

Document:-  
**A/CN.4/SR.2318**

**Summary record of the 2318th meeting**

Topic:  
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Extract from the Yearbook of the International Law Commission:-  
**1993, vol. I**

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be duly reflected in the draft of the final chapter of its report to the General Assembly.

*It was so agreed.*

37. The CHAIRMAN recalled that members had been invited to indicate whether they would be willing to participate in preparing a publication as part of the Commission's contribution to the United Nations Decade of International Law.<sup>5</sup> He reminded members that few replies had been received and that the deadline was 15 July.

*The meeting rose at 12.20 p.m.*

<sup>5</sup> See footnote 1 above.

## 2318th MEETING

*Tuesday, 13 July 1993, at 10.05 a.m.*

*Chairman:* Mr. Julio BARBOZA

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

**State responsibility (concluded)\* (A/CN.4/453 and Add.1-3,<sup>1</sup> A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.480 and Add.1).

2. Mr. MIKULKA (Chairman of the Drafting Committee), said that at the forty-fourth session of the Commission (1992), the Drafting Committee had adopted articles 6, 6 *bis*, 7, 8, 10<sup>2</sup> and 10 *bis*, on reparation, as well as a new paragraph 2 for article 1.<sup>3</sup> Those articles, which had

\* Resumed from the 2316th meeting.

<sup>1</sup> Reproduced in *Yearbook... 1993*, vol. II (Part One).

<sup>2</sup> The substance of article 9 (Interest), as proposed by the Special Rapporteur in his second report in 1989, was incorporated in paragraph 2 of article 8. Hence the gap in the sequence of articles.

<sup>3</sup> For the text, see *Yearbook... 1992*, vol. I, 2288th meeting, para. 5.

not been acted on at the previous session in the absence of commentaries, had now been adopted at the present session.<sup>4</sup>

3. At the present session, the Drafting Committee had considered the articles of part 2, proposed by the Special Rapporteur in his fourth report<sup>5</sup> and adopted articles 11 to 14, concerning countermeasures. The titles and texts of those provisions read as follows:

### *Article 11. Countermeasures by an injured State*

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in articles . . . , not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

### *Article 12. Conditions relating to resort to countermeasures*

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

### *Article 13. Proportionality*

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

### *Article 14. Prohibited countermeasures*

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

<sup>4</sup> For the adoption of article 1, paragraph 2, and article 6, see 2314th meeting; for the adoption of articles 6 *bis*, 7, 8, 10 and 10 *bis*, see 2316th meeting.

<sup>5</sup> For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

(e) any other conduct in contravention of a peremptory norm of general international law.

#### ARTICLE 11 (Countermeasures by an injured State)

4. Article 11, as originally proposed by the Special Rapporteur, had placed three conditions on lawful resort to countermeasures: the actual existence of an internationally wrongful act, the prior submission by the injured State of a demand for a cessation and/or reparation, and the lack of an adequate response to the demand. The Drafting Committee's version focused not so much on the conditions to be met for resort to countermeasures to be lawful as on the scope and limits of the injured State's entitlement to resort to countermeasures.

5. In the Drafting Committee's formulation of paragraph 1—as indeed in the Special Rapporteur's text—the essence of the concept of countermeasures was conveyed by the words “not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act”. In plenary, some members had suggested the phrase “to suspend the performance of its obligations” as an alternative. The Drafting Committee, however, had thought that the phrase might restrict the scope of application of countermeasures to obligations of a continuing character and exclude therefrom obligations requiring the achievement of a specific result. It had therefore opted for the Special Rapporteur's formulation.

6. Aside from defining the basic component of the notion of countermeasures, article 11 circumscribed the scope of the injured State's entitlement in three ways: it first required that the wrongdoing State should have failed to comply with its obligations under articles 6 to 10 *bis*. In that regard, the Drafting Committee had substituted for the criterion of “adequate response”, initially proposed by the Special Rapporteur, the clearer and more objective criterion of failure to comply with specific obligations, and the sentence was so structured as to place in a prominent position, at the very beginning of the article, that basic requirement for lawful resort to countermeasures. Secondly, the text recommended by the Drafting Committee, like the Special Rapporteur's proposal, made the injured State's entitlement subject to the conditions and restrictions set forth in subsequent articles. Thirdly, and perhaps most importantly, it required that resort to countermeasures should be “necessary to induce [the wrongdoing State] to comply with its obligations under articles 6 to 10 *bis*”. The expression “as necessary” performed a dual function. First it made it clear that countermeasures might be applied only as a last resort, where other means available to an injured State such as negotiations, diplomatic protests or measures of retortion would be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicated that the decision of the injured State to resort to countermeasures was to be made reasonably and in good faith and at its own risk. That point would be elaborated on in the commentary.

7. Some members of the Drafting Committee had felt that the right under article 11 should be limited to directly injured States. They had referred to the distinction, which was, of course, relevant only to the violation of multilateral obligations, between the State which was di-

rectly injured by the violation in the material and legal sense and the State which was injured, not materially, but only legally. The majority of the members of the Drafting Committee had, however, been reluctant to make such a distinction, which was not made anywhere else in the draft and would in some way call into question the definition of an injured State in article 5.<sup>6</sup> Some members had taken the view that the problem was dealt with in article 13, on proportionality, which limited the legally injured State in the choice of the measures it could resort to, as compared with the directly injured State. Furthermore, the issue would arise again in the context of crimes, with which the Commission intended to deal at a later stage. The proponents of the distinction between directly and indirectly injured States had therefore agreed not to insist on the matter, on the understanding that it would be more thoroughly discussed when the Commission addressed the question of crimes.

8. As to paragraph 2 of article 11, the Special Rapporteur had included in his article 14,<sup>7</sup> on prohibited countermeasures, a paragraph 1 (b) (iv) ruling out resort by way of countermeasures to conduct which consisted of a breach of an obligation towards any State other than the State which had committed the internationally wrongful act. In plenary, it had been generally recognized that the rights of States not involved in the responsibility relationship between the injured State and the wrongdoing State should not be affected by countermeasures taken by the former against the latter. At the same time, the approach adopted by the Special Rapporteur, which denied the legitimacy of any countermeasures incidentally breaching the rights of third States, had been viewed as too sweeping in an interdependent world where States were increasingly bound by multilateral obligations. In view of those considerations, the Drafting Committee had opted for ensuring protection of the rights of third States by relying on one of the initial characteristics of countermeasures, namely the fact that the unlawful character of conduct resorted to by way of countermeasures was precluded only as between the injured State and the wrongdoing State. As stressed by the Commission in paragraph (18) of its commentary to article 30 of part 1 of the draft, “the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction is justified”.<sup>8</sup> The Drafting Committee had taken the view that, since that rule related to the content and scope of the injured State's entitlement to resort to countermeasures, its proper place was in article 11. It had therefore inserted in article 11 a paragraph 2 which provided that, if a countermeasure involved a breach of an obligation towards a third State, the wrongfulness of such a breach was not precluded by reason of its permissibility in relation to the wrongdoing State. In other words, paragraph 2 was in the nature of a warning to the injured State that any measure which might result in a violation of the rights of the third State would be a wrongful act against that third State and it

<sup>6</sup> For the texts of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook* . . . 1986, vol. II (Part Two), pp. 38-39.

<sup>7</sup> See footnote 5 above.

<sup>8</sup> See *Yearbook* . . . 1979, vol. II (Part Two), p. 120.

served as an invitation to the injured State to pause before resorting to such measures and to take such precautionary steps as consulting with the third States concerned, weighing the consequences of alternative courses of action and ascertaining that no other choice was available on account of an instant overwhelming necessity. That point would be elaborated on in the commentary. The title of article 11 was that proposed by the Special Rapporteur.

ARTICLE 12 (Conditions relating to resort to countermeasures)

9. The text of article 12 had been extensively discussed and was the result of painstaking compromises. In plenary, a number of members of the Commission had felt that requiring, as a precondition, the exhaustion of all amicable procedures available under general international law would put the wrongdoing State in an advantageous position, bearing in mind the wide range of settlement procedures available and the time needed for their implementation. The Drafting Committee had therefore replaced the concept of the exhaustion of all available procedures by that of the initiation of a procedure.

10. The Drafting Committee had also distinguished between two different situations covered by paragraph 1 (a) and paragraph 1 (b), namely, the situation where the injured and wrongdoing States were bound to use a specific procedure by virtue of a "relevant treaty" to which they were parties and, secondly, the situation where there was no pre-existing obligation between the two States concerned about the specific type of procedure to be resorted to.

11. With regard to paragraph 1 (a), the term "relevant" referred to a treaty applicable to the area to which the wrongful act and countermeasures related.

12. With regard to paragraph 1 (b), it was important to subordinate recourse to countermeasures to the condition that the injured State offered a dispute settlement procedure to the allegedly wrongdoing State. That element was not provided for in the text initially proposed by the Special Rapporteur.

13. While that dual approach to the question of resort to dispute settlement had met with a wide measure of general approval in the Drafting Committee, views had differed, as indicated by the square brackets in paragraphs 1 (a) and 1 (b), on the nature of the dispute settlement procedure to be applied. Some members thought that the language between square brackets should be eliminated, so that any procedure could be used, whether or not involving a third party, others insisted on a procedure with binding effects, such as arbitration or judicial settlement, and still others considered that the two points of view could be reconciled by providing for third-party procedures in general. The positions were even more diverse, in that some members might favour one solution for paragraph 1 (a) and another solution for paragraph 1 (b). The Drafting Committee had not been able to come to a generally acceptable formula on that point, which would therefore have to be settled by the Commission.

14. The point most widely discussed in the Drafting Committee was whether or not the use of a settlement procedure should necessarily precede resort to countermeasures. The first solution, which was unquestionably preferred by a large number of members, might none the less give rise to several problems. First, it would be unjustifiable in cases where the internationally wrongful act continued. Secondly, it would not take into account the fact that "interim measures of protection", such as freezing assets, might have to be taken by the injured State without prior recourse to a settlement procedure. The Special Rapporteur had, admittedly, addressed that issue by way of an exception, contained in paragraph 2 (b) of his text,<sup>9</sup> to the general rule of prior resort to a dispute settlement procedure. However, the Drafting Committee had not deemed it appropriate to follow that approach in view of the vagueness of the concept of "interim measures of protection taken by the injured State". Lastly, some members had been of the view that there were situations, other than those mentioned, in which it would not always be justified to require that resort to dispute settlement should precede the taking of countermeasures. For that reason, the Drafting Committee had preferred not to spell out the temporal element in the text and had opted for a formulation which emphasized the conditions that had to be met from the start in order for resort to countermeasures to be lawful.

15. At the same time, the Drafting Committee had placed an important limitation on the right to take countermeasures, namely—and that was the object of paragraph 2—by suspending that right when and to the extent that an agreed dispute settlement procedure was being implemented in good faith by the allegedly wrongdoing State. The term "agreed" referred both to procedures under pre-existing obligations as envisaged in paragraph 1 (a) and to procedures accepted as a result of an offer under paragraph 1 (b).

16. The suspension of the right of the injured State was subject to a very important proviso, reflected in the last clause of the paragraph, namely, that the internationally wrongful act had ceased.

17. As in paragraph 1, the question of the nature of the procedures, the application of which resulted in the suspension of the right of the injured State, had not been settled by the Drafting Committee and the word "binding" had been placed in square brackets.

18. Paragraph 3, which limited the scope of the exception contained in paragraph 2, dealt with the case in which, in the framework of a binding dispute settlement procedure, the competent body addressed to the parties a request or an order with which the wrongdoing State refused to comply. The phrase "request or order" covered such measures as interim measures of protection ordered by ICJ or an arbitral tribunal, as well as the judgement or award or other final decision of such a body. It did not, however, cover recommendations made in the framework of a non-binding procedure such as conciliation. Some members had taken the view that the case of the final decision should not come under that paragraph, since failure to comply with such a final decision should be seen as a new internationally wrongful act which gave

<sup>9</sup> See footnote 5 above.

rise to all the rights provided for under part 2. Nevertheless, the prevailing opinion had been that the injured State should not have to bear the burden of going through all the stages involved in claiming reparation and resorting to countermeasures and should, rather, recover the right suspended under paragraph 2.

19. The title of the article was a slightly amended version of the one proposed by the Special Rapporteur.

#### ARTICLE 13 (Proportionality)

20. Article 13 as recommended by the Drafting Committee was very close to the text proposed by the Special Rapporteur.<sup>10</sup> It laid down the rule of proportionality and provided that a specific course of conduct should be proportional, first, to the degree of gravity of the wrongful act, and, secondly, to the effects of that wrongful act on the injured State. The Drafting Committee had taken note of the views expressed both by the Special Rapporteur in his fourth report<sup>11</sup> and by members of the Commission in plenary that the test of proportionality should not be limited to a simple comparison between the countermeasure and the wrongful act because the effects of a wrongful act on the injured State were not necessarily in proportion to the degree of gravity of the act. Therefore, the effects of the wrongful act should also be taken into account in determining the type and intensity of the countermeasure to be applied.

21. With reference to the last four words of article 13, "on the injured State", he would point out that the Special Rapporteur had expressed concern in the Drafting Committee that those words would have the effect of narrowing the scope of the article and unduly restricting a State's ability to take effective countermeasures in respect of certain wrongful acts involving obligations *erga omnes*, such as violations of human rights. The Special Rapporteur's view was that the requirement that a countermeasure should also be proportional to the effects of the wrongful act on the injured State lent itself to unduly restrictive interpretations, since it might be invoked to prevent a State from taking countermeasures against a State violating the human rights of its own people or of the people of a third State, on the ground that the State contemplating the countermeasures was not materially affected. That would have a negative effect on the development and enforcement of human rights law. Other members of the Drafting Committee had disagreed with that interpretation, holding the view that violations of human rights entailed at least legal injuries and any legally injured State would be entitled to take countermeasures. For his own part, he wished to emphasize that understanding by the Drafting Committee, since it was an important issue. In the opinion of the Drafting Committee, the last four words of the article in no sense undermined the right of a State to take countermeasures against another State which had violated human rights or other rights corresponding to *erga omnes* obligations. It had been further pointed out that the purpose of countermeasures, namely, to induce the wrongdoing State to

comply with its obligations under articles 6 to 10 *bis*, determined the type of measures to be resorted to and their degree of intensity. Since the latter issue was already covered by article 11, it was unnecessary to revert to the matter in article 13. Those points should be explained in the commentary to the article.

22. It had been clear in the Drafting Committee that the requirement of proportionality under article 13 did not mean that a countermeasure must amount to the full equivalent of the wrongful act or of the effects of the act on the injured State. Rather, it was intended to put a brake on the injured State's reaction. It should also be couched in sufficiently flexible terms to make it relatively easy to apply.

23. It had also been understood that, in defining the test of proportionality, situations of inequality in terms of economic power, political power, and so on, should be borne in mind, for they might well become relevant in some circumstances in determining the type of countermeasures to be applied and their intensity. It had been agreed that the commentary to the article should elaborate on all those points.

24. The Drafting Committee had inserted the words "degree of" before the word "gravity" in order to make it clear that the text encompassed wrongful acts of varying degrees of gravity. The title remained the same as the title proposed by the Special Rapporteur.

#### ARTICLE 14 (Prohibited countermeasures)

25. As to article 14, at the forty-fourth session there had been no disagreement with the Special Rapporteur's general approach to the question of prohibited countermeasures or with his identification of the broad areas where non-compliance with applicable norms by way of countermeasures should not be permissible. In the light of the discussion in plenary, the Drafting Committee had therefore been faced with a twofold task, namely, to define precisely the limits beyond which, in each of the areas identified by the Special Rapporteur, an injured State was precluded from taking countermeasures, and to structure the article in such a way as to avoid *undesirable a contrario* interpretations.

26. The introductory phrase proposed by the Special Rapporteur had not posed any problem and had been left unchanged. Subparagraph (a) prohibited resort, by way of countermeasure, to the threat or use of force. The reference to the threat or use of force had been followed in the Special Rapporteur's formulation by the phrase "in contravention of Article 2, paragraph 4, of the Charter of the United Nations". The Drafting Committee had replaced that phrase by the words "as prohibited by the Charter of the United Nations", which it considered an improvement over the original formula in two respects. First, it took account of the fact that Article 2, paragraph 4, was not the only provision of the Charter to bear in mind in defining the scope of the prohibition of the use or threat of force, since the Charter allowed for the use of force as authorized by the United Nations and also in the exercise of the right of individual or collective self-defence under Article 51. Some members had pointed out that those exceptions would come into play only in relation to delinquencies qualified as crimes un-

<sup>10</sup> Ibid.

<sup>11</sup> *Yearbook . . . 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3.

der article 19 of part 1<sup>12</sup> of the draft and might therefore not be relevant in the present context. However, the Drafting Committee had been generally agreed that, by merely referring to Article 2, paragraph 4, of the Charter, subparagraph (a) would incorrectly reflect the content of the Charter's prohibition of the threat or use of force. The Drafting Committee had therefore opted for a general reference to the Charter. A second advantage was that the formula took account of the fact that the prohibition of the threat or use of force, while it was contained in the Charter, formed part of general international law and had been characterized by ICJ as a norm of customary international law. The Charter was thus mentioned as one source, but not the exclusive source, of the prohibition in question.

27. Subparagraph (b) of article 14 corresponded to paragraph 2 of the article proposed by the Special Rapporteur.<sup>13</sup> In plenary, it had been widely agreed that extreme economic and political coercion could have consequences as serious as those arising from the use of armed force and that the concern underlying paragraph 2 of the Special Rapporteur's text had therefore deserved to be reflected in article 14. As formulated by the Special Rapporteur, however, paragraph 2 had sought to clarify the meaning of the term "force", as used in Article 2, paragraph 4, of the Charter of the United Nations, and many members had taken the view that the Commission would be ill-advised to try to interpret the Charter or to get into the controversial question of whether the term "force", as used in Article 2, paragraph 4, meant exclusively armed force or encompassed other forms of unlawful coercion. Against that background, the Drafting Committee had decided to base itself on subparagraph (b) of article 14, as originally proposed by the Special Rapporteur, which had read: "any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken".<sup>14</sup> Nevertheless, the members of the Drafting Committee had on the whole considered that the text had been couched in excessively broad terms, amounting, in effect, to a quasi-prohibition of countermeasures. The Drafting Committee had therefore restricted the scope of the subparagraph in two ways. It had first replaced the all-embracing concept of "conduct" by the narrow concept of "extreme economic or political coercion" and had furthermore replaced the phrase "susceptible of", which brought within the ambit of the paragraph any conduct capable of remotely and unintentionally endangering the territorial integrity or political independence of the State, by the term "designed" which denoted a hostile or punitive intent.

28. As to subparagraph (c) concerning the norms of diplomatic law, a fundamental concept which had been raised was that of the relationship between article 14 and article 2 of part 2, as adopted in 1983.<sup>15</sup> Concern had been expressed that, by strengthening the specific rules of the 1961 Vienna Convention on Diplomatic Relations

and the 1963 Vienna Convention on Consular Relations against countermeasures, the Commission might in effect be tampering with treaty regimes and primary norms. The remark had also been made that it was illogical to take into consideration one treaty regime and leave out others, such as the regime governing the law of the sea, which contained principles no less important than those of diplomatic law. Nevertheless, the prevailing view in the Drafting Committee had been that certain rules of diplomatic law had enough of a political basis and purpose to place them beyond the scope of the regime of countermeasures. More specifically, it had been pointed out that, in situations which were, by definition, conflictual, it was essential to keep open the channels of diplomacy and to protect from countermeasures persons and premises which were highly vulnerable.

29. In plenary, the formulation of the corresponding provision in the Special Rapporteur's text, paragraph 1 (b) (ii),<sup>16</sup> had been generally regarded as too sweeping and the concept of "normal operation of . . . diplomacy" as prohibiting, in effect, all countermeasures in the diplomatic field, since any such countermeasures necessarily entailed some disruption in the normal conduct of diplomatic relations. Yet, as everyone knew, measures such as declarations of *persona non grata*, the severance or suspension of diplomatic relations and the recall of ambassadors were widely and effectively used as retaliatory measures.

30. The Drafting Committee had therefore limited the scope of the text proposed by the Special Rapporteur by focusing not on the normal operation of diplomacy, but on the inviolability of persons, premises, archives and documents. The Drafting Committee had thought it appropriate to extend the scope of the provision to consular agents and premises because they, too, were prime targets in situations of inter-State tension. That, however, did not imply any equation between the diplomatic and consular regimes, which were different. Indeed, the understanding was that consular agents, premises, archives and documents were protected to the extent that they enjoyed inviolability under the relevant rules of international law.

31. On the other hand, the Drafting Committee had eliminated the reference to multilateral diplomacy, which was unnecessary because representatives to international organizations were covered by the reference to diplomatic agents and inappropriate because no retaliatory step taken by a host State to the detriment of officials of international organizations could ever qualify as a countermeasure, for it would involve non-compliance not with an obligation towards the wrongdoing State, but with an obligation to a third party, namely, the international organization concerned.

32. Subparagraph (d) dealt with countermeasures not in conformity with rules on the protection of human rights. In plenary, the basic approach suggested by the Special Rapporteur had commanded general agreement, subject, however, to defining with more precision the threshold beyond which each State was allowed to derogate from human rights by way of countermeasures. The Drafting Committee had considered that the phrase "is

<sup>12</sup> For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>13</sup> See footnote 5 above.

<sup>14</sup> See *Yearbook . . . 1992*, vol. I, 2277th meeting, p. 151, footnote 9.

<sup>15</sup> For the text, see *Yearbook . . . 1983*, vol. II (Part Two), p. 42.

<sup>16</sup> See footnote 5 above.

not in conformity” duplicated the idea of prohibition which was the essence of article 14 and had therefore replaced it by the more appropriate expression “derogate from”. The other change made by the Drafting Committee was the characterization of those human rights which were, so to speak, off limits for countermeasures. The Special Rapporteur had explained in plenary that, in using the expression “fundamental human rights”, he had not intended to reinterpret Article 1, paragraph 3, of the Charter of the United Nations, but had merely tried to restrict the scope of the text to the “core” of human rights to be protected against countermeasures. To convey the Special Rapporteur’s intention, the Drafting Committee, drawing on the judgment of ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,<sup>17</sup> had used the phrase “basic human rights”. The intention of that phrase was to prohibit any infringement of the right of every individual to life, liberty and security of person. Also prohibited were infringements of the rules of the humanitarian law on the protection of war victims and massive violations of human rights, particularly in the form of racial discrimination. An important factor to be taken into consideration in determining the lawfulness of a countermeasure derogating from basic human rights was the requirement that countermeasures should remain essentially a matter between States and have minimal effects on private individuals lest they might amount to collective punishment.

33. The last subparagraph of article 14, namely, subparagraph (e) corresponded to paragraph 1 (b) (iii) of the Special Rapporteur’s text<sup>18</sup> and prohibited resort, by way of countermeasure, to conduct in contravention of a peremptory norm of international law. In plenary, some members had questioned the need for such a prohibition in view of the fact that the rules of *jus cogens* were, by definition, rules which might not be derogated from, by way of countermeasures or otherwise. The prevailing view had been that a reference to *jus cogens*, a concept which varied with the passage of time, would ensure automatic adjustment of the instrument being elaborated, in keeping with changes in international legal thinking. The Special Rapporteur’s text had one drawback. By singling out the prohibition of the threat or use of force—a rule of *jus cogens par excellence*—and then referring in general terms to the peremptory norms of international law, it had given the impression that that prohibition did not form part of *jus cogens*. Subparagraph (e) as proposed by the Drafting Committee remedied that problem. It did not attempt to decide which, among the types of conduct described in subparagraphs (a) to (d), would depart from peremptory norms of international law, but clearly indicated that at least some of those types of conduct, first and foremost the threat or use of force, were in contravention of *jus cogens*.

34. Paragraph 1 (b) (iv) of the Special Rapporteur’s text<sup>19</sup> on countermeasures affecting the rights of third States had been unlimited and the issue was now dealt with in paragraph 2 of article 11. “Prohibited countermeasures” was the title of article 14 proposed by the Special Rapporteur.

35. Lastly, the Drafting Committee had not had time to consider article 5 *bis* referred to it at the forty-fourth session.<sup>20</sup>

36. The CHAIRMAN suggested that the Commission should take note of the report of the Drafting Committee and wait until its following session to take a decision on the draft articles, once it had considered the commentaries to the draft articles which would be submitted by the Special Rapporteur.

37. Mr. YANKOV thanked the Chairman of the Drafting Committee for the excellent, complete, thorough and accurate report he had submitted on the Committee’s work at the current session, which provided relevant commentary on the substance and form of the articles and showed the various stages each one had gone through, from the text proposed by the Special Rapporteur to the text adopted by the Drafting Committee. That work might in fact provide the basis for the actual commentaries to the draft articles. In any case, that proved that the Commission had been right to allocate more time to the work of the Drafting Committee.

38. Up until its forty-fourth session, the Commission had been in the habit of coming to a decision on the draft articles and commentaries immediately after they were adopted by the Drafting Committee. Since then, a new procedure appeared to have developed, namely, that the commentaries were not submitted until the following session and, consequently, one year went by between the adoption of a text by the Drafting Committee and its adoption by the Commission. Since a new practice had come into being, some thought should be given to all its consequences. In particular, the Special Rapporteur should be required to take fuller account of the report submitted by the Drafting Committee at the preceding session, from the point of view of both substance and the interpretation and development of the various provisions. The commentaries submitted at the current session did not give the impression that that had been done. In particular, the commentaries seemed to attach too much importance to doctrine instead of explaining why a certain expression had been used or a certain provision adopted. Although the importance of doctrine should not be minimized in any way, it could not take precedence over the implementation of the law and the way the problem was understood at the present time.

39. Mr. KOROMA said he regretted that the Commission would not be able, in plenary, to consider the draft articles adopted by the Drafting Committee. In the first place, the question involved was the very important one of countermeasures. Secondly, experience had shown that anything the Commission produced, even provisionally, came into the public domain and ran the risk of being taken for a finished product. It would therefore be better to follow Mr. Yankov’s suggestion and go back to the previous practice of considering draft articles the same year that they were adopted by the Drafting Committee.

40. Mr. CALERO RODRIGUES said he agreed with the speakers who did not think that it was wise for the Commission to consider draft articles one year after they had been adopted by the Drafting Committee. The rea-

<sup>17</sup> Judgment of 5 February 1970, *I.C.J. Reports* 1970, p. 3.

<sup>18</sup> See footnote 5 above.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

son for the time-lag was the need to have the commentaries to the articles, but that need had not actually been proved. The Commission could perfectly well work on preliminary commentaries, since, in any case, the final commentaries could affect only the articles adopted by the Commission itself and not those produced by the Drafting Committee. The Commission might therefore consider the draft articles on the basis of the text of those articles and the report of the Chairman of the Drafting Committee. In addition, the new practice introduced at the preceding session might give rise to problems at the end of the Commission's term of office, since its membership would change between the adoption of the draft articles by the Drafting Committee and their adoption by the Commission itself.

41. Mr. BENNOUNA noted that the term "peremptory" in article 14, subparagraph (e), should be translated in French as *impérative*, not as *obligatoire*. With regard to the draft articles as a whole, he agreed with Mr. Calero Rodrigues that the Commission might adopt the texts without waiting for the commentaries. Not doing so would give the impression that the Commission had produced less, whereas it had allocated two weeks of intensive work to the Drafting Committee in order to produce more. It had also committed itself to completing its work on the topic during its current term of office. In any event, only article 12 gave rise to problems and contained passages in square brackets; the Commission might therefore postpone the consideration of only that draft article until the following year and come to an immediate decision on the others.

42. Mr. VERESHCHETIN said he agreed with Mr. Yankov that the commentaries to the draft articles should be broadly based on the Drafting Committee's report and reflect its discussions. The Commission was in fact planning to prepare guidelines on the preparation of commentaries at its next session and it would be highly desirable for it to include Mr. Yankov's proposal.

43. He was, however, not convinced that it was wise to refer draft articles to the Sixth Committee without commentaries. One solution might be to replace the commentaries by the report of the Drafting Committee, in which case the report should be attached in an annex.

44. The CHAIRMAN said that, if the Commission did the same as the previous year, the Chairman of the Commission would, when reporting to the Sixth Committee, inform delegations that the text of the draft articles adopted by the Drafting Committee and the report of the Committee were available to them for information purposes, but that they could, of course, not discuss them.

45. Mr. SHI noted that article 20 of the statute of the Commission provided that the "Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary . . .". Thus, no text, not even one adopted by the Commission, could be submitted to the Sixth Committee without its commentary. As to Mr. Bennouna's fears about the Commission's productivity, the Commission had to produce, at its current session, the report of the Working Group on a draft statute for an international criminal court, a subject that was of the greatest interest to the General Assembly. He was therefore in favour of

postponing the consideration of the draft articles in plenary until the following year.

46. Mr. PAMBOU-TCHIVOUNDA said that he understood both Mr. Bennouna's and Mr. Shi's arguments, but feared that letting the draft articles "lie fallow" for a year would affect the importance the Commission attached to the question of countermeasures. Without going so far as to adopt the draft articles and submit them to the Sixth Committee, the Commission might adopt the in-between approach of considering the text adopted by the Drafting Committee and including the debate in the summary record of the meeting.

47. Mr. VILLAGRÁN KRAMER noted that Mr. Bennouna had made a specific proposal that only the consideration of the article that involved problems, namely, article 12 should be postponed until the following session.

48. The CHAIRMAN read out article 20 of the statute of the Commission and said that it seemed perfectly clear: all draft articles submitted to the Sixth Committee must be accompanied by commentaries.

49. Mr. BENNOUNA said that he would not insist that the Commission should come to a decision on his proposal, although he did not feel that the interpretation of article 20 of the statute given by the Chairman and Mr. Shi was the only one possible. The Commission had before it several draft articles on a topic that was in the course of being considered and not the entire set of draft articles on that topic. In any event, at its next session, the Commission should think about going back to the only logical practice, namely, as soon as the Drafting Committee had adopted a text, the Commission should consider it and adopt it at that same session and submit it to the General Assembly together with a commentary.

50. Mr. TOMUSCHAT said he realized that the drafting of commentaries was a heavy burden for the special rapporteurs and very time-consuming, but the task did not appear to be absolutely impossible. The discussion was showing that the Commission did not wish to continue having a time-lag between the adoption of texts by the Drafting Committee and their adoption by the Commission, especially if delegations to the Sixth Committee would have the text of the draft articles available and might therefore consider them without necessarily realizing that they did not have the Commission's imprimatur.

51. The CHAIRMAN said that, at the previous session of the General Assembly, the Sixth Committee had not considered any draft articles that had not previously been adopted by the Commission.

52. Mr. ROSENSTOCK said that the Commission was not bound to adopt the draft articles at all costs, even without commentaries, especially since it had no reason to be ashamed of its record. Generally speaking, it was better for draft articles to be adopted the same year by both the Commission and the Drafting Committee, but that rule could stand an exception from time to time, provided that the exception did not become the rule. The problem should be seen in the broader context of the Commission's working methods, and it had to be determined how special rapporteurs might be given a reasonable length of time to prepare commentaries worthy of the name without the Commission having to wait for the following session.



53. Mr. YANKOV requested that the report of the Drafting Committee should be reproduced *in extenso* in the summary record of the meeting.

54. The CHAIRMAN said that, in his understanding, the debate that had just taken place indicated that the Commission wished to take note of the Drafting Committee's report (A/CN.4/L.480 and Add.1) and to postpone the adoption of the draft articles contained therein until the next session.

*It was so decided.*

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)\* (A/CN.4/446, sect. D, A/CN.4/450)<sup>21</sup> (A/CN.4/L.487)**

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

55. The CHAIRMAN, speaking as Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that, although both the draft articles on State responsibility and the draft articles proposed by the Drafting Committee in the report under consideration (A/CN.4/L.487) were not accompanied by commentaries, the reasons for the lack of commentary were different in each case. He had not drafted commentaries, not because of lack of time or willingness, but because of the particular features of the chapter on prevention and in order to take account of the views of the members of the Commission who had stated that they preferred to have a general view of the articles on prevention before adopting them. He would submit commentaries at the next session if the Drafting Committee had completed its consideration of the articles on prevention.

56. Mr. MIKULKA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, noted that the Commission had decided at its forty-fourth session to approach the topic step by step and to consider, first, articles dealing with preventive measures for activities with a risk of transboundary harm.<sup>22</sup> When the Commission had referred articles 10 to 20 *bis* to the Drafting Committee at the current session, it had indicated that the Drafting Committee, with the help of the Special Rapporteur, could play a role that went beyond a simple drafting exercise. It could consider the scheme of the new articles and then begin actual drafting.

57. With that understanding, the Drafting Committee had first considered the general scheme of the draft. For that purpose, it had considered all the articles before it, namely, articles 1 to 5 (General provisions) and 6 to 10 (Principles),<sup>23</sup> as well as articles 11 to 20 *bis* (Preven-

tion) proposed by the Special Rapporteur in his ninth report (A/CN.4/450). It had concluded that, in order for the articles on prevention to be independent and coherent, there should be, above all, an article on the scope, defining the activities to which preventive measures applied. Then, the three terms that were essential to the formulation of a working hypothesis should be defined; those terms were "risk of causing significant transboundary harm", "transboundary harm" and "State of origin". The Drafting Committee had therefore worked on article 1 (Scope of the present articles) and article 2 (Use of terms) and had then moved on to the consideration of the articles on preventive measures.

58. The titles and texts of articles 1, 2, 11, 12 and 14 as adopted by the Drafting Committee read as follows:

*Article 1. Scope of the present articles*

The present articles apply to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which create a risk of causing significant transboundary harm through their physical consequences.

*Article 2. Use of terms*

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out.

...

...

*Article 11. Prior authorization*

States shall ensure that activities referred to in article 1 are not carried out in their territory or otherwise under their jurisdiction or control without their prior authorization. Such authorization shall also be required when a major change in the activity is planned.

*Article 12. Risk assessment*

Before taking a decision to authorize an activity referred to in article 1, a State shall ensure that an assessment is undertaken of the risk of the activity causing significant transboundary harm. Such an assessment shall include an evaluation of the possible impact of that activity on persons or property as well as on the environment of other States.

...

*Article 14. Measures to minimize the risk*

States shall take legislative, administrative or other actions to ensure that all necessary measures are adopted to minimize the risk of transboundary harm of activities referred to in article 1.

\* Resumed from the 2306th meeting.

<sup>21</sup> Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

<sup>22</sup> See *Yearbook* . . . 1992, vol. II (Part Two), p. 51, paras. 345-346.

<sup>23</sup> For the texts of draft articles 1 to 10, see *Yearbook* . . . 1990, vol. II (Part One), pp. 105-106, document A/CN.4/428 and Add.1, annex.

## ARTICLE 1 (Scope of the present articles)

59. According to the Drafting Committee, article 1, which defined the scope of the articles only for the purposes of the preventive measures, did not define the scope of all of the articles, but only those that dealt with prevention of transboundary harm. The Committee had benefited from the work done by the Drafting Committee on article 1 at the previous session. That text had not been adopted by the Drafting Committee, at the time, but had already incorporated a number of points that had been raised and discussed and had therefore provided the Drafting Committee with a good working document for its work at the current session.

60. Article 1 limited the scope of the articles to activities not prohibited by international law and carried out in the territory or otherwise under the jurisdiction or control of a State which created a risk of causing significant transboundary harm through their physical consequences. That definition of scope, which was limited to preventive measures, introduced four criteria.

61. The first criterion referred to the title of the topic: the articles applied to "activities not prohibited by international law". It had been the view of the Drafting Committee that that critical element of the topic, although already indicated in the title of the topic, should be incorporated in the article on the scope. That criterion was also crucial in making the distinction between the articles of the topic under review and those of the topic of State responsibility for wrongful acts. Some members of the Drafting Committee had been of the opinion that it would be more prudent not to mention that criterion in article 1, arguing that the distinction between a wrongful act and an activity not prohibited by international law was not always so clear-cut and, in some cases, was a matter of a threshold of harm. In their view, preventive measures should be couched in general terms applicable to any activity. That view had not been accepted by the majority of the members of the Drafting Committee, who had believed that an article on the scope of such a general nature would blur the distinction between the two topics and contribute to theoretical confusion. In their view, it was clear that those articles were without prejudice to transboundary harm which might be caused by wrongful acts.

62. The second criterion was that the activities to which preventive measures were applicable were "carried out in the territory or otherwise under the jurisdiction or control of a State". Three concepts were used in that criterion, "territory", "jurisdiction" and "control". The Drafting Committee had been aware that the expression "jurisdiction or control of a State" was a more commonly used formula in some instruments (for example, in principle 21 of the Stockholm Declaration,<sup>24</sup> the 1982 United Nations Convention on the Law of the Sea, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, and principle 2 of the Rio Declaration on Environment and Development<sup>25</sup>), but it had preferred to mention the con-

cept of "territory" as well in order to emphasize the territorial link between activities under the articles and a State. The most typical scenario covered by the articles was an activity undertaken within the territory of a State with some extraterritorial injurious impact on States. The territorial link was therefore a dominant factor.

63. Another reason for mentioning the term "territory" stemmed from concerns expressed in the Drafting Committee at both the current and the preceding sessions over some uncertainty in contemporary international law about the extent to which a State might exercise extraterritorial jurisdiction in respect of certain activities. Moreover, because multinational corporations operated under several jurisdictions for different purposes, the practical question had been how to draft that article so as to minimize ambiguity. The Drafting Committee had felt that territorial jurisdiction should be the dominant criterion. Consequently, when an activity occurred within the territory of a State, that State must comply with its obligations to take preventive measures. Territory was therefore decisive evidence of jurisdiction. Consequently, in cases of competing jurisdictions over an activity covered in the articles, the territorially-based jurisdiction prevailed. He drew attention to the fact that the words "or otherwise" after the word "territory" were intended to signify the special relation of the concept "territory" to the concept "jurisdiction or control". In cases where jurisdiction was not territorially based, jurisdiction was determined in accordance with the relevant principles of international law.

64. The three concepts called for a few brief observations. The expression "territory" referred to areas over which a State exercised its sovereign authority.

65. The expression "jurisdiction" was intended to cover, in addition to the activities being undertaken within the territory of a State, activities over which a State was authorized under international law to exercise its competence and authority. For example, under international law, a State might in certain circumstances exercise jurisdiction over activities in what might be called the "global commons", such as the high seas or outer space, or activities in another State, for example, as a caretaker in a Trust or Non-Self-Governing Territory.

66. The concept of "control" was intended to cover situations in which a State was exercising *de facto* jurisdiction even though it lacked jurisdiction *de jure* under international law, as in cases of intervention, occupation and annexation which had not been recognized under international law. In such cases, international law did not recognize the jurisdiction of another State over the occupied or annexed territory, but attached certain legal consequences to the effective control of the occupying Power.

67. The third criterion was that activities covered in the articles must create a "risk of causing significant transboundary harm". The element of risk was intended to limit the scope of the articles, at the current stage of the work, to activities with risk and, consequently, excluded from their scope activities which in fact caused transboundary harm in their normal operation, such as creeping pollution. The words "significant transboundary harm" were intended to exclude activities which caused harm only in the territory of the State within

<sup>24</sup> Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), part one, chap. I.

<sup>25</sup> A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), p. 3.

which the activity was undertaken or those activities which harmed the “global commons”, but did not harm any other State. The phrase “risk of causing significant transboundary harm” should be taken as a single term, as it was defined in article 2.

68. The fourth criterion was that the significant transboundary harm must have been caused by the “physical consequences” of such activities. The Commission had agreed long ago that, in order to bring the topic within a manageable scope, it should exclude transboundary harm which might be caused by State policies in economic, monetary, socio-economic or similar fields. The Drafting Committee had felt that the most effective way of limiting the scope of the articles, as had been indicated many times during the debate in the Commission, was to require that those activities should have transboundary physical consequences which in turn resulted in significant harm.

69. To conclude his discussion of article 1, he repeated that its title was to be understood as applying only to those articles dealing with obligations to take preventive measures.

#### ARTICLE 2 (Use of terms)

70. As to article 2, he said that two versions had been referred to the Drafting Committee in 1988 and 1989.<sup>26</sup> However, the Drafting Committee had considered that only those terms essential for dealing with the articles on prevention should be defined for the time being. Those terms were: “risk of causing significant transboundary harm”, “transboundary harm” and “State of origin”.

71. Subparagraph (a) defined the concept of “risk of causing significant transboundary harm” as encompassing a low probability of causing disastrous harm and a high probability of causing other significant harm. The Committee had felt that, instead of defining separately the concepts of “risk” and “harm”, it was more appropriate to define the term “risk of causing significant transboundary harm” because of the interrelationship between risk and harm and the particular meaning of the adjective “significant” for both of them.

72. For the purposes of the articles under review, “risk” referred to the combined effect of the probability of the occurrence of an accident and the magnitude of its injurious impact. It was therefore the combined effect of those two elements that set the threshold: the combined effect should reach a level that was deemed significant. The Drafting Committee had been of the view that the obligations of prevention imposed on States should be not only reasonable, but also carry some limits, given the fact that the activities under discussion were not prohibited by international law and that the task was to strike a balance between the interests of the States concerned.

73. The Drafting Committee had drawn inspiration from the definition of risk contained in the Code of Conduct on Accidental Pollution of Transboundary Inland Waters.<sup>27</sup> Under section I (f), of the Code of Conduct, “risk means the combined effect of the probability of

occurrence of an undesirable event and its magnitude”. However, since the draft articles under review applied to a much wider range of activities than those covered by the Code of Conduct, the definition adopted by the Drafting Committee allowed for a spectrum of possibilities ranging from a low probability of causing disastrous harm, which was characteristic of ultra-hazardous activities, to a high probability of causing other significant harm. Obviously, in all cases, the combined effects must be “significant”. The word “encompasses” in article 2, subparagraph (a), was intended to highlight the fact that the spectrum of activities covered was limited and did not, for example, include activities where there was a low probability of causing significant transboundary harm.

74. With regard to the meaning of the word “significant”, the Drafting Committee had been aware that it was not without ambiguity and that “significance” had to be determined in each specific case. The commentary to the article might explain how that adjective should be understood, bearing in mind the definitions in the draft articles on the law of the non-navigational uses of international watercourses, if the Commission decided to use the same adjective in that context. In any case, it was the view of the Drafting Committee that “significant” was something more than “measurable”, but less than “serious” or “substantial”.

75. Subparagraph (b) defined “transboundary harm” as meaning harm caused in the territory of or in places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned shared a common border. The definition was self-explanatory and made it clear that the articles did not apply to circumstances where the injurious impact of an activity affected the “global commons”. They did, however, cover activities conducted under the jurisdiction or control of a State, for example on the high seas, with effects in the territory of another State or in places under its jurisdiction or control or, conversely, activities conducted in the territory of a State with injurious consequences on, for example, the ships of another State on the high seas. The various possibilities would be explained more thoroughly in the commentary to the article.

76. At the request of some members of the Drafting Committee, he drew attention to the concerns they had expressed that the scope of the articles was unnecessarily narrow and consequently did not encompass the protection of the “global commons”.

77. Subparagraph (c) defined “State of origin” as the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 were carried out. The definition was self-explanatory.

78. It went without saying that article 2 was not complete. As the Drafting Committee progressed, there would probably be more terms to be defined.

79. Turning to the articles on prevention, he recalled that one view that had been particularly emphasized by the Special Rapporteur in his ninth report and generally supported by the members was that the obligations imposed on States in the articles on preventive measures were primarily obligations of due diligence. The articles dealing with preventive measures identified, to the ex-

<sup>26</sup> See 2300th meeting, footnote 18.

<sup>27</sup> E/ECE/1225-ECE/ENVWA/16 (United Nations publication, Sales No. E.90.II.E.28).

tent possible, the content of the obligation of due diligence, so as to guide States in meeting such obligations, provide a common ground for them to negotiate with each other and possibly guide decision-makers called upon to settle disputes.

#### ARTICLE 11 (Prior authorization)

80. The content of article 11, which imposed an obligation on States to ensure that activities having a risk of causing significant transboundary harm were not undertaken in their territory or otherwise under their jurisdiction or control without their prior authorization, was the same as that originally proposed by the Special Rapporteur.<sup>28</sup> However, some drafting changes had been made in order to state the purpose of the article more clearly. The Drafting Committee had felt that the phrase "shall ensure" was stronger than the phrase "shall require", which had been used in the draft article proposed by the Special Rapporteur. The word "authorization" meant granting permission, the form of which was left to States. A State would therefore necessarily be aware that an activity referred to in article 1 was taking place under its authority and that it should take the other measures indicated in the articles.

81. The formula "in their territory or otherwise under their jurisdiction or control" was taken from article 1 for consistency. The words "activities referred to in article 1" was shorthand for activities with a risk of causing significant transboundary harm.

82. The second sentence of article 11 contemplated situations where a major change was proposed in the conduct of any activity that was otherwise innocuous, but was transformed as a result of that change into an activity that created a risk of causing significant transboundary harm. Such a change would also require prior authorization by States. The title of the article was "Prior authorization", as proposed by the Special Rapporteur.

#### ARTICLE 12 (Risk assessment)

83. The content of article 12 was similar to that proposed by the Special Rapporteur in his ninth report. Before granting authorization to operators to undertake activities referred to in article 1, a State should ensure that an assessment was undertaken of the risk of the activity causing significant transboundary harm. That assessment enabled the State to determine what risk was involved in the activity and what preventive measures it should take. It had been the Drafting Committee's view that, since the articles were designed to have global application, they should not be too detailed, but should contain the minimum necessary for clarity.

84. The question of who should conduct the assessment was left to the State. Such an assessment was normally conducted by the operators themselves observing certain guidelines set by the State. The evaluation of such assessments was normally done by Government departments or agencies. Those were matters within the purview of internal legislation. The article did require,

however, that the assessment should include an evaluation of the possible impact of the activity concerned on persons or property, as well as on the environment of other States. That requirement had been considered necessary to clarify the first sentence. That was because the State of origin would have to transmit the risk assessment to the States that were in jeopardy of suffering harm by it and those States would need to know what possible harmful effects that activity might have on them and the probabilities of the occurrence of the harm.

85. However, it was clear that the article did not oblige States to require risk assessment for any activity being undertaken within their territory or otherwise under their jurisdiction or control. As to which activities should have risk assessments, the prevailing view in the Drafting Committee had been that activities falling within the scope of the draft articles had some general characteristics that were easily identifiable and could provide some indication to States. For example, the source of energy used in an activity, the material produced, the substances used in production, the location of the activity and its proximity to the border area, and so on, might provide some useful assessment criteria. There was also the possibility that, during the course of an activity, a State might recognize that the activity fell within the purview of the articles: it should then follow the procedures envisaged in them. The Special Rapporteur had explained that a provision might be inserted, for example, in article 2 (Use of terms), listing and describing in more detail the characteristics of activities falling within the scope of the articles.

86. The Drafting Committee had decided to put article 13 (Pre-existing activities) aside and come back to it later. It dealt with the problem of activities which had existed before the articles had come into force. Those cases raised complex questions and the Drafting Committee had felt that it would be more efficient to attempt first to discuss the articles dealing specifically with the preventive measures which had to be implemented in respect of new activities.

#### ARTICLE 14 (Measures to minimize the risk)

87. As to article 14 (Measures to minimize the risk), he said that the Special Rapporteur, in his ninth report, had defined prevention, in broad terms, as including measures taken prior to the occurrence of an accident (or prevention *ex ante*) and measures taken after the occurrence of an accident (or prevention *ex post*) to minimize the extent and the magnitude of the harm. Article 14, as proposed by the Special Rapporteur, reflected that broad concept of prevention, but included two additional elements. The first was the obligation of States to make sure that the operators used "the best available technology". The second was the obligation of States to encourage operators to obtain "insurance or other financial guarantees" enabling them to pay compensation in case they caused harm.

88. During the discussion in the Commission, many members had expressed a preference for the narrower concept of prevention, namely, prevention *ex ante*. They had taken the view that the measures taken after the occurrence of an accident to minimize the harm belonged to the part of the articles that dealt with compensation.

<sup>28</sup> See *Yearbook . . . 1992*, vol. II (Part Two), p. 45, footnote 100.

The Drafting Committee had adopted their point of view. It had also considered that it might not be appropriate to require a State to make certain that the operators used the best available technology. There were problems with that requirement: for example, who would determine what the best available technology was and how would that be done? The most advanced technology was not necessarily a guarantee of safety and in addition was not always within the means of the developing countries. The use of proper technology was only one of the many factors that States had to take into account in order to minimize the risk of causing significant transboundary harm. It was the view of the Drafting Committee that those questions could be elaborated on in the commentary, but need not be covered in the text.

89. The Drafting Committee had felt that the requirement of insurance should be dealt with in the section dealing with liability and compensation. The Drafting Committee consequently had revised the text of article 14 as proposed by the Special Rapporteur.

90. Like the earlier articles, article 14 should be seen in the context of an obligation of due diligence of States. The articles were an attempt to specify, to the extent possible, the content of that obligation, which was particularly clear in the present case, since States alone were directly concerned. In accordance with that article, States were under an obligation to take unilateral measures to minimize the risk of transboundary harm of activities referred to in article 1. Those unilateral measures included enacting legislation and taking administrative and other actions to ensure that all necessary measures were adopted to minimize the risk of transboundary harm.

91. "Administrative and other actions" meant enforcement actions. The words "to ensure that all necessary measures are adopted" had two functions. The first was to underline the requirement that the State was obliged to enforce its domestic laws and regulations designed to minimize transboundary harm by seeing to it that operators complied with those regulations. The second was to stress that the obligation of the State was no more or less than the obligation to exercise all due diligence. States were obliged only to do their best to see to it that operators complied with the rules. The word "minimize" should be understood in that context to mean reducing the possibility of harm to the lowest degree possible. Lastly, the title of the article had been changed to "Measures to minimize the risk", which was closer to the content of the article.

92. The CHAIRMAN drew the attention of the members of the Commission to a translation problem in the Spanish and French versions of the draft articles. The word "significant" had been translated by the words *importante* and *important*, respectively. Supported by Mr. PAMBOU-TCHIVOUNDA, he suggested that, in the French version, the word *important* should be replaced by the word *sensible* in all the articles in which it appeared. The corresponding correction should be made in the Spanish version.

*It was so decided.*

93. The CHAIRMAN thanked the Chairman of the Drafting Committee for his excellent introduction to the Committee's second report. If he heard no objection, he would take it that the Commission wished to take note of

the report and postpone the adoption of the draft articles until its next session.

*It was so decided.*

*The meeting rose at 1.15 p.m.*

## 2319th MEETING

*Wednesday, 14 July 1993, at 10.10 a.m.*

*Chairman: Mr. Julio BARBOZA*

*later: Mr. Vaclav MIKULKA*

*Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.*

### Draft report of the Commission on the work of its forty-fifth session

1. The CHAIRMAN invited the Commission to consider its draft report on the work of its forty-fifth session, starting with chapter IV, and in particular first to consider the commentaries to articles 1, 6, 6 *bis*, 10 and 10 *bis* of the draft on State responsibility.

#### CHAPTER IV. *State responsibility* (A/CN.4/L.484 and Corr.1 and Add.1-7)

##### C. Draft articles of part 2 of the draft on State responsibility

2. TEXTS OF DRAFT ARTICLE 1, PARAGRAPH 2, AND DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTY-FIFTH SESSION (A/CN.4/L.484/Add.2-7)

*Commentary to paragraph 2 of article 1 (A/CN.4/L.484/Add.2)*

Paragraph (5)

2. Mr. RAZAFINDRALAMBO, referring to the French text, proposed that the words *d'un désistement par l'État lésé de son droit*, in the last sentence, should be replaced by the words *d'une renonciation par l'État lésé à son droit*.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

*The commentary to paragraph 2 of article 1, as amended, was approved.*

3. Mr. ROSENSTOCK observed that, at its next session, the Commission should consider the advisability of making the commentaries, some of which were long and