*Idem* (p. 23).
A/CN.4/430 and Add.1	Eighth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	*Idem* (p. 27).
A/CN.4/431 [and Corr.1]	Third report on jurisdictional immunities of States and their property, by Mr. Motoo Ogiso, Special Rapporteur	*Idem* (p. 3).
A/CN.4/432	Fifth report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	To be reproduced in consolidated form in *Yearbook . . . 1991*, vol. II (Part One), as document A/CN.4/438.
A/CN.4/433	Filling of a casual vacancy (article 11 of the statute): note by the Secretariat	Reproduced in the present volume (p. 1).
A/CN.4/433/Add.1	*Idem*—Addendum to the note by the Secretariat: candidature and curriculum vitae	Mimeographed.
A/CN.4/L.443	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the forty-fourth session of the General Assembly	Mimeographed.
A/CN.4/L.444	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee on second reading: articles 1 to 10 and 12 to 16	Texts reproduced in *Yearbook . . . 1990*, vol. I, summary record of the 2191st meeting (paras. 23 *et seq.*).
A/CN.4/L.445	Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: articles 22 to 27	*Idem*, summary records of the 2187th meeting and 2188th meeting (paras. 1-74).
A/CN.4/L.446	Draft report of the International Law Commission on the work of its forty-second session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10* (A/45/10). The final text appears in *Yearbook . . . 1990*, vol. II (Part Two).
A/CN.4/L.447 and Add.1, Add.2 [and Add.2/Corr.1] and Add.3	*Idem*: chapter II (Draft Code of Crimes against the Peace and Security of Mankind)	*Idem*.

Document	*Title*	*Observations and references*
A/CN.4/L.448	*Idem*: chapter III (Jurisdictional immunities of States and their property)	*Idem.*
A/CN.4/L.449 and Add.1 and 2	*Idem*: chapter IV (The law of the non-navigational uses of international watercourses)	*Idem.*
A/CN.4/L.450	*Idem*: chapter V (State responsibility)	*Idem.*
A/CN.4/L.451	*Idem*: chapter VI (Relations between States and international organizations (second part of the topic))	*Idem.*
A/CN.4/L.452	*Idem*: chapter VII (International liability for injurious consequences arising out of acts not prohibited by international law)	*Idem.*
A/CN.4/L.453	*Idem*: chapter VIII (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/L.454 [and Corr.1]	Draft Code of Crimes against the Peace and Security of Mankind: report of the Working Group established by the Commission pursuant to the request from the General Assembly in paragraph 1 of its resolution 44/39	*Idem*, chap. II, sect. C.
A/CN.4/L.455	Draft articles on the draft Code of Crimes against the Peace and Security of Mankind. Titles and texts adopted by the Drafting Committee: articles 16, 18 and X	Texts reproduced in *Yearbook . . . 1990*, vol. I, summary records of the 2196th meeting (paras. 43 *et seq.*), 2197th meeting and 2198th meeting (paras. 1-8 and 52-81).
A/CN.4/SR.2149-A/CN.4/SR.2204	Provisional summary records of the 2149th to 2204th meetings	Mimeographed. The final text appears in *Yearbook . . . 1990*, vol. I.

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