

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1986

Volume II
Part One

Documents of the thirty-eighth 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 thirty-eighth 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

ECE	Economic Commission for Europe
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization (now IMO)
IMO	International Maritime Organization
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
WHO	World Health Organization
World Bank	International Bank for Reconstruction and Development

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* * *

<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (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.

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/397 and Add.1*

Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur

[Original: English]
[4 March and 23 April 1986]

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Multilateral conventions cited in the present report:

	Source
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), hereinafter referred to as "1969 Vienna Convention"	United Nations, <i>Treaty Series</i> , vol. 1155, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

I. "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)

A. Texts of the articles and annex of part 3 of the draft

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

B. Commentaries to the articles and annex of part 3 of the draft¹

General commentary

(1) Any legal system is faced with the question as to what should happen if its primary rules of conduct are in fact not observed. The obvious simple answer is that in such a case there should be some means of "enforcement" of the primary rules, some way to arrive at a situation of fact which comes as close as possible to the situation which would have resulted from the voluntary observance of the rules. One such way is to establish that situation; another is to induce voluntary observance by the threat of adverse consequences in case of non-observance.

(2) In the international legal system there are inherent limitations to enforcement of primary rules binding on sovereign, territorially separated, States. Indeed, the absence of a central power with its own substratum requires more subtle techniques to promote the desired result. The new substantive legal relationships between States entailed by an internationally wrongful act constitute one of those techniques. However, some form of "organization" remains necessary; substitution of one set of substantive legal relationships for another simply raises the same problem of "implementation" of that other set of rules. Moreover, inevitably, the "secondary" set of rights and obligations tends to move even further away from the desired result as expressed in the primary rules. This is particularly clear where the lack of "organization" leads to the acceptance of a decentralized response to an (alleged) internationally wrongful act, i.e. measures of reciprocity, reprisals and possibly even self-help and punishment.

(3) Moreover, the very existence of an internationally wrongful act depends on a set of facts and a set of primary rules; on both points there may very well be a genuine divergence of opinion between the States concerned in a concrete case.

(4) If State A alleges that it has been injured by an internationally wrongful act committed by State B, it may be led to take measures which themselves are not in conformity with its primary obligations towards State B. State B, denying that it has committed an internationally wrongful act, may then claim for its part to be injured by an internationally wrongful act of State A and itself take measures which themselves are not in conformity with its obligations. The latter measures may then again cause countermeasures, and so on. The old, existing primary legal relationships are thus in danger of becoming, in fact, completely nullified by such escalation.

(5) Only some "organization", some form of compulsory third-party dispute-settlement procedure can help to put a stop to that escalation.

¹ Part I of the draft (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*; part 2 of the draft (Content, forms and degrees of international responsibility), articles 1 to 5 of which have been provisionally adopted by the Commission, and articles 6 to 16 referred to the Drafting Committee, appears in *Yearbook . . . 1985*, vol. II (Part Two), pp. 24-25 (arts. 1 to 5) and pp. 20-21, footnote 66 (arts. 6 to 16).

(6) States, in creating primary rules binding upon them, sometimes also envisage the situation of (allegations of) non-observance of those rules and provide for an organizational device to deal with that situation, possibly in the form of a compulsory third-party dispute-settlement procedure leading to a final and binding decision in concrete cases, and possibly even providing for an organizational device to deal with a situation in which that final and binding decision is not complied with. More often than not, however, no such machinery is established, or for that matter excluded *a priori*.

(7) The articles of part 3 are intended to lay down a minimum of residual rules and procedures to be applied if no other machinery is expressly accepted by the States concerned (cf. art. 2 of part 2). They are inspired by the mechanisms envisaged in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea.

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Commentary

(1) The first step in a situation in which an internationally wrongful act is alleged is obviously that the alleged injured State or States demand reparation *lato sensu*, i.e. measures to be taken by the alleged author State to establish a situation which comes as close as possible to that which would have prevailed if the primary rule had been complied with, possibly including measures to prevent repetition of the act (see art. 6 of part 2).

(2) The notification provided for in article 1 must indicate the alleged facts and the rules allegedly not complied with.

(3) See the notification procedure provided for in article 65, paragraph 1, of the 1969 Vienna Convention.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present

article in answer to another State claiming performance of the obligations covered by that notification.

Commentary

(1) Normally, some period of time should be accorded to the alleged author State to examine the situation and react to the notification, either by raising objections or by declaring its willingness to take the measures required.

(2) There may, however, be cases of special urgency in which the injured State immediately has to protect its interests, possibly by taking, within its own territory, measures which are themselves not in conformity with its international obligations (cf. also art. 10, para. 2 (a), of part 2). In the latter case, however, another notification is required (para. 1).

(3) Such measures may involve the interests of third States, in particular where the obligations the performance of which is to be suspended by the injured State are stipulated in a multilateral treaty (cf. arts. 10 to 13 of part 2). Such third States should then be informed, in order to be able to raise objections (para. 2).

(4) Paragraph 3 is based on article 65, paragraph 5, of the 1969 Vienna Convention. It may well be that an immediate measure taken by a State whose interests are adversely affected by the act of another State is, for the time being, rather considered by the former State as a measure of retortion (i.e. an act not itself prohibited by international law). If, however, the second State considers this measure as constituting an internationally wrongful act, the first State must be in a position to invoke article 8 or article 9 of part 2.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Commentary

Notification and objection thereto create a situation of dispute between States which should be settled by peaceful means. Paragraphs 1 and 2 of article 3 basically repeat the wording of article 65, paragraphs 3 and 4, of the 1969 Vienna Convention.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(a) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (b) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(b) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(c) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Commentary

(1) Article 4 is based on article 66 of the 1969 Vienna Convention, and accordingly makes a distinction between the types of rules of international law the application and interpretation of which are involved in a dispute.

(2) Subparagraph (a) of article 4 deals with the exception of *jus cogens* within the context of the application of article 12 (b) of part 2. The typical effect of a rule of international *jus cogens* is that it can be set aside only by another rule of international *jus cogens* (normally subsequent, but possibly contemporaneous, as in the hypothetical case where the rule of *jus cogens* provides for its own suspension as such for other States in case of its violation by one or more States). The situation in which the commission of an internationally wrongful act by one State is invoked by another State to justify measures of reciprocity or reprisal which are themselves contrary to a rule of international *jus cogens* is comparable to the situation in which a State invokes a treaty in order to justify acts in conformity with its obligations under that treaty, but conflicting with a peremptory norm of general international law. The supremacy of the latter norm, however, makes it necessary to ascertain its particular quality. In case of diverging opinions of States on this point, "the principal judicial organ of the United Nations" is best qualified to decide the issue.

(3) Though conduct not in conformity with a rule of international *jus cogens* does not necessarily constitute an international crime, there is an obvious connection between the two concepts, if only because both concepts involve the protection of fundamental interests of the international community and also recognition by that community as a whole that such protection requires a particular rule overriding other international rules of conduct and entailing particular additional legal consequences in case of a breach. Consequently, subparagraph (b) of article 4 provides for the same procedure of final and binding decision of the ICJ as in subparagraph (a). This subparagraph does not refer to article 15 of part 2 (the additional legal consequences of aggression) because the (alleged) commission of aggression and the related claim of self-defence should be dealt with in the first instance in accordance with the relevant provisions of the Charter of the United Nations. Whether, to what extent and how the ICJ has a

role to play in the process is a matter of interpretation and application of the Charter itself.

(4) Subparagraph (c) of article 4 deals with cases in which the prevention of escalation is the main reason for organizing a procedure of compulsory conciliation. If and when objection is raised against a notification of (intended) measures of reciprocity or reprisal, and no solution is reached by other peaceful means, a third-party operation, even if it does not result in binding decisions, could help to restore as much as possible the original legal relationships between the States concerned.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (c) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Commentary

(1) Article 5 is based on the 1982 United Nations Convention on the Law of the Sea inasmuch as it recognizes the interaction, and therefore the legal nexus, between the substantive rules and the international machinery for settling the inevitable difficulties that arise in their application in concrete cases.

(2) However, the provisions of part 3 are still meant to be residual rules. In creating a primary rule of conduct—or at least before the question of actual performance becomes controversial—States may expressly provide for another way of dealing with such controversies, if and when they arise. In particular, they may, at the time of creating a rule of international law, envisage that future controversies relating to its implementation should be resolved exclusively by consensus as a result of negotiation. Even though such an attitude would reflect on the legal character of the rule itself and of the rights and obligations resulting therefrom, it cannot be denied that the articles of part 3 (like other articles on "implementation" in respect of other topics, proposed by the Commission and/or adopted at United Nations Conferences) contain an element of progressive development of international law. Indeed, this is in line with the other parts of the present articles, which to a certain extent move away from the "unilateralism" (unlimited admission of countermeasures) and "bilateralism" (relationships only between an author State and a directly affected State) which characterize older rules of international law.

(3) Nevertheless, on balance, it would seem appropriate to admit a reservation, be it only in respect of the legal consequences—provided for in article 4 (c) of part 3—of the infringement of a right created by a treaty

concluded before the date of entry into force of the present articles.

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (c) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

Commentary

(1) Paragraphs 1 and 2 of the annex reproduce (with the necessary changes of reference) paragraphs 1 and 2 of the annex to the 1969 Vienna Convention. Paragraphs 3 and 4 are taken from articles 12 and 13 of annex V to the 1982 United Nations Convention on the Law of the Sea; the text is inspired by the concept of a compulsory conciliation procedure.

(2) Paragraphs 5, 6, 7 and 8 are modelled on paragraphs 3 (changing the reference to "any party to the treaty" to "any State"), 4, 5 and 6 of the annex to the 1969 Vienna Convention. Paragraph 9 is taken from article 9 of annex V to the United Nations Convention on the Law of the Sea. It would seem that, in the context of State responsibility, this rule is preferable to the one contained in paragraph 7 of the annex to the 1969 Vienna Convention, which, in the context of presumably less frequent procedures relating to the validity of a treaty, puts the financial burden on the United Nations.

II. Preparation of the second reading of part 1 of the draft articles (arts. 1 to 35)

A. Introduction

1. In their written and oral comments on articles 1 to 35 of part 1 of the draft, several Governments remarked

that their comments were provisional, inasmuch as they were subject to the content of parts 2 and 3 of the draft, which were still unknown to them. It may thus be expected that at least some Governments will later com-

ment in written or oral form on those articles in the light of the complete set of draft articles on State responsibility.

2. Nevertheless, it would seem useful for the Commission, after it has provisionally adopted the draft articles of parts 2 and 3, to start the second reading of part 1 in the light of the comments and observations already received from Governments, possibly also taking into account the published comments of learned authors on the Commission's work in this field.

3. It would seem advisable, at the present stage, to concentrate on criticism voiced in respect of individual provisions of articles 1 to 26 (chapters I to III of part 1 of the draft). Indeed, the whole history of the debates in the Sixth Committee of the General Assembly on successive reports of the Commission on the topic gives the impression that the Commission's approach to the topic, and the various draft articles it has provisionally adopted, have met with the general approval of the Sixth Committee.

4. Accordingly, the present section will not deal with the arguments sometimes advanced by those who doubt the feasibility of arriving at a generally acceptable progressive development and codification of the rules of international law on State responsibility, in the form of a United Nations convention on State responsibility or otherwise.

5. Obviously, in the final stage of its work on the topic, the Commission will have to decide what to recommend to the General Assembly with regard to how that work should be followed up; but the approach of presenting a set of draft articles now seems beyond question.

6. Consequently, the present section summarizes, in respect of individual articles of chapters I to III of part 1 of the draft, the suggestions for improvement—or, as the case may be, deletion—made in the written comments received from Governments to date.²

² The written comments of Governments on the articles of part 1 of the draft, referred to in the present section, were published as follows:

Yearbook . . . 1980, vol. II (Part One), document A/CN.4/328 and Add.1-4:

	Pages	Paragraphs
Austria		
Article 1	91	26
Article 3	91	32-33
Article 7	91	28-30, 34
Article 8	92	36
Article 13	92	37
Article 14	92	38
Article 18	92	39
Article 22	92	42
Article 23	93	44
Canada		
Article 7	93-94	2
Article 8	93-94	2-3
Article 18	94	4
Articles 20, 21 and 23	94	6
Article 22	94	7
Articles 24 to 26	94-95	8
Chile		
Article 10	97	14
Article 18	98-99	23

B. Written comments of Governments

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

(1) Austria seems to suggest that the text of article 1 should indicate more clearly that "international responsibility is not limited to internationally wrongful acts". In this context, it notes "seemingly contradictory comments" in the Commission's commentaries to articles 1 and 2, referring *inter alia* to circumstances precluding wrongfulness.

(2) In the opinion of the present Special Rapporteur, the text of article 1 can remain as it stands. The relationship between article 1, article 3, chapter II, chapter III and chapter V (in particular article 35) is sufficiently clear from the texts themselves. It is true that article 35 is simply a saving clause, but that does not necessarily mean that "any question that may arise in regard to compensation for damage caused by that act" (i.e. an act the wrongfulness of which is precluded by the—non-exhaustive—provisions of the other articles of chapter V) is necessarily a question to be dealt with under the

	Pages	Paragraphs
Mali		
Article 18	101	1
Article 22	101	3
Article 23	101	4
Netherlands		
Article 8	102	7
Article 10	102	8
Article 18	102-103	9
Articles 21 and 23	103	11
Article 22	103	12
Yugoslavia		
Article 6	105	11
Article 8	106	13-14
Article 10	105-106	12
Article 18	106	17

Yearbook . . . 1981, vol. II (Part One), document A/CN.4/342 and Add.1-4:

	Pages	Paragraphs
Czechoslovakia		
Article 3	73	3
Article 7	73	5
Articles 14 and 15	73	6
Germany, Federal Republic of		
Article 2	74	
Article 6	74	
Article 11	74	
Articles 12 and 13	74	
Article 17	74	
Articles 20 to 26	75-76	
Article 22	75-76	
Mongolia		
Article 7	76	3
Sweden		
Article 18	78	

Yearbook . . . 1982, vol. II (Part One), document A/CN.4/351 and Add.1-3:

	Pages	Paragraphs
Spain		
Article 22	16-17	3

topic "International liability for injurious consequences arising out of acts not prohibited by international law". Indeed, the suggested limitation of the scope of the latter topic to environmental matters would exclude such coverage. It is quite another question whether the draft articles on State responsibility should, as it were, fill the gap left by article 35, and a question on which the Commission has not yet pronounced.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

(1) The Federal Republic of Germany believes that the content of article 2 is self-evident and suggests its deletion, or at least the incorporation of its legal substance in article 1.

(2) In the opinion of the present Special Rapporteur, the latter suggestion could be accepted. Indeed, articles 1 and 2 embody the same legal rule, looked at from two different points of view: that of the injured State and that of the author State. No change of wording seems to be required: article 2 could simply become paragraph 2 of article 1.

(3) Austria's comments refer to the position of member States of a federal State, and can better be dealt with under article 7.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:

(a) conduct consisting of an action or omission is attributable to the State under international law; and

(b) that conduct constitutes a breach of an international obligation of the State.

(1) Austria raises the issue of the omission of "fault" from the definition of the subjective elements, and the omission of "damage" or "injury" from the definition of the objective elements of the internationally wrongful act.

(2) Czechoslovakia raises the same issue, as well as that of the omission of the "existence of causal connection".

(3) In their written comments, these two Governments reserve their position; their final opinion is said to depend on the complete set of draft articles.

(4) In the opinion of the present Special Rapporteur, article 3 can remain as it stands. Inevitably both the *subjective* and the *objective* elements of an internationally wrongful act are based on the interpretation of the primary rule involved. Indeed, a legal relationship between States, being a legal relationship between legal entities, requires a translation of legal notions into facts (including the fact of causal connection) and vice versa, in order ultimately to arrive at the desired result of primary rules, which is a situation of fact. In this sense "abstractions" and "fictions" (both, in essence, the separation of the relevant from the irrelevant) are necessary ingredients of primary legal rules. The present articles on State responsibility, being meant to be ap-

plicable irrespective of the origin and content of the primary rules involved, cannot but move to a higher level of abstraction and fiction.

(5) Consequently, article 3 reduces the elements of an internationally wrongful act to two: attributability of human conduct to the State, and breach of an international obligation. A third element—the absence of "circumstances precluding wrongfulness"—is added in chapter V, while what could be called a fourth element—the requirement that the international obligation be in force for the State at the time the act was performed—is added in article 18 and elaborated in articles 24 to 26.

(6) It would seem to the present Special Rapporteur that the three additional elements referred to by Austria and Czechoslovakia (i.e. *fault*, *causal connection* and *damage*) are, one way or another, taken care of by the system of the draft articles.

(7) *Fault* can actually be seen as a "breach of an international obligation" in the sense of article 16, if and when the primary rule requires of the State only conduct which can be reasonably required of it. This is particularly true if the conduct consists of an omission (in the case of an obligation of due diligence). To what extent that is the case depends on the (interpretation of the) primary rule itself, particularly in the light of its object and purpose. Obviously, circumstances precluding wrongfulness may also play a role in determining fault on the part of the State. At the same time, the element of attributability of human conduct to the State contains an element of fault on the part of the State. The draft articles recognize this in accepting attributability to the State of conduct of persons who are organs of the State but act outside their competence or contrary to instructions, in accepting attributability to the State of conduct of persons who are not organs of the State but act "in fact on behalf of the State", and in accepting that "conduct which is related to that of the persons or groups of persons" not acting on behalf of the State may give rise to State responsibility.

(8) *Damage* as a possible element of an internationally wrongful act is again a matter of the (interpretation of the) primary rule involved. As is the case with fault, articles 20, 21 and 23 of part 1 of the draft are relevant here. Also, in the opposite sense, article 35 is relevant. Furthermore, it is self-evident that (pecuniary) compensation can be claimed only if there is damage (cf. also art. 6 of part 2).

(9) Finally, *causal connection* as a possible element of the internationally wrongful act refers to a link between an act or omission and a situation of fact which may be qualified as "damage". Here it is even more obvious that the (interpretation of the) primary rule is involved. There exist in international law obligations *per se* requiring a particular course of conduct irrespective of possible factual consequences of conduct not in conformity with that required by the obligation (as is recognized in article 20).

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State.

(1) Yugoslavia and the Federal Republic of Germany suggest the deletion of article 6, since its content is nowadays undisputed.

(2) The present Special Rapporteur considers that it would be useful to retain article 6 as it stands. It is a fact that, in the modern State, power is functionally decentralized, and that the organs of the State are often to a greater or lesser extent independent of each other. In this sense, to consider the State as one, as it were monolithic, entity is to create a legal fiction. Nevertheless it is a basic tool of international law and, as such, article 6—like its territorial analogue, article 7—merits a place in the present draft articles. On the other hand, it is to be noted in this connection that rules of international law sometimes recognize the functional decentralization of power within the State and the relative position of its organs. Articles 21 (para. 2) and 22 illustrate this point (cf. also art. 18, para. 5).

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Paragraph 1

(1) Austria refers to questions arising from the situation in which member States of a federal State have retained a limited measure of international personality.

(2) It will be recalled that the Commission dealt with this question first in the commentary (paras. (10) and (11)) to article 7,³ and then in the commentary (para. (18)) to article 28.⁴ It arrived at the following conclusion: (a) "In the cases . . . in which component States retain an international personality of their own . . . it seems evident that the conduct of their organs is . . . attributable to the federal State where such conduct amounts to a breach of the federal State's international obligations";⁵ (b) "where the conduct of organs of a component State amounts to a breach of an international obligation incumbent upon the component State, such conduct is to be attributed to the component State and not to the federal State";⁶ (c) "the federal State

should be responsible for internationally wrongful acts attributable to the member State if they were committed in a sphere of activity subject to the control or direction of the federal State"⁷ (by virtue of article 28, paragraph 1).

(3) It is to be noted that Austria, in its written comments, refers to an entirely different question and seems to suggest "that the consequences of an internationally wrongful act committed by a member State of a federal union may affect the federal State, for instance if it resulted in the duty to make monetary compensation and the member State did not possess financial autonomy".

(4) In the opinion of the present Special Rapporteur, the Commission should reconsider the question. The Commission's position, as set out in paragraph (2) above, seems to be based upon a strict separation between the member State, having retained "an international personality of [its] own" and therefore able to have its own international obligations, the breach of which by it entails its own international responsibility, and the federal State, which is, so to speak, a "third" State in respect of the legal relationship between the member State and another State, and therefore responsible towards the latter State only if the internationally wrongful act of its member State is "committed . . . in a field of activity in which that [member] State is subject to the power of direction or control" of the federal State. On the other hand, even if the member State has retained "an international personality of [its] own", it is considered to be "a territorial government entity within a State" (i.e. within the federal State), and therefore the conduct of its organs is considered as an act of the federal State, irrespective of whether or not the member State, under the Constitution of the federal State, has acted within the field of its "autonomy" (i.e. not under the direction or control of the federal State, in other words not holding a "subordinate position" in the sense of article 6).

(5) The lack of symmetry is obvious, but does not necessarily make the set of articles 6, 7 (para. 1) and 28 (para. 1) unsuitable for application in the case of federal unions. The point seems to be rather that, whatever measure of "international personality" is retained by the member State, the territory of this territorial governmental entity is, at the same time, part of the territory of the federal State. This aspect is bound to be relevant when the question of the new rights of the injured State comes up. If it is accepted that such new rights include a right of the injured State to claim reparation *lato sensu* (under draft article 6 of part 2) and, under certain circumstances, a right to suspend the performance of its obligations towards the author State (under draft articles 8 and 9 of part 2), the question arises whether the "separation construction" underlying paragraph 1 of article 28 is realistic. As noted by Austria (see para. (3) above), a member State which has not committed the internationally wrongful act "in a field of activity in which that State is subject to the power of direction or control" of the federal State may simply not have itself the (financial and other) means to fulfil its new obliga-

³ *Yearbook . . . 1974*, vol. II (Part One), pp. 280-281, document A/9610/Rev.1.

⁴ *Yearbook . . . 1979*, vol. II (Part Two), p. 99.

⁵ Para. (10) of the commentary to article 7 (see footnote 3 above).

⁶ *Ibid.*

⁷ Para. (18) of the commentary to article 28 (see footnote 4 above).

tions under draft article 6 of part 2. Furthermore, it may not be in a position such that the performance of obligations towards it alone may be suspended. Finally, and perhaps even more important, any measure, even if only by way of retortion, taken by the injured State is bound to affect also the interests of the federal State as a whole.

(6) The Commission might therefore consider simplifying matters by putting the member States of a federal State (provided, of course, that they are States) on completely the same footing as any other territorial governmental entity within a State. After all, the retention (itself a notion of historical rather than legal meaning) of a measure of international personality by a member State of a federal State is bound to be of a rather limited character, if only because of the full international personality of the federal State.

(7) The present Special Rapporteur accordingly proposes: (a) to add, in article 7, paragraph 1, between the words "within a State" and "shall", the phrase "whether or not empowered under the internal law of that State to be subject to international obligations"; (b) to delete, in the commentaries to articles 7 and 28, all references to the situation of member States of a federal State retaining a measure of international personality.

(8) In essence, this would mean that, in so far as the (secondary) rules of State responsibility are concerned, the (primary) international obligations of a member State of a federal State are assimilated to international obligations of the federal State (although, of course, with regard to their content, they are limited to that member State).

(9) The observations of Czechoslovakia and Mongolia relate to the points dealt with in the foregoing paragraphs.

Paragraph 2

(1) Canada expresses the opinion that responsibility in respect of the conduct of an entity which is not part of the formal structure of the State must be more restrictively delineated.

(2) Mongolia expresses the opinion that this provision "must in no case and in no circumstances be made the basis for the attribution to a State of the acts of those of its organs which are not State organs".

(3) In the opinion of the present Special Rapporteur, paragraph 2 of article 7 should remain as it stands: it is a necessary link in the chain connecting articles 5, 6, 7 and 8. As the Commission stated in the commentary (para. (18)) to article 7:

... The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. . . .⁴

Indeed, the State can act only through human beings and the way in which it "organizes" those human beings for the purpose of exercising governmental author-

ity is not relevant to its responsibility under international law. In this respect, the most formal way of organization, dealt with in article 5, can be contrasted with the most informal way, referred to in article 8.

(4) Nor does it seem necessary or advisable to try to define the term "elements of the governmental authority". Though, of course, the functions or role of the State in a given society vary from State to State, the exercise of governmental authority can be clearly distinguished in law from other State activities. Furthermore, in cases falling under article 7, paragraph 2, the question whether or not the internal law of the State concerned has conferred on a particular entity the exercise of elements of governmental authority can be easily answered by comparing the nature of the powers conferred with the nature of the powers retained by State organs (in the sense of article 5) or by organs of a territorial governmental entity (in the sense of article 7, paragraph 1).

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

(1) Austria suggests adding to subparagraph (a) the condition of "effective exercise of elements of the governmental authority", or at least to "exclude transactions under private law".

(2) The Netherlands suggests that subparagraph (a) could be deleted if the phrase "in the absence of the official authorities" were deleted from subparagraph (b).

(3) Canada expresses the opinion that "the circumstances in which a State may be held responsible for such actions" (i.e. as described in subparagraph (b)) "must be more restrictively delineated".

(4) Yugoslavia considers that, from a logical point of view, article 8 should be placed after articles 9 and 10, and suggests inserting in the draft articles a clause containing *inter alia* a definition of "an entity empowered to exercise elements of the governmental authority".

(5) In the opinion of the present Special Rapporteur, there are valid reasons for dealing in separate articles with the cases covered by subparagraph (a) and those covered by subparagraph (b). As the Commission remarked in the commentary (para. (1)) to article 8,⁵ there is a clear distinction between the two groups of cases with regard to where the initiative lies. In this respect, the cases dealt with in article 8, subparagraph (a), are in between the situation referred to in article 7, paragraph 2, and that referred to in article 11, paragraph 1, whereas the cases dealt with in article 8, subparagraph (b), are rather in between the situation referred to in article 7, paragraph 2, and that referred to in article 14; these are the gradations between legal and illegal power.

⁴ Yearbook . . . 1974, vol. II (Part One), p. 282, document A/9610/Rev.1.

⁵ *Ibid.*, p. 283.

(6) Subparagraph (a) deals with the unofficial agents of State entities *lato sensu*. It is obvious that, if such agents are used in order to try to evade the State responsibility which would have been incurred by the same conduct of an official agent, such evasion cannot be admitted by international law. The State entity, in making use of an unofficial agent, would itself commit at least a related act in the sense of article 11, paragraph 2. By the same token, it seems clear that in such situations the objective and subjective elements of the internationally wrongful act are inextricably interwoven (as is also the case in article 27).

(7) For this reason a formulation of the rule in terms of "attributability" only presents particular difficulties.

(8) Thus, while there is validity in the argument that the words "in fact acting on behalf of that State" are somewhat vague, it would seem difficult to refer, in subparagraph (a), to "effective exercise of elements of the governmental authority", because those terms imply a *prima facie* justification of that exercise, at least under the internal law of the State concerned. It would seem even less possible to combine subparagraphs (a) and (b) in a single rule, as suggested by the Netherlands, if only because "the absence of the official authorities" is an essential element in the cases covered by subparagraph (b).

(9) The Commission might, however, consider another solution, which would be to combine the rule contained in article 8, subparagraph (a), with that set out in article 11, paragraph 1, in the form of an exception. Paragraph 1 of article 11 could then read as follows:

"1. The conduct of a person or group of persons not acting as an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority shall not be considered as an act of the State under international law, except if it is established that such person or group of persons acted in concert with and at the instigation of such organ."

The words "in concert with and at the instigation of" are taken from the commentary (para. (5)) to article 8.¹⁰ This solution, while still dealing with the cases covered by article 8, subparagraph (a), within the framework of attributability, would perhaps better indicate that it is not so much the fact that persons act on behalf of the State which creates attributability as the fact that those persons being only *de facto* agents of the State is not a bar to State responsibility for an internationally wrongful act, if otherwise committed.

(10) If this solution were adopted, article 8 would be limited to the present subparagraph (b). Here, as already noted, we are dealing with an entirely different situation inasmuch as the initiative lies with the private persons concerned and not with the State organs. Though no written comments of Governments have yet been presented concerning subparagraph (b) of article 8, the present Special Rapporteur ventures to suggest that the Commission should reconsider the adequacy of retaining the final words: "and in

circumstances which justified the exercise of those elements of authority".

(11) It would seem to the present Special Rapporteur that those words are not necessary to distinguish the situation envisaged in subparagraph (b) from that of an "insurrectional movement" under article 14. On the other hand, from the point of view of international law, the mere fact that, "in the absence of the official authorities", a person or group of persons on their own initiative "fill the gap" equates their conduct of in fact exercising elements of governmental authority to such conduct of official authorities. In any case, whether or not the circumstances justify their filling the gap is rather a matter of appreciation under the internal law of the State. To burden the application of rules of international law on State responsibility with such appreciation would seem inappropriate.

(12) Incidentally, the combination of article 8, subparagraph (a), and article 11, paragraph 1, would go some way in the direction of Yugoslavia's proposed sequence of articles (see para. (4) above). As for the definition of "elements of the governmental authority", reference may be made to paragraph (4) of the comments concerning paragraph 2 of article 7 above.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity.

(1) Chile suggests the following wording for article 10:

"The conduct of an organ or entity, as the case may be, which exceeded its competence according to internal law or contravened instructions concerning its activity shall also be considered as an act of the State under international law."

(2) The Netherlands and Yugoslavia remark that article 10 should also be made applicable to the organ mentioned in article 9.

(3) In the opinion of the present Special Rapporteur, the present wording of article 10 is sufficiently clear as to be understood as referring to "an entity empowered to exercise elements of the governmental authority" in the situations mentioned both in article 7, paragraph 2, and in article 10.

(4) The suggestion made by Chile raises the problem of distinguishing between conduct of an organ "acting in that capacity" and conduct of the same human being acting as a private person. According to the commentary (para. (29)) to article 10,¹¹ the Commission introduced the phrase "such organ having acted in that capacity"—which does not appear in the text suggested by Chile—"to indicate that the conduct referred to comprises only the actions and omissions of organs in carrying out their official functions and not the actions and omissions of individuals having the status of organs

¹⁰ *Ibid.*, p. 284.

¹¹ *Yearbook* . . . 1975, vol. II, p. 70, document A/10010/Rev.1.

in their private life". On the other hand, in the same commentary, the Commission considered and rejected any limitation on the rule of State responsibility laid down in article 10, such as the qualification that the conduct of the person involved should at least be within his "general competence" or "apparent competence", or should have been performed with "the use of means derived from function" (paras. (22) to (25)),¹² recognizing at the same time (para. (26))¹³ "that it is not always easy to establish in a specific case whether the person acted as an organ or as an individual".

(5) In the opinion of the present Special Rapporteur, the distinction between conduct of a person "acting within the scope of the discharge of his State function" and conduct of that person "in his private life" is at once somewhat artificial and in practice often not easy to make. Only one human being is involved, and whether his motivation in performing, or refraining from performing, certain acts is to serve the interests of the State or to let his personal bias prevail is probably, in many cases, not even clear to himself. On the other hand, for the victim of his conduct, the distinction is clearly irrelevant, and the question of proof becomes paramount (cf. para. (18) of the commentary to article 10¹⁴). Accordingly, the correct wording of article 10 is dependent upon a choice of the direction of development of the law on State responsibility in relation to the development of the primary rules of international law. It seems clear that States hesitate to take the risk of being held responsible for acts of their organs—human beings which are motivated by personal bias—generally prohibited under internal law. But there is at least *culpa in eligendo* on the part of the State; and, on the other hand, effective protection of the interests of injured States in international law requires that such States are not burdened with the task of proving that a person, being an organ of another State, really acted in a specific case "on behalf" of that State.

(6) On balance, the present Special Rapporteur is of the opinion that the retention of the words "such organ having acted in that capacity" in article 10 might (unintendedly) create uncertainty in international relations, since they might be interpreted as permitting the—in itself logical—defence that the organ, when "contravening instructions concerning its activity", and even more so when "exceeding its competence according to internal law", did not act as an "organ of the State". He therefore proposes following the suggestion of Chile (para. (1) above) as to the wording of article 10. This would also be in line with the proposed combination of article 8, subparagraph (a), with article 11, paragraph 1 (cf. para. (9) of the comments concerning article 8 above).

Article 11. Conduct of persons not acting on behalf of the State

1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

¹² *Ibid.*, pp. 67-69.

¹³ *Ibid.*, pp. 69-70.

¹⁴ *Ibid.*, p. 67.

2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10.

(1) The Federal Republic of Germany suggests "that the purview of article 11 be worked into article 8".

(2) The present Special Rapporteur agrees with the substance of this proposal, but would prefer to do it the other way round, as proposed above in paragraph (9) of the comments concerning article 8.

Article 12. Conduct of organs of another State

1. The conduct of an organ of a State acting in that capacity which takes place in the territory of another State or in any other territory under its jurisdiction shall not be considered as an act of the latter State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10.

Article 13. Conduct of organs of an international organization

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

(1) The Federal Republic of Germany considers that "the legal content of articles 12 and 13 is . . . something that can be taken for granted and that could without harm be omitted from the draft".

(2) The present Special Rapporteur is of the opinion that the articles should be retained. In time of peace, an organ of a State, acting in that capacity in the territory of another State, can do so only with the consent of that other State. It seems useful to provide, if only implicitly, that such consent in itself does not make that other State responsible for the conduct of such organ. Similar considerations apply in favour of retaining article 13.

(3) Austria comments, in relation to article 13: "It is doubtful whether the Commission's decision not to include in this article a second paragraph, corresponding to the provisions in articles 11, 12 and 14, meets the requirements of the case."

(4) The present Special Rapporteur is of the opinion that the reasons advanced by the Commission in the commentary (para. (13)) to article 13¹⁵ for not inserting a clause corresponding to paragraph 2 of articles 11, 12 and 14 are not particularly convincing. While, as stated above, the mere consent of the territorial State to the activities of organs of international organizations within its territory does not make that State responsible for the conduct of such organizations, the situation is not fundamentally different from that envisaged in article 12. The Commission itself recognized, in the paragraph of the commentary just cited, that:

. . . if the territorial State associated itself with the perpetration, by an organ of the organization, of an action constituting an internationally wrongful act, or if it failed to react in the appropriate manner to such an action, it might incur international responsibility by reason

¹⁵ *Ibid.*, pp. 90-91.

of its own conduct which, by virtue of draft articles 5 to 10, would always be attributable to it.

Indeed, international organizations having generally less power than a State, it would seem more likely that, if an international organization commits an internationally wrongful act at all, it has had or might receive some form of support from the territorial State.

(5) Unlike the Commission, the present Special Rapporteur does not think that, in the case of article 13, the formulation of the clause "would pose special problems going beyond the scope of the present draft". After all, the clause is rather in the nature of a reminder that, while on the one hand the mere presence of an organ of a foreign State or of an international organization within the territory of a State does not in itself make the latter State responsible, on the other hand the factual situation might well involve also an internationally wrongful act of that territorial State.

(6) It is therefore proposed that a second paragraph be added to article 13 worded in the same way as paragraph 2 of article 12.

Article 14. Conduct of organs of an insurrectional movement

1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration shall not be considered as an act of that State under international law.

2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new Government of a State or which results in the formation of a new State

1. The act of an insurrectional movement which becomes the new Government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State.

(1) Austria expresses the opinion that "it is not clear whether article 14, paragraph 1, includes the case of an insurrectional movement, recognized by foreign States as a local *de facto* government, which in the end does not establish itself in any of the modes covered by article 15 but is defeated by the central authorities".

(2) In the opinion of the present Special Rapporteur, articles 14 and 15 and the commentaries thereto are sufficiently clear on this point: whether the insurrectional movement is recognized by foreign States or not is irrelevant for the non-attributability of its conduct to the State within whose territory it is established.

(3) Czechoslovakia deems it appropriate "that the Commission pay due attention to the definition" of the term "insurrectional movement" and refers in this

respect to the 1977 Additional Protocols to the Geneva Conventions of 12 August 1949.

(4) The present Special Rapporteur recalls that the Commission, in the commentary (para. (29)) to article 14¹⁶ and the commentary (para. (22)) to article 15,¹⁷ clearly intended the term "insurrectional movement" to be a neutral term and to cover also national liberation movements. For the purposes of the present articles 14 and 15, it does not seem necessary to distinguish between the two types of movement. However, if the Commission, in the final stage, should wish to insert in the set of articles a definition of terms (including the term "insurrectional movement"), it would seem proper in that context to mention specifically national liberation movements.

Article 17. Irrelevance of the origin of the international obligation breached

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.

2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State.

(1) The Federal Republic of Germany suggests that consideration should be given to the possibility of incorporating in article 17, paragraph 1, the concept embodied in article 19, paragraph 1, by adding the words "and regardless of the subject-matter of the obligation breached".

(2) The present Special Rapporteur would be inclined to accept this suggestion, but feels that a decision to this effect could be taken only after the second reading of article 19.

Article 18. Requirement that the international obligation be in force for the State

1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period.

¹⁶ *Ibid.*, p. 99.

¹⁷ *Ibid.*, pp. 105-106.

(1) With regard to paragraph 2 of article 18, Austria expresses the opinion that: "The words 'ceases to be considered an internationally wrongful act if, subsequently . . . ' are by no means precise enough to prevent the occurrence of situations which, according to the commentary, the Commission intended to exclude."

(2) Canada considers that the concept of retroactivity, as embodied in paragraph 2 of article 18, "should be circumscribed to the maximum degree possible".

(3) Chile, in respect of paragraph 2 of article 18, suggests "to state expressly that it would apply only during the interval between the occurrence of the breach and the utilization of the mechanisms for 'implementing' the resulting international responsibility".

(4) The Netherlands states: "An objection to the present wording of the second paragraph of article 18 is that it does not make it sufficiently clear that it is the primary norm of preemptory law itself which determines its effect: either retroactive force or immediate effect."

(5) Yugoslavia suggests including in paragraph 2 of article 18 "some material from the commentary [to that paragraph] so that the proposed provisions would be clearer from a reading of the text itself".

(6) Sweden considers paragraph 2 of article 18 as "not compatible with articles 64 and 71 of the Vienna Convention on the Law of Treaties" and remarks: ". . . it may be argued that paragraph 2 of article 18 deals with the existence or not of an obligation . . . and that therefore it should not be included in a legal instrument aimed at codifying secondary rules only."

(7) Mali points to the relationship between article 18 and articles 24 to 26 and consequently suggests "to emphasize that link, either by bringing those articles closer to article 18 or through cross-references".

(8) Sweden expresses some doubts about paragraphs 4 and 5 of article 18, considering that "they are difficult to understand and they deal with problems which could presumably be solved by using ordinary logic".

(9) In the opinion of the present Special Rapporteur, it is clear that paragraph 2 of article 18 deals with a question of so-called intertemporal law (i.e. of conflict between primary rules in time). Such questions arise in any legal system. Actually, if and when a rule is established, it is in the first instance up to those who establish the rule to indicate the intended scope of its force, including its force *vis-à-vis* other primary rules, past, present and future.

(10) In the international legal system we can take as a starting-point that there are, possibly were, and hopefully will be some rules of international *jus cogens*, formally defined in article 53 of the 1969 Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation** is permitted and which can be *modified** only by a subsequent norm of general international law having the same character".

(11) As regards the force of a norm of international *jus cogens vis-à-vis* norms laid down in treaties, the 1969

Vienna Convention contains special provisions in articles 53 (first sentence), 64, 71 and 66 (a). All these provisions and the definition of *jus cogens* itself are "future-oriented" in the sense that they indicate what the legal relationships between States are from the moment a norm of *jus cogens* comes into force up until the moment a later norm of *jus cogens* provides otherwise.

(12) Obviously, "the international community as a whole" is not itself bound by either the definition or the other provisions of the 1969 Vienna Convention on *jus cogens*. It is conceivable, for instance, that that community, while accepting and recognizing a particular norm, expressly derogates from the proviso in article 71, paragraph 2 (b), *in fine* in determining that the particular norm does not affect (specific) rights, obligations or legal situations created through the execution of a (specific) previous treaty prior to its termination by virtue of that norm.

(13) The same applies to article 18, paragraph 2, of the present draft articles on State responsibility. It is conceivable, for instance, that the international community as a whole, in creating a norm of international *jus cogens*, expressly determines that that norm shall not have the retroactive force provided for in article 18, paragraph 2. In this sense, the observation of the Netherlands (para. (4) above) is correct, although, in the opinion of the present Special Rapporteur, it does not require a change in the wording of the article.

(14) It should, on the other hand, be recalled that, under paragraph 2 of article 18 of the draft, the retroactive force of a norm of *jus cogens* is rather limited. One might even say that, in a certain sense, there is no retroactive force at all, for the provision is rather directed at the situation of a procedure of dispute settlement between States, set in motion after the entry into force of a norm of *jus cogens*. In the settlement of such a dispute, the norm of *jus cogens* is to be taken into account to the extent that the conduct prescribed (not merely admitted) by that norm, as from the date of its coming into force, "ceases to be considered an internationally wrongful act". In the commentary (para. (18)) to article 18,¹⁸ the Commission made it perfectly clear that "the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force". What is perhaps less clear is that the application of the "intertemporal" rule of article 18, paragraph 2, must raise the question of the moment and duration of a breach of an international obligation, a question addressed in paragraphs 3, 4 and 5 of article 18 and in articles 24, 25 and 26.

(15) The normal implication (but see paras. (12) and (13) above) of a norm of *jus cogens* prescribing particular conduct is that, from the moment such a norm comes into force, the prescribed conduct is no longer a breach of an international obligation. The retroactive force of article 18, paragraph 2, then is that, even if the newly prescribed conduct took place before the entry into force of the relevant norm of *jus cogens*, that conduct is no longer considered internationally wrongful

¹⁸ *Yearbook . . . 1976*, vol. II (Part Two), p. 92.

after the entry into force. If one follows the construction of the Commission throughout its treatment of the topic, according to which an internationally wrongful act creates new legal relationships from the moment it occurs, there seems to be room for an analogy with a treaty creating—or whose execution creates—a new legal relationship between States. One would then turn to article 71, paragraph 2 (b), *in fine* of the 1969 Vienna Convention for guidance. This rule is inspired by the well-known distinction, made by arbitrator Max Huber in the *Island of Palmas (Miangas)* case,¹⁹ between “creation” of a legal situation and its “continued manifestation”. Quite apart from the often remarked intrinsic difficulty of this distinction,²⁰ there arises the difficulty that some of the legal consequences entailed by an internationally wrongful act in accordance with the articles of part 2 of the draft are not in themselves in conflict with the (new) rule of *jus cogens*. Thus, while it is clear that the State injured by the breach of an international obligation committed before the entry into force of the norm of *jus cogens* cannot, after that entry into force, claim a belated performance of that obligation, the substitute performance, consisting of the payment of a sum of money, is certainly not in itself in conflict with the norm of *jus cogens*. However, an international tribunal which, after the entry into force of the norm of *jus cogens*, decides that such a claim is valid at that time necessarily considers the past conduct to be an internationally wrongful act. Furthermore, if the States concerned arrive at an agreement according to which the State which, in the past, committed the then internationally wrongful act pays a sum of money by way of compensation to the then injured State, such agreement is presumably not void *ab initio*, even if concluded after the entry into force of the (new) norm of *jus cogens*.

(16) Actually, what article 18, paragraph 2, seems to intend to express is rather that, after the entry into force of a norm of *jus cogens*, States shall—to use the wording of article 71, paragraph 1 (a), of the 1969 Vienna Convention—“eliminate . . . the consequences” (in this context the legal consequences in the sense of article 1 of part 2 of the draft) of an act now prescribed by that norm, provided that the legal consequences already “executed” before the entry into force of that norm (such as a settlement arrived at through negotiations or otherwise) remain as they are.

(17) But the Commission’s commentary seems to go less far inasmuch as it makes a distinction between the period of time before the entry into force of the norm of *jus cogens* and the period after that entry into force, irrespective of the date of settlement of the claim of the injured State, the originally internationally wrongful act remaining an internationally wrongful act until the date of entry into force of the norm of *jus cogens*. This is presumably motivated by the consideration that a settlement usually takes a long time and that the original author State should not profit from the subsequent radical change of opinion of “the international com-

munity of States as a whole” as to the wrongfulness of certain conduct, by delaying the settlement of the original claim.

(18) In the opinion of the present Special Rapporteur, all depends on the object and purpose of the particular norm of *jus cogens* involved in the case. In itself, on the international plane, it does not seem very likely that conduct that was considered unlawful suddenly comes to be considered not only as permitted, but as compulsory. It seems much more likely that there is an intermediate stage (of gestation, so to speak) in which the original wrongfulness becomes dubious. After all, the resolution of a conflict between the requirements of a regulation of relationships between States as such and the interests of humanity as a whole is, more often than not, the *raison d’être* of the emergence of a norm of international *jus cogens*. Accordingly, a residual rule of intertemporal law in this field, while on the one hand not interfering with claims already settled, should perhaps at the same time reserve the possibility of compensation for damage caused by an act previously considered internationally wrongful and subsequently considered compulsory.

(19) In this way, the formal force of the emergence of a norm of international *jus cogens* making specific conduct compulsory would be rather in the nature of a “circumstance precluding wrongfulness” of that specific conduct in the past, while nevertheless—by analogy with article 35 of part 1 of the draft—not prejudging “any question that may arise in regard to compensation for damage caused by that act”.

(20) Mitigated in this way—and without prejudice to its place in the final draft—the wording of the rule at present contained in article 18, paragraph 2, could, it would seem, be retained, although the commentary should of course be modified. Actually, the present commentary—as Austria (see para. (1) above) and Yugoslavia (see para. (5) above) remark in their written comments—is not fully reflected in the text itself.

(21) The reservation suggested in paragraph (19) above would go in the direction of the written comments of Canada (see para. (2) above).

(22) The suggestion contained in the written comments of Chile (see para. (3) above) would, in the opinion of the present Special Rapporteur, not solve the problem. There are in fact three relevant dates: (a) the date of the occurrence of the breach; (b) the date of the entry into force of the norm of international *jus cogens*; (c) the date of utilization of the mechanisms for “implementing” the resulting international responsibility. If date (c) chronologically precedes date (b), there seems to be no problem; normally it cannot be presumed that the establishment of a rule of international *jus cogens* is intended to interfere with the settlement of the original claim, or even a settlement the procedure of which is formally commenced. Nor is there, of course, any problem if date (a) comes after date (b). The only problem arises when dates (a) and (b) come before date (c).

(23) The written comments of Sweden (see para. (6) above) seem in themselves correct. Indeed, article 18, paragraph 2, is intended to describe the force—in terms of time—of particular primary rules. But doing so

¹⁹ Arbitral award of 4 April 1928, see United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829.

²⁰ See, for example, P. Tavernier, *Recherches sur l’application dans le temps des actes et des règles en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1970).

seems inevitable in the context of the draft articles on State responsibility. The concept of international *jus cogens* having been accepted, one cannot ignore its impact on the rules of State responsibility. As a matter of fact, the Commission has recognized the special position of *jus cogens* in various other contexts of State responsibility.

(24) The written comments of Mali (see para. (7) above) are correct (cf. para. (14) above) and raise the question of the place to be given to article 18, paragraph 2, and its suggested mitigation (cf. para. (19) above) in the final set of draft articles. The present Special Rapporteur is fully convinced of the close relationship between article 18, paragraphs 1, 3, 4 and 5, and articles 24 to 26 of the draft. The force of the obligation and the legal determination of the moment and duration of its breach are certainly two sides of the same coin. This might lead the Commission finally to put the all-important article 19 immediately after article 17 and to put article 18, paragraph 2, and its suggested mitigation, as dealing with a special aspect of the intertemporal problem, immediately after article 26.

(25) The doubts expressed by Sweden (see para. (8) above) relate to paragraphs 4 and 5 of article 18 only; apparently, no such doubts are raised by paragraphs 1 and 3. In the opinion of the present Special Rapporteur, paragraphs 1, 3, 4 and 5 of article 18 should be read in conjunction with articles 24 to 26, which in turn are linked with articles 20, 21 and 23, inasmuch as they introduce a typology of obligations and of the corresponding acts of the State. It is therefore proposed to deal with the written comments on all these provisions at the same time.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.

Article 21. Breach of an international obligation requiring the achievement of a specified result

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.

2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions or omissions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

The breach of an international obligation requiring a State to prevent a given event occurs when the event begins. Nevertheless, the time of commission of the breach extends over the entire period during which the event continues.

(1) Canada considers that articles 20, 21 and 23 should be reviewed "to ensure that the distinction they outline is necessary and practical".

(2) The Federal Republic of Germany considers articles 20 to 26 "very abstract and theoretical" and, in particular, considers it necessary "to clarify the relationship" between articles 20 and 23.

(3) Austria, in respect of article 23, notes the absence from the text of the article of the qualifying phrases which appear in the commentary.

(4) The Netherlands is of the opinion that the difference between the rules stated in article 21, paragraph 1, and article 23 is "too slight to justify separate treatment".

(5) Mali considers the present wording of article 23 "too categorical" and is of the opinion that the relationship between this article and paragraph 1 of article 21 must be defined.

(6) With regard to articles 24, 25 and 26, Canada wonders "whether there is a need for the detail and complexity of these three rules".

(7) In the opinion of the present Special Rapporteur, there were two main reasons for the Commission to embark upon a typology of obligations and of breaches thereof. One reason is connected with article 22, on the exhaustion of local remedies, and will be dealt with under that heading. The other reason is the *time factor* (moment and duration) and its legal relevance for a number of questions arising in the context of parts 2 and 3 of the draft articles. The latter reason is underlined in the commentary (para. (5)) to article 24.²¹ The time factor is, of course, also relevant in connection with the time limits of the force of the rule of interna-

²¹ *Yearbook . . . 1978*, vol. II (Part Two), pp. 86-87.

tional law imposing the obligation breached (see article 18).

(8) It should be recalled that articles 3 (*b*) and 16 put the objective element of an internationally wrongful act in terms of the "breach of an international obligation of the State". Obviously, what is required of a State by an international obligation is a matter of (interpretation of) the primary rule. One can distinguish various types of requirements, but the relevance of such distinctions for the various questions indicated in the preceding paragraph needs to be tested for each of those questions. Thus, as already remarked in the context of article 18, paragraph 2, the force of a rule of international law is not necessarily limited to acts or facts which took place, or to situations which began and ceased to exist, within the time period between the entry into force and the termination of that rule.

(9) The Commission has distinguished between three types of requirements (adoption of a particular course of conduct; achievement of a specified result; prevention of the occurrence of a given event) and between four types of acts of the State (an act not extending in time; an act having a continuing character; a composite act; a complex act). Actually, in so far as concerns the articles of part 1 of the draft adopted on first reading and the articles of parts 2 and 3 adopted on first reading or proposed, the legal relevance of these distinctions is rather limited.

(10) On the other hand, there is bound to exist a large variety of obligations under international law. In particular, the obligations of conduct imposed by a rule of international law are normally explicitly or implicitly linked to the protection of particular interests of another subject of international law, possibly through the "object and purpose" of the rule.²² The particularity of the course of conduct, as well as the specificity of the result required, often do not have a character of their own. Hence, for example, the objections raised against the wording of article 23 (see paras. (3) and (5) above).

(11) Furthermore, as to the four types of acts of the State, it should be recognized that, in reality, there is no such thing as "an act not extending in time". Certainly there may exist legal obligations which can be fulfilled, or violated, only by a series of acts or omissions situated at different points in time, in order to constitute a particular course of conduct or to achieve cumulatively a specified result. On the other hand, there certainly may exist *per se* obligations for which the effects (being the result) of conduct not in conformity with their requirements are irrelevant. Whether or not, in such cases, acts or omissions, or final results, situated in time beyond the period of force of the obligation should be taken into account in assessing the existence or non-existence of a breach of the obligation is a difficult question; this question, it is submitted, does not necessarily have to receive the same answer in respect of all the legal consequences of a breach (cf. para. (7) above and para. (14) below).

(12) In this respect, article 18, paragraphs 1, 3, 4 and 5, dealing with "acts", seem to be not quite in conformity with articles 24 to 26, dealing with "breaches". While the former set of provisions seems to permit the taking into account only of facts situated within the period of time during which the obligation was in force for the State concerned, the latter set of provisions is construed differently and assigns a moment of beginning and a moment of completion to the breach. In the case of article 24, these two moments are supposed to coincide (indeed, in the examples given—death, destruction—the act, legally speaking, is the result); in the case of article 25, paragraph 1, only the moment of the first act is relevant, although the duration of the breach cannot exceed the period of force of the obligation ("and remains not in conformity with the international obligation"); in the case of article 25, paragraph 2, only the moment of "completion" is relevant, although the duration of the breach extends backwards to the point in time of the first act or omission (irrespective of the moment of entry into force of the obligation?); in the case of article 25, paragraph 3, the same solution applies as in the case of article 25, paragraph 2. Finally, in the case of article 26, the result required being the absence of a given event, only the first moment of the event is relevant, although the duration of the breach extends forward (again, irrespective of the moment of termination of the force of the obligation?) to the moment of termination of the event.

(13) In the opinion of the present Special Rapporteur, the treatment of (*a*) the force of the obligation (art. 18), (*b*) the content of the obligation (arts. 20, 21 and 23), (*c*) the moment and duration of the breach (arts. 24, 25 and 26) and (*d*) the legal consequences of the breach (para. (5) of the commentary to article 24) as separate groups of legal questions (both separate as groups and unified within each group) fails to take into account the interrelationship between those phases in the total process of the law and, consequently, is bound to create confusion and artificialities in its application, even if the residual character of the provisions is admitted (as, for example, in article 28 of the 1969 Vienna Convention). This may account for the—admittedly rather vague—misgivings expressed in the written comments of Governments. Incidentally, in the literature on the topic, the misgivings are much more substantiated.²³

(14) An example may illustrate the above. A first question relates to the meaning of the words "moment" and "duration" of a breach. At first sight, one might be inclined to think that "duration" is a continuous sequence of moments, in particular when those words are coupled with such terms as "begins", "continues", "accomplished", "initiated" and "completed", and together related to what is called "time of commission" (arts. 24, 25 and 26). The necessary consequence of this

²² See, for example, article 31 of the 1969 Vienna Convention.

²³ See, for example, J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *Mélanges offerts à Paul Reuter* (Paris, Pedone, 1981), p. 181; J. Combacau and D. Alland, "'Primary' and 'secondary' rules in the law of State responsibility: categorizing international obligations", *Netherlands Yearbook of International Law*, 1985 (The Hague), vol. XVI, p. 81; and J. J. A. Salmon, "Le fait étatique complexe: une notion contestable", *Annuaire français de droit international*, 1982 (Paris), vol. XXVIII, p. 709.

view would be that any moment falling within the time of commission would be a moment at which the breach occurs. This conclusion is, however, incompatible with the differentiation made in articles 24 to 26. Apparently, then, the moment and the duration of a breach are not in a relationship of equivalence. Indeed, "moment" seems rather to refer to the period of time during which the obligation is in force, while "duration" seems relevant rather for one of the legal consequences of a breach, namely, in the words of the commentary (para. (5)) to article 24:²⁴ "the determination of the extent of the injury caused by a given internationally wrongful act and, consequently, of the amount of reparation owed by the State that has committed the act in question". But under article 24, an act of a State "not extending in time" has no duration at all; nevertheless, the effects of such act are clearly relevant for the determination of the amount of reparation, and such effects have to be evaluated *inter alia* in terms of the duration of the interest permanently affected by the breach. On the other hand, as is stated in the same paragraph of the commentary to article 24: "The determination of the moment and duration of the breach of an international obligation will always affect the determination of the *moment** from which the period of prescription will begin to run . . ." But which moment is that: the first or the last moment of the (extended) "time of commission", or somewhere in between? And, to take still another phase in the total process of the law as set out in the same paragraph, the moment and duration of a breach may be decisive with regard to:

. . . the determination of the existence or non-existence of the competence of an international tribunal to deal with a dispute arising out of the breach by a State of an international obligation where the agreement concluded by the parties to the dispute includes a clause limiting the jurisdiction of the tribunal established under or mentioned in the agreement to disputes concerning "acts" or "situations" subsequent to a specific date, provided that the parties in question have not expressly laid down special criteria for the interpretation of that clause. . . .

Incidentally, the last words quoted underline the residual character of the articles dealt with here. In any case, the Commission, in the commentary (para. (10)) to article 24,²⁵ considers the analysis of the *Phosphates in Morocco* case²⁶ particularly instructive for the distinction between an "instantaneous act producing continuing effects" and a "continuing act" of a lasting nature. But this case turns on the interpretation of the words "with regard to situations or facts subsequent to such ratification" in the relevant instrument. Furthermore, within the context of the application of the European Convention on Human Rights, the tendency—referred to in the commentary (para. (21)) to article 18²⁷—has been rather to accept the competence of the relevant (quasi-) judicial body even if the government act, curtailing or taking away in respect of a particular private person one of his (otherwise continuing) fundamental freedoms, dated from before the Convention entered into force in respect of the State(s) involved in the

dispute. No doubt the object and purpose of the system instituted by that Convention are germane to this tendency.

(15) In view of the foregoing observations, the present Special Rapporteur is of the opinion that the Commission should reconsider whether the *time factor* should be addressed at all in the draft articles on State responsibility. No doubt the problem as such exists and has to be solved in practice. The question is only whether it is feasible to elaborate sufficiently clear and unambiguous rules for the solution of the problem. The present Special Rapporteur is doubtful about this. Actually, in the domestic legal systems of several countries, jurisprudence has shown that general legislative provisions in this field seldom yield easily applicable guidelines which do justice to the wide variety of norms and situations. This is not surprising: as remarked by the famous Argentine writer Jorge Luis Borges, time is an indocile subject.

(16) Any legal norm, legal relationship, legal status or legal obligation has its limits in time: it enters into force and it terminates. This does not mean that facts occurring beyond those limits in time are *a priori* irrelevant for the content of that norm, relationship, status or obligation. But the extent to which, and the manner in which,²⁸ they are relevant is a matter of choice to be made by those who establish the norm, relationship, status or obligation. Often such a choice is not made, or is left more or less ambiguous. But such rules—or rather metarules—are inevitably more abstract and more given to the use of fiction than the choice made by those who establish the actual norm, relationship, status or obligation. Such metarules tend to become either too revolutionary or too conservative. This is particularly true for modern international law, because of its characteristic of trying to reconcile the coexistence of sovereign States and the dictates of humanity.

Article 22. Exhaustion of local remedies

When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.

(1) Austria considers it "advisable not to limit the application of article 22 to the obligations mentioned in article 21, but to include obligations demanding the adoption of a particular course of conduct in the introductory sentence of article 22".

(2) Canada considers that article 22 should be reformulated to take into account the exception to the rule of the exhaustion of local remedies for cases of "injury to foreign individuals or to their property that has been caused outside the territory of the State concerned".

(3) Mali is of the opinion that article 22 "should reflect the fact that the breach of an obligation may occur when the local remedies process drags on indefinitely".

²⁴ See footnote 21 above.

²⁵ *Yearbook* . . . 1978, vol. II (Part Two), pp. 88-89.

²⁶ Judgment of the PCIJ of 14 June 1938, *P.C.I.J.*, Series A/B, No. 74, p. 10.

²⁷ *Yearbook* . . . 1976, vol. II (Part Two), p. 93, footnote 436.

²⁸ Cf. commentary to article 18, *ibid.*, pp. 92-93, footnote 433.

(4) The Netherlands considers that the requirement of the exhaustion of local remedies should be restricted to those cases in which the breach of an international obligation of which a State is accused took place within the jurisdiction of that State.

(5) The Federal Republic of Germany “has always understood this rule as a procedural condition for the assertion of claims arising out of the breach of an already substantively defined international obligation”.

(6) Spain remarks that article 22 does not cover the situation where—as is the case under the Spanish Constitution of 1978—the central Government, on its own initiative, may prevent or make good the injury when a territorial governmental entity commits a breach of international law.

(7) In the opinion of the present Special Rapporteur, all these written comments reflect misgivings in regard to the construction of the rule of the exhaustion of local remedies, as laid down in article 22, in connection with article 21, paragraph 2, and with the notion of a “complex act” (art. 18, para. 5, and art. 25, para. 3). In fact, article 22 is construed as a special case of application of article 21, paragraph 2, and the “succession of actions or omissions by the same or different organs of the State in respect of the same case” that may occur in the course of the exhaustion of local remedies is the main example of the notion of a complex act.

(8) Obviously, it is again a matter of (interpretation of) the primary rule itself whether the obligation it imposes—in the words of article 21, paragraph 2, and article 22—“allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State”. According to article 22, it is only in the case of a “result required . . . by an international obligation concerning the treatment to be accorded to aliens” that the alien concerned should himself take the initiative to exhaust the “effective local remedies available” to him. The breach is then completed only if and when such exhaustion of local remedies fails to bring about the required (or an equivalent) result. Nevertheless, according to article 18, paragraph 5, there is a breach even if the “complex act” is completed only after the period of time during which the obligation is in force for the State concerned. There is no mention in this provision of the situation in which, after the termination of the force of the obligation, the complex act is not completed, the (no longer required) result or an equivalent result having been achieved through the exhaustion of local remedies, or otherwise by acts *proprio motu* of the State.

(9) All this seems to raise the question why special treatment should be accorded to international obligations “concerning the treatment to be accorded to aliens”. Is the rationale of the local remedies rule to be found in the statement that the State has not acted until all its competent organs have finally and definitely taken a stand? Or is the non-exhaustion of local

remedies a sort of “contributory negligence” on the part of the alien? In the first case, there seems to be no reason for special treatment of obligations concerning the treatment to be accorded to aliens, it being sufficient that any obligation of result allows that this or an equivalent result may be achieved by subsequent conduct of the State. In the second case, there is room for the requirement of an initiative by the alien himself, but this requirement is rather in the nature of a condition for the attribution of his interests to his State on the international plane, and should be qualified. Actually, such qualifications are in essence suggested in the written comments of the Federal Republic of Germany (see para. (5) above) and in those of Canada, Mali and the Netherlands (see paras. (2), (3) and (4) above).

(10) It may be noted that, if paragraph 1 (b) of draft article 6 of part 2 were adopted by the Commission, the construction of an obligation of result, which is not really an obligation of result but rather one to achieve an equivalent final result at some indefinite moment of time, would seem to be unnecessary. Indeed, the only reason for such a construction would seem to be to suspend the application of countermeasures, or the submission of a claim to an international tribunal by the injured State, for a reasonable period during which the author State could, by way of (an equivalent) substitute performance, legalize the situation. The requirement of an initiative by the alien himself (exhaustion of local remedies) is based on an entirely different reason, namely that the situation is within the jurisdiction of the alleged author State.

(11) For the above reasons, the present Special Rapporteur proposes for the consideration of the Commission:

- (a) the deletion of paragraph 2 of article 21; and
- (b) the redrafting of article 22 as follows:

“When the conduct of a State within its jurisdiction is not in conformity with what is required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or juridical persons, there is a breach of the obligation only if the alien concerned has exhausted the effective local remedies available to him without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment.”

(12) This new formulation for article 22 would also go in the direction of the written comment of Austria (see para. (1) above). The remark made by Spain (see para. (6) above) does not require further modification of article 22. The mere possibility for the central Government to “prevent or make good the injury” on its own initiative does not put the alien under an obligation to request such a measure. Actually, article 7, paragraph 1, and article 10 apply in the case mentioned by Spain: an internationally wrongful act has been committed and, if the central Government intervenes, it fulfils the requirement set out in article 6, paragraph 1 (b), of part 2, as proposed by the present Special Rapporteur.

JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

[Agenda item 3]

DOCUMENT A/CN.4/396*

Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur

[Original: English]
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* Incorporating document A/CN.4/396/Corr.1.

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NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973)	United Nations, <i>Treaty Series</i> , vol. 1035, p. 167.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.
Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978)	United Nations, <i>Juridical Yearbook 1978</i> (Sales No. E.80.V.1), p. 106.
Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 7 April 1983)	A/CONF.117/14.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Draft articles on jurisdictional immunities of States and their property

INTRODUCTORY NOTE

1. The present report is the eighth and final report by the Special Rapporteur on jurisdictional immunities of States and their property; it comprises a set of draft articles to be considered by the International Law Commission on first reading. The draft is almost complete; it lacks only the final clauses, the preparation of which could be left to the future codification conference, and a provision on the settlement of disputes, which might take the form of an article or an optional protocol to be adopted once the body of the draft as a whole has been approved. Before considering whether any further articles need be added to the draft at the present stage to complete the first reading, it may be useful to take stock and indicate the current status of the draft articles submitted so far, with a view to their final preparation for first reading.

2. For all practical purposes, it is necessary, first, to recall the draft articles provisionally adopted by the Commission. These texts are set out in a note submitted by the Secretary-General to the General Assembly at its fortieth session, section IV of which concerns the "Draft articles on jurisdictional immunities of States and their property, as provisionally adopted by the International Law Commission".¹ These draft articles are reproduced for easy reference in section A of chapter I,

accompanied by the additional comments considered appropriate. This first group includes: for part I of the draft, article 1 and certain provisions of articles 2 and 3; for part II, articles 7 to 10; and for part III, articles 12 to 20.

3. Secondly, it would be useful to mention the draft articles which have been discussed by the Commission and are now before the Drafting Committee. These are article 6, in part II of the draft; article 11, in part III; and articles 21 to 24, in part IV. These draft articles, as revised by the Special Rapporteur, are reproduced in section B of chapter I, with explanatory notes where necessary.

4. Thirdly, part I and part V contain draft articles submitted earlier by the Special Rapporteur which may require further discussion in the Commission before being referred to the Drafting Committee. These are, for part I of the draft, certain provisions of articles 2 and 3, and articles 4 and 5; and for part V, articles 25 to 28. These draft articles are reproduced in section C of chapter I.

5. The attention of the Commission is also drawn to the possibility of adding a part VI, on the settlement of disputes, and/or a part VII, on final provisions. These questions are dealt with in chapter II of the present report.

¹ A/40/447.

6. In chapter III, the Special Rapporteur endeavours, by way of conclusion, to clarify certain doubts expressed in the Commission and in the Sixth Committee of the General Assembly, to allay certain fears and to emphasize the urgent need for a convention on the topic in the face of alarming developments, occurring more and more frequently, in the practice of some States. The principles of State immunities can be preserved only when nations can be persuaded to agree on the extent of

their application with some permissible flexibility. The absence of a general convention or any further delay in adopting one will reflect poorly upon the level of readiness or willingness of States to find a compromise solution to each of the remaining pressing problems. There is no doubt whatsoever that, if such a scenario were to ensue, the States that would suffer by far the worst consequences would be the majority, if not almost all, of the developing countries.

CHAPTER I

A. Draft articles provisionally adopted by the Commission

PART I INTRODUCTION

Article 1. Scope of the present articles

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

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;

...

(g) "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.

Article 3. Interpretative provisions

...

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.

Explanatory notes

7. The original text of *article 1*, which was adopted, with commentary, by the Commission at its thirty-second session,² was subsequently revised at the thirty-fourth session³ so as to reflect more accurately the narrower scope of the draft articles by confining it to the immunity of a State from the jurisdiction of the courts of another State. This more limited scope thus leaves aside the wider question of the immunity of a State from the exercise of sovereign power by organs of another State other than courts, for example by the executive, administrative or military authorities in fields other

than the judicial domain. This aspect may have to be re-examined after consideration of part IV of the draft.

8. *Article 2, paragraph 1 (a)*, is a corollary of the revised text of *article 1*. A definition of the term "court" was deemed necessary. In this context, any organ of a State empowered to exercise judicial functions is a court, whatever nomenclature is used.⁴ This definition may need to be reconsidered in the light of further examination of the exercise of the power to order or adopt enforcement measures by an organ of State not exercising judicial functions.

9. *Article 2, paragraph 1 (g)*, a subparagraph whose numbering may later be adjusted, was introduced as part of a package covering the exception of "commercial contracts" in *article 12* and was adopted, at the thirty-fifth session, together with the interpretative provision of *article 3, paragraph 2*.⁵ The use of the term "commercial contract" is intrinsically broadened by the enumeration of the three categories of contracts or transactions, excluding contracts of employment.

10. In *article 3*, both the "nature" test and the "purpose" test have been given appropriate status and priority in determining whether a contract is commercial or non-commercial. Primarily, reference is made to the nature of the transaction. If, according to the "nature" test, it is non-commercial, then the contract is decidedly non-commercial. But should the contract appear to be commercial in nature, its purpose should also be taken into account if, in the practice of the State in question, namely the State party to the contract, "purpose" is relevant to determining the non-commercial character of the contract. Relevance does not imply decisiveness, nor is "taking into account" necessarily determinative of the non-commercial character of the contract. The purpose should not be overlooked, but should be taken into consideration, especially in connection with efforts to relieve famine or the occurrence of an epidemic or natural disaster in developing countries. Humanitarian considerations may suffice to efface the apparent commercial nature of a transaction, so as to give greater prominence to its non-commercial character. On the other hand, if, in the practice of the State party to the contract, the purpose of the transaction is not relevant, then it should not be permitted to invoke the purpose test to override the commercial nature of the transac-

² *Yearbook* . . . 1980, vol. II (Part Two), pp. 141-142.

³ *Yearbook* . . . 1982, vol. II (Part Two), pp. 99-100, with commentary.

⁴ *Ibid.*

⁵ *Yearbook* . . . 1983, vol. II (Part Two), p. 35.

tion. The practice of the forum State is not in question in this context. The court is generally free to adopt any criterion or to follow the practice of its own executive branch in determining the non-commercial character of a contract by reference to its "purpose" in addition to the primary test of its "nature".

PART II
GENERAL PRINCIPLES

Article 6. State immunity⁶

Article 7. Modalities for giving effect to State immunity

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 a 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 rights, interests, properties 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 agencies or instrumentalities in respect of an act performed in the exercise of governmental 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.

Article 8. Express consent to the exercise of jurisdiction

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.

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

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

⁶ The text of article 6 provisionally adopted by the Commission at its thirty-second session, with commentary, was as follows:

"Article 6. State immunity

"1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles.

"2. Effect shall be given to State immunity in accordance with the provisions of the present articles."

(*Yearbook . . . 1980*, vol. II (Part Two), pp. 142 *et seq.*)

This article has been discussed again by the Commission and still gave rise to divergent views. The Drafting Committee has also re-examined article 6 as provisionally adopted. Although the Committee did not propose a new text, the Commission decided to reconsider the article at its future sessions. The Drafting Committee considered article 6 briefly at the thirty-seventh session, but was unable to conclude its discussion owing to lack of time.

(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.

Article 10. Counter-claims

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.

Explanatory notes

11. With the exception of article 6, the articles in part II of the draft as provisionally adopted by the Commission have given rise to comparatively fewer comments. It should be noted none the less that *article 7* as provisionally adopted still contains a cross-reference to article 6 in square brackets, which may be retained or deleted depending on the outcome of further consideration of article 6.

12. *Articles 7, 8 and 9* and the commentaries thereto were provisionally adopted by the Commission at its thirty-fourth session.⁷ *Article 10* was provisionally adopted, with commentary, at the thirty-fifth session.⁸

PART III
EXCEPTIONS TO STATE IMMUNITY

Article 12. Commercial contracts

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

2. Paragraph 1 does not apply:

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

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

Article 13. Contracts of employment

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

⁷ *Yearbook . . . 1982*, vol. II (Part Two), pp. 100 *et seq.*

⁸ *Yearbook . . . 1983*, vol. II (Part Two), pp. 22 *et seq.*

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.

Article 14. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate 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 wholly or partly 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.

Article 15. Ownership, possession and use of property

1. 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.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

Article 16. Patents, trade marks and intellectual or industrial property

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

- (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.

Article 17. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating 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.

Article 18. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating 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.

Article 19. State-owned or State-operated ships engaged in commercial service

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

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

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

- (a) a claim in respect of collision or other accidents of navigation;
- (b) a claim in respect of assistance, salvage and general average;
- (c) a claim in respect of repairs, supplies, or other contracts relating to the ship.

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

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

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

7. If in any proceedings 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.

Article 20. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a

[commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity or interpretation of the arbitration agreement,
- (b) the arbitration procedure,
- (c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Explanatory notes

13. The texts of articles 12 and 15 and the commentaries thereto were provisionally adopted by the Commission at its thirty-fifth session.⁹ The title of part III will be re-examined after consideration of all the possible exceptions.¹⁰

14. *Article 12* was adopted together with its ancillary provisions (art. 2, para. 1 (g), and art. 3, para. 2), as indicated above (paras. 9-10). It should be recalled that the exception contained in this article originally related to the wider notion of "commercial activities", but is now confined to "commercial contracts" as defined in article 2, paragraph 1 (g), and interpreted in article 3, paragraph 2. During subsequent debate in the Sixth Committee and in the Commission, the observation was made that a clearer and more pronounced connection with the territory of the forum State may have to be stipulated in order to justify the exercise of the jurisdiction of that State in regard to the commercial contract in question, for as provisionally adopted, article 12 leaves that question to the "applicable rules of private international law". The territorial link with the State of the forum could be tightened by requiring further that the contract must have been entered into or performed, or intended to be performed, in whole or in part in the territory of the forum State, or more explicitly still, that the State party to the commercial contract must have established or maintained an office in the forum State to strengthen the territorial connection necessary to justify the exercise of jurisdiction.

15. Articles 13 and 14 and the commentaries thereto were provisionally adopted by the Commission at its thirty-sixth session, together with articles 16, 17 and 18.¹¹ Each of the exceptions contained in these five articles has been the subject of comments in the Sixth Committee. These exceptions will be examined in the light of the comments and observations made during the second reading of the draft articles.

16. With regard to *article 13*, it should be noted, at this stage, that objections have increasingly been raised concerning the redundancy of the additional requirement in paragraph 1 that the employee should be "covered by the social security provisions which may be in force in that other State". The reason is that, in many countries, especially developing countries, there are, as far as is known, no social security provisions in force.

17. The exception concerning "personal injuries and damage to property" in *article 14* has been the subject of further controversy and increased interest because of the possibilities unfolded in *Letelier v. Republic of*

Chile (1980)¹² and in the incident involving the mining of the ship *Rainbow Warrior* in New Zealand in July 1985.¹³ In addition, vexatious litigation, which is undesirable and should be discouraged, is a constant danger, especially in highly developed countries where ever-widening jurisdiction is being assumed and greater opportunity provided to institute lawsuits against an organ or representative of a foreign Government in regard to liability for accidents or non-commercial torts. Even if immunity were to be upheld by the court or successfully invoked by the State, the cost of establishing immunity might be too high for a developing country and completely out of proportion to the relative merits of the cause of action, which, as a non-starter, could entail unnecessary hardships. These are practical problems and considerations that deserve the most careful attention. A relevant question to be considered in this connection is the possibility of maintaining State immunity in respect of personal injuries and damage to property resulting from an act performed in the exercise of governmental function or authority. If the liability or responsibility of a State flows from an act which may be qualified as an act *jure imperii*, it may be questioned whether the courts of the forum State offer the best means to settle the dispute. It is arguable that the requirement of exhaustion of local remedies may oblige the forum State to exercise jurisdiction and to deny immunity, thereby avoiding any implication of denial of justice, particularly if the forum State is in fact also the *locus delicti commissi*. The question may validly be asked whether the territorial or local courts should refrain from exercising jurisdiction in the case of injuries suffered by their own nationals at the hands of a foreign Government. A balanced approach is vital to a meaningful solution to this problem. Article 14 may have struck a fair and delicate balance. The second reading will hopefully throw further light on the matter after the views and reactions of Governments have been taken fully into consideration.

18. *Article 15* has been favourably received as enunciating a clear exception to State immunity based on the predominance of the *forum rei sitae*, and as a generally accepted rule on the applicability of the *lex situs* in private international law. This rule is consistent with the principle of territorial sovereignty in public international law.

19. Articles 16, 17 and 18 have not provoked as much opposition as articles 13 and 14, since in some way each of the three exceptions relates to the main exception concerning commercial contracts in article 12, or to the property exception in article 15. Besides, these three exceptions are supported by fairly consistent State practice in the respective fields.

20. *Article 16* has given rise to reservations on the part of representatives of certain developing countries

¹² United States of America, *Federal Supplement*, vol. 488 (1980), p. 665; see also H. D. Collums, "The *Letelier* case: Foreign sovereign liability for acts of political assassination", *Virginia Journal of International Law* (Charlottesville, Va.), vol. 21 (1981), p. 251.

¹³ This incident occurred following France's opposition to the activities of the organization Greenpeace, which led to the mining of the *Rainbow Warrior* and claims being made before the New Zealand courts against the French Government and its agents.

⁹ *Yearbook* . . . 1983, vol. II (Part Two), pp. 25-34 and 36-38.

¹⁰ *Ibid.*, p. 22, footnote 68.

¹¹ *Yearbook* . . . 1984, vol. II (Part Two), pp. 63 *et seq.*

anxious to clarify and remove all possible doubts concerning their freedom of choice and sovereign authority to nationalize property within their territory, and the extent of the extraterritorial effects of a nationalization decree or a measure of expropriation, especially in the context of the transfer of technology and permanent sovereignty over natural resources. While such misgivings may, to some extent, be dispelled by the text proposed for paragraph 2 of article 11, some members of the Commission still appear reluctant to give this exception their whole-hearted endorsement.

21. The exception concerning fiscal matters in *article 17* is essentially limited in nature and scope of application. It is justified by the territorial supremacy of the State of the forum in regard to the unchallenged power to tax based on territorial source of income or importation or entry of goods into the territory.

22. The exception concerning participation in companies or other collective bodies in *article 18* is based on considerations similar to those relating to commercial contracts. These considerations are distinctly traceable to the consent of the State to participate in companies or other collective bodies formed and functioning in another State.

23. Articles 19 and 20 and the commentaries thereto were provisionally adopted by the Commission at its thirty-seventh session.¹⁴ In view of their limited scope and specialized content, the exceptions contained in these articles perhaps merit some further comments.

24. With regard to *article 19*, the exception of State-owned or State-operated ships engaged in commercial service is fairly well established in practice, as confirmed by treaties and judicial decisions.¹⁵ Conventions¹⁶ also confirm the dichotomy of two categories of ships based on the nature of their service, namely government non-commercial as opposed to commercial non-governmental service. The lingering controversy relates to the formula finally to be adopted, which need not reflect this dichotomy. While there is no objection to the expression "government non-commercial service", some members of the Commission took exception to the phrase "commercial non-governmental service", holding that "non-governmental" is superfluous and carries the misleading implication that there can be "commercial governmental" service. The question that remains to be decided at a later stage, possibly during second reading, is whether or not there is a need to emphasize this dichotomy, since immunity exists for

"government non-commercial service" in any case, while it is denied in regard to "commercial service". If further clarification is necessary, it could be made in the text of the article itself or in a separate interpretative provision. On the other hand, there may be other combinations and permutations of the two sets of opposite expressions, namely governmental and non-governmental, and commercial and non-commercial, which may have no bearing on the present study.

25. The exception set out in *article 20*, as the revised title of the article indicates, relates to the "effect of an arbitration agreement" and is, as such, confined to the direct consequences of an expression of consent to submit to arbitration differences relating to commercial contracts or to civil or commercial matters. The precise scope of the article is still undecided. It is hoped, however, that the question of scope could be settled well before the start of the second reading.

B. Draft articles pending consideration by the Drafting Committee

26. The draft articles to be considered by the Drafting Committee at the Commission's thirty-eighth session include those referred to it by the Commission at previous sessions, and those which have to be considered further by the Commission before referral to the Committee (see sect. C below).

PART II

GENERAL PRINCIPLES

*Article 6. State immunity*¹⁷

Explanatory notes

27. As already indicated, the text of article 6 was provisionally adopted by the Commission at its thirty-second session. The Commission decided, however, to reconsider the article in view of the divergent opinions expressed and the revision of article 1.

28. The text of article 6 will have to reflect a corresponding change in the revised text of article 1, so that, in paragraph 1, the words "immune from the jurisdiction" must be qualified by the phrase "of the courts". Paragraph 2 has become redundant owing to the adoption of article 7. Following consultations with members of the Drafting Committee, the Special Rapporteur proposed some alternative versions of the draft article, none of which has so far been adopted. In order to facilitate further consideration by the Drafting Committee, the Special Rapporteur wishes to recall the alternative formulas suggested, which might still serve as a basis for the Committee's current work.

Article 6. State immunity

ALTERNATIVE A

A State is immune from the jurisdiction of the courts of another State to the extent and subject to the exceptions provided in the present articles.

¹⁴ *Yearbook . . . 1985*, vol. II (Part Two), pp. 60 *et seq.*

¹⁵ See the commentary to article 19, *ibid.*, pp. 61-63; see also the Special Rapporteur's sixth report, *Yearbook . . . 1984*, vol. II (Part One), pp. 30 *et seq.*, document A/CN.4/376 and Add.1 and 2, paras. 136-230.

¹⁶ See, for example, the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 1926) and the 1934 Additional Protocol (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 173 *et seq.*); and the 1982 United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 193, document A/CONF.62/122, part XII, sect. 10).

¹⁷ See footnote 6 above.

ALTERNATIVE B

A State is immune from the jurisdiction of the courts of another State subject to the exceptions (and limitations) provided in the present articles.

ALTERNATIVE C

A State is immune from the jurisdiction of the courts of another State subject to the provisions of the present articles.

29. Different terms have been used to refer to the exceptions provided for in the draft articles, such as "limitations", "conditions" or "qualifications". The term "exceptions" may not be comprehensive, but appeared to be more realistic, and therefore acceptable to many. On the other hand, the phrase "to the extent . . . provided in the present articles" was equally welcome as an added epithet or qualifying measure for the amount or degree of immunity recognized and accorded. The phrase did not appear acceptable to some. On the whole, alternative C, with the shortest qualifying phrase, "subject to the provisions of the present articles", seemed more readily acceptable, although still falling short of commanding consensus. Similar wording has been suggested: "except as otherwise provided in the present articles". Alternative C-type formulas were considered unsatisfactory by one member of the Drafting Committee, but the majority of members of the Committee would be prepared to accept the formula "subject to the provisions of the present articles", with or without specific reference to "the exceptions and/or limitations provided in the present articles".

30. Since article 6 is basic to the draft, great caution and circumspection need to be exercised to achieve satisfactory results. The Drafting Committee was very close to adopting the second alternative of the draft article as a compromise formula that could respond to the needs of all States without impairing the existing rule of international law on State immunity. The inductive method originally recommended and adopted by the Commission would seem to preclude any proposition that immunity does not exist in the practice of States in any case, or that immunity exists in every case without exceptions or qualifications. The truth appears to lie somewhere in between, and article 6 must reflect the basic principle as accurately as possible. Other approaches will not lead to any generally acceptable compromise among States belonging to various regions of the world and having varying levels of national development.

PART III

EXCEPTIONS TO STATE IMMUNITY

Article 11. Application of exceptions in the present part

[Revised text]

1. The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.

2. Nothing in the present part shall prejudice the question of extraterritorial effects of measures of nationalization taken by a State in the exercise of governmental authority with regard to property, movable or immovable, industrial or intellectual, which is situated within its territory.

Explanatory notes

31. The only article in part III pending before the Drafting Committee is article 11, which is designed to preface the exceptions to State immunity set out in article 12 to 20. The revised text of paragraph 1 of this article was submitted by the Special Rapporteur following the discussion in the Commission at its thirty-fourth session.¹⁸ It was intended to emphasize the residual character of the exceptions provided for in part III. It has since become apparent that, if article 11 is to be retained in its present form, the title should be changed accordingly. As it now stands, article 11 does not seek to define the scope of part III; rather, general allowance is made for the operation of certain conditions in the application of the exceptions provided for in part III, depending on the agreement of the parties, particularly the condition of reciprocity and other conditions as may be mutually agreed. The retention of article 11 no longer depends on the final decision concerning article 6.

32. Paragraph 2 was added after the provisional adoption of draft article 16 at the thirty-sixth session;¹⁹ it was generally endorsed by the Commission and was referred to the Drafting Committee for further consideration.²⁰ The Drafting Committee is invited to consider the propriety and usefulness of such a paragraph, independently of where this provision should be contained, i.e. in article 11 or in some other article near the beginning or the end of the draft articles.

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY
FROM ENFORCEMENT MEASURES*Article 21. Scope of the present part*

The present part applies to the immunity of one State in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State.

Article 22. State immunity from enforcement measures

A State is immune without its consent in respect of its property, or property in its possession or control or in which it has an interest, from judicial measures of constraint upon the use of such property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgment or any other debts.

Article 23. Effect of express consent to enforcement measures

1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint upon the use of its property, or property in its possession or control or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the exercise of judicial measures of constraint upon the property, which it has specifically identified for that purpose:

- (a) by international agreement; or
- (b) in a written contract; or
- (c) by a declaration before the court in a specific case.

¹⁸ *Yearbook* . . . 1982, vol. II (Part Two), p. 99, footnote 237.

¹⁹ *Yearbook* . . . 1984, vol. II (Part Two), p. 59, footnote 200.

²⁰ *Ibid.*, p. 69, para. (10) of the commentary to article 16.

2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present articles, for which a separate waiver is required.

Article 24. Types of property generally immune from enforcement measures

1. Unless otherwise expressly and specifically agreed by the State concerned, no judicial measure of constraint by a court of another State shall be permitted upon the use of the following property:

(a) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international and regional organizations protected by inviolability; or

(b) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of a State; or

(c) property of a central bank held by it for central banking purposes and not allocated to any specific payments; or

(d) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

(e) public property forming part of national archives of a State or of its distinct national cultural heritage.

2. In no circumstances shall any property listed in paragraph 1 be regarded as property used or intended for use for commercial and non-governmental purposes.

Explanatory notes

33. The discussion on the draft articles of part IV at the thirty-seventh session²¹ will still be vivid in the minds of members of the Commission and the Drafting Committee, and therefore it is not necessary to recall it at this point. The above draft articles are the revised texts submitted by the Special Rapporteur²² in the light of the comments and observations made at that session before their referral to the Drafting Committee. They seem to require no additional restructuring in the light of the further comments and statements made in the Sixth Committee at the fortieth session of the General Assembly. The Special Rapporteur continues to have a flexible attitude as regards the number of articles to include in this part, which could vary between two and four.

C. Draft articles pending further consideration by the Commission

[Revised and updated texts]

34. The remaining articles of part I and part V of the draft have been orally presented to the Commission, and some of them have been the subject of preliminary discussion. It is expected that it will be possible to refer them to the Drafting Committee after the discussion at the thirty-eighth session, so that the consideration of the draft articles on first reading can be completed before the expiry of the term of office of the current members of the Commission. The texts of these draft articles are therefore reproduced below, accompanied by explanatory notes on their status to help bring the draft up to date in view of recent developments.

²¹ See *Yearbook* . . . 1985, vol. II (Part Two), pp. 53 *et seq.*, paras. 216-247.

²² For the texts originally submitted by the Special Rapporteur, *ibid.*, pp. 53-54, footnotes 191 to 194.

PART I
INTRODUCTION

Article 2. Use of terms

1. For the purposes of the present articles:

(a) "court" . . . [adopted]

(a) "immunity" . . . [withdrawn]

(b) "jurisdictional immunities" . . . [withdrawn]

(c) "territorial State" . . . [withdrawn]

(d) "foreign State" . . . [withdrawn]

(e) "State property" means property, rights and interests which are owned, operated or otherwise used by a State according to its internal law; [revised]

(f) "trading or commercial activity" . . . [withdrawn]

(g) "commercial contract" . . . [adopted]

(g) "jurisdiction" . . . [withdrawn]

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be ascribed to them in the internal law of any State or by the rules of any international organization.

Article 3. Interpretative provisions

1. In the context of the present articles, unless otherwise provided:

(a) the expression "State" includes:

(i) the sovereign or head of State;

(ii) the central Government and its various organs or departments;

(iii) political subdivisions of a State in the exercise of its governmental authority; and

(iv) agencies or instrumentalities acting as organs of a State in the exercise of its governmental authority, whether or not endowed with a separate legal personality and whether or not forming part of the operational machinery of the central Government; [revised]

(b) the expression "judicial functions" includes:

(i) adjudication of litigation or dispute settlement;

(ii) determination of questions of law and of fact;

(iii) administration of justice in all its aspects;

(iv) order of interim and enforcement measures at all stages of legal proceedings; and

(v) such other administrative and executive functions as are normally exercised in connection with, in the course of, or pursuant to a legal proceeding by the judicial, administrative or police authorities of a State. [revised]

2. . . . [adopted]

Article 4. Jurisdictional immunities not within the scope of the present articles

The fact that the present articles do not apply to jurisdictional immunities accorded or extended to:

(i) diplomatic missions under the Vienna Convention on Diplomatic Relations of 1961,

(ii) consular missions under the Vienna Convention on Consular Relations of 1963,

(iii) special missions under the Convention on Special Missions of 1969,

(iv) the representation of States under the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 1975,

(v) permanent missions or delegations of States to international organizations in general,

(vi) internationally protected persons under the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, [added]

shall not affect:

(a) the legal status and extent of jurisdictional immunities recognized and accorded to such missions and representation of States or

internationally protected persons under the above-mentioned conventions;

(b) the application to such missions or representation of States or international organizations, or internationally protected persons, of any of the rules set forth in the present articles to which they would also be subject under international law independently of the articles; [revised]

(c) the application of any of the rules set forth in the present articles to States and international organizations non-parties to the articles, in so far as such rules may have the legal force of customary international law independently of the articles.

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which the relations between States would be subject under international law independently of the articles, the present articles apply only to the granting or refusal of jurisdictional immunities to States and their property after the entry into force of the said articles as regards States parties thereto or States having declared themselves bound thereby. [revised]

Explanatory notes

35. The above articles of part I of the draft were submitted to the Commission at its thirty-second session.²³ Since its work on the topic was only at its initial stage, the Commission decided to postpone discussion of the substance of definitional problems, and of the drafting and interpretative problems resulting therefrom.²⁴ As has been recalled (para. 9 above), the Commission considered it useful, at its thirty-fifth session, to adopt provisionally the texts of certain provisions of articles 2 and 3²⁵ in conjunction with article 12.²⁶ During its previous sessions, the Commission has had occasion to discuss the substance of certain provisions of articles 2 to 5 at various times in connection with its consideration of the draft articles of parts III and IV. Thus very few explanatory notes are required at this late stage.

36. The number of terms to be defined has been reduced in the revised text of draft article 2. The terms "court" (para. 1 (a)) and "commercial contract" (para. 1 (g)) have been provisionally adopted. Most other terms originally proposed have been withdrawn by the Special Rapporteur, either because they no longer appeared necessary ("immunity" and "jurisdictional immunities"), or because other, more straightforward terms were adopted: thus the expressions "territorial State" and "foreign State" have been replaced by "one State" and "another State", respectively. The expression "trading or commercial activity" has been replaced by the more precise term "commercial contract", while the term "jurisdiction" is replaced by "court". The notion of "State property" has to be expanded to cover not only the relation to the State through ownership, but also the connection through operation and use, for it has become more and more apparent that the test of the nature of the use is a valid one for upholding or re-

jecting immunity in respect of property in use by the State.

37. The interpretative provisions in draft article 3, paragraph 1 (a) and (b), have been maintained and slightly revised and updated. Although there is no need to define the term "State", it may be necessary to enumerate the types of body that could be identified with or equated to the State for the purposes of immunity. Consideration of part IV of the draft, on enforcement measures, has led to the slight revision of subparagraph (b) on "judicial functions", since, for present purposes, the provision should cover provisional measures as well as enforcement measures, and indeed preventive or other measures that could be ordered by the competent authorities in connection with a legal proceeding before, during or even after the trial. Paragraph 2 of article 3 was provisionally adopted by the Commission in connection with the exception concerning commercial contracts (see para. 10 above).

38. Draft article 4 has been revised and updated by adding a reference to a new category, namely "internationally protected persons", including diplomatic agents. This provides a necessary clarification regarding the scope and effect of application of the draft articles in relation to the existing rules of international law and the obligations established by previous conventions concerning certain aspects of jurisdictional immunities of States and their property.

39. Draft article 5 on non-retroactivity merely confirms the usage of recent conventions, the intention being not to override or undo past relations, or a situation that is a *fait accompli*, or an acquired or historic right. Thus, with regard to temporal application, the point of departure is the date of entry into force of the articles, without retroactive effect, which could bring about undesirable and unnecessary complications.

PART V

MISCELLANEOUS PROVISIONS

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(a) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf of the State for governmental purposes; or

(b) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(c) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum

²³ *Yearbook* . . . 1980, vol. II (Part Two), pp. 138 *et seq.*, paras. 111-121.

²⁴ *Ibid.*, p. 141, para. 122.

²⁵ See the commentaries to paragraph 1 (g) of article 2 and to paragraph 2 of article 3, *Yearbook* . . . 1983, vol. II (Part Two), pp. 34-36.

²⁶ See paragraph (10) of the commentary to article 12, *ibid.*, p. 26; and the commentary to paragraph 1 (a) of article 2, *Yearbook* . . . 1982, vol. II (Part Two), p. 100.

State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or interdicting it to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate for reasons of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

Explanatory notes

40. The articles constituting part V of the draft were submitted to the Commission at its thirty-seventh session, but, due to lack of time, it was not able to consider them, and confined its discussion to draft articles 19 and 20 of part III and draft articles 21 to 24 of part IV.²⁷

²⁷ *Yearbook . . . 1985*, vol. II (Part Two), pp. 52-53, para. 213.

Some members of the Commission commented on certain draft articles of part V, which is to be discussed fully at the thirty-eighth session.

41. The Special Rapporteur will have a further opportunity to clarify some of the questions raised concerning the necessity and usefulness of part V, which will virtually complete the substantive articles on the topic. Draft *article 25* appeared absolutely necessary for historical and practical reasons. One member of the Commission pointed out that centuries of State practice with regard to sovereign immunities could not be erased from the history of legal developments. Besides, the immunities of diplomatic agents and consular officers have been given separate treatment in two distinct conventions.²⁸ Yet this article is the only one proposed to deal with this other category of immunities, accorded to personal sovereigns and heads of State, which, not unlike diplomatic immunities, comprise the two dimensions *ratione materiae* and *ratione personae*, with appropriate norms based on the consistent practice of States.

42. Draft *article 26* deals with procedural practice concerning service of process and the question of judgment in default of appearance, while draft *article 27* deals with procedural privileges as necessary ramifications of jurisdictional immunities, including exemption from unenforceable orders, from certain fines or penalties, and from security for costs. Draft *article 28* is a residual provision providing a measure of latitude for readjustments of the extent and quality of treatment to be accorded to States in accordance with treaties, conventions or agreements in force between them, in conformity with the standard practice of the States concerned, having regard to considerations of reciprocity.²⁹

²⁸ 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations.

²⁹ See the Special Rapporteur's seventh report, *Yearbook . . . 1985*, vol. II (Part One), pp. 44 *et seq.*, document A/CN.4/388, paras. 118-135.

CHAPTER II

Additional parts

43. The 28 articles submitted by the Special Rapporteur in his seven previous reports appear to have virtually completed the substantive and procedural provisions to be included in the draft articles on jurisdictional immunities of States and their property. The only two outstanding questions are those mentioned in the introductory note (para. 5 above). These relate to the possibility of including dispute-settlement provisions in the draft, and to the need for final provisions. For practical purposes, these two questions could form the subject-matter of additional articles to be incorporated ultimately in the draft as part VI (Settlement of disputes) and part VII (Final provisions).

A. Settlement of disputes

44. The possibility of including one or more dispute-settlement provisions in part VI of the draft is based on the existence of similar provisions in codification conventions prepared by the Commission, such as the 1969 Vienna Convention on the Law of Treaties (art. 66), the 1978 Vienna Convention on Succession of States in Respect of Treaties (arts. 84 and 85) and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (art. 66). On the other hand, it should be noted that not every recent conven-

tion contains provisions on dispute settlement. An interesting example is the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts. Moreover, the procedure for arbitration and conciliation established by article 66 of the 1969 Vienna Convention, like the corresponding provision of the 1986 Vienna Convention, concerns only one specific category of disputes, relating to the interpretation of what constitutes a peremptory norm of general international law (*ius cogens*).

45. For the topic under consideration, there are two possibilities. There appears to be no harm in devoting a part of the draft to the settlement of disputes, since such provisions have become increasingly fashionable in recent works of codification. This part could cover disputes concerning the application or interpretation of the articles in general, or be confined to specific aspects of the topic, such as the application of one of the recognized exceptions, whether or not on the basis of reciprocity.

46. On the other hand, the need for a dispute-settlement clause may depend on the substance of the draft articles. In the present context, State immunity is relative in the sense that consent or waiver by the State is always possible at any time. The exercise of jurisdiction by a court may be either obligatory, as in some civil-law systems, or discretionary, as is generally the case, not only on the ground of jurisdictional immunity, but on more substantive grounds such as "act of State", *forum non conveniens* or lack of personal or subject-matter jurisdiction. In the practice of States, which is not limited to the judiciary alone and is often not uninfluenced by the views and decisions of the executive or by the adoption of statutes by the legislature, once State immunity is recognized and applied by the court there can be no dispute. Indeed, the question of jurisdictional immunity may be said to have been settled primarily by the competent court of the forum State to the satisfaction of the foreign State by upholding its jurisdictional immunity. Should the court reject immunity and exercise jurisdiction in a proceeding affecting the interests of another State, there is a possibility of a secondary or consequential dispute between the forum State and the State whose immunity has been rejected. Experience has shown that, in such a situation, which is not uncommon, the State may protest against the decision of the court of another State. However, such protests have never culminated in any dispute involving questions of jurisdictional immunity in the annals of international litigation. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the ICJ did touch on an analogous issue, namely the inviolability of diplomatic premises and archives and of consular offices, as well as the personal inviolability of diplomatic agents and consular officers of the United States of America in Iran.³⁰ But even that case is not directly relevant, since the dispute did not arise out of the exercise of jurisdiction by a court giving rise to a claim of jurisdictional immunity. It concerned mainly the duty of protection by the receiving State, or the inviolability of diplomatic premises and of the staff of the embassy and consulate.

47. Apart from this case, there are no other instances of disputes between States in this field or related fields. Thus there can be a dispute only if a court decides to exercise jurisdiction in proceedings involving another State. Where jurisdiction has been exercised, only rarely have the States refused jurisdictional immunities taken any measure or step other than mere presentation of a protest.³¹ In the light of past practice, the Commission may not find it absolutely necessary to include dispute-settlement provisions in the draft articles. The Special Rapporteur would not himself propose the inclusion of such a part, having regard to the paucity of instances involving differences or disputes between States in respect of the exercise of jurisdiction by a competent court or non-application or refusal of jurisdictional immunity. However, one may wish to guard against the emergence of a new trend which could entail not only the exercise of jurisdiction in proceedings involving the interests of another State in a dispute, but also seizure, attachment or other enforcement measures by way of execution against its property.³² In order to avoid or discourage vexatious litigation, there may be a growing need to devote a part of the draft to dispute settlement, which might have the salutary effect of not encouraging courts readily to allow provisional or enforcement measures against State property, or property in use by a State or in which a State has an interest. If the Commission therefore considers it expedient that such a part should be included in the draft articles, it is submitted that the appropriate precedents may be found in recent conventions, for example in part VI of the 1978 Vienna Convention on Succession of States in Respect of Treaties. The articles of part VI of the draft may be worded accordingly.

PART VI

SETTLEMENT OF DISPUTES

Article 29. Consultation and negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they shall, upon the request of any of them, seek to resolve it by a process of consultation and negotiation.

Article 30. Conciliation

If the dispute is not resolved within six months of the date on which the request referred to in article 29 has been made, any party to the dispute may submit it to the conciliation procedure specified in the annex to the present articles by submitting a request to that effect

³¹ See, for example, *Société Le Gostorg et représentation commerciale de l'URSS v. Association France-Export* (1926) (Sirey, *Recueil général des lois et des arrêts*, 1930 (Paris), part 1, p. 49, and note by J. P. Niboyet, pp. 49-50; *Dalloz périodique*, 1929 (Paris), part 1, p. 75, note by R. Savatier; *Annual Digest of Public International Law Cases, 1925-1926* (London), vol. 3 (1929), p. 174, case No. 125); and *A. M. Qureshi v. USSR* (1981) (*All Pakistan Legal Decisions* (Lahore), vol. XXXIII (1981), p. 377).

³² See the judgment of the PCIJ of 15 June 1939 in the *Société commerciale de Belgique (Socobelge)* case, *P.C.I.J., Series A/B*, No. 78, p. 160.

³⁰ Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

to the Secretary-General of the United Nations and informing the other party or parties to the dispute of the request.

Article 31. Judicial settlement and arbitration

Any State at the time of signature or ratification of the present articles or accession thereto or at any time thereafter may, by notification to the depositary, declare that, where a dispute has not been resolved by the application of the procedures referred to in articles 29 and 30, that dispute may be submitted for a decision to the International Court of Justice by a written application of any party to the dispute, or in the alternative to arbitration, provided that the other party to the dispute has made a like declaration.

Article 32. Settlement by common consent

Notwithstanding articles 29, 30 and 31, if a dispute regarding the interpretation or application of the present articles arises between two or more Parties to the present articles, they may by common consent agree to submit it to the International Court of Justice, or to arbitration, or to any other appropriate procedure for the settlement of disputes.

Article 33. Other provisions in force for the settlement of disputes

Nothing in articles 29 to 32 shall affect the rights or obligations of the Parties to the present articles under any provisions in force binding them with regard to the settlement of disputes.

48. A simplified version in a single provision could be included instead. Further examples are provided by optional protocols concerning the compulsory settlement of disputes, such as the Optional Protocols to the 1961 Vienna Convention on Diplomatic Relations,³³ the 1963 Vienna Convention on Consular Relations³⁴ and the 1969 Convention on Special Missions.³⁵ An annex, to be included at the end of the draft articles, could be worded as follows:

ANNEX

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 30, the Secretary-General shall

³³ United Nations, *Treaty Series*, vol. 500, p. 241.

³⁴ *Ibid.*, vol. 596, p. 487.

³⁵ United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 139.

bring the dispute before a conciliation commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the appointment of the last of them, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any Party to the present articles to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

B. Final provisions

49. The final provisions do not call for detailed discussion, for any of the more recent codification conventions could constitute a model. For example, part VII of the 1978 Vienna Convention on Succession of States in Respect of Treaties could be followed. The text below could provide a working basis for the Commission's consideration.

PART VII FINAL PROVISIONS

Article 34. Signature

The present articles shall be open for signature by all States until . . . at . . . , and subsequently, until . . . , at United Nations Headquarters in New York.

Article 35. Ratification

The present articles are subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 36. Accession

The present articles shall remain open for accession by any State. The instruments of accession shall be

deposited with the Secretary-General of the United Nations.

Article 37. Entry into force

The present articles shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession.

Article 38. Authentic texts

The original of the present articles, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

50. The same purpose may be achieved by incorporating the final provisions into a single final article containing several paragraphs covering all the points that need to be included in the final clauses. On the other hand, consideration of the question of final provisions or final clauses could be postponed until the second reading or until the plenipotentiary conference is convened. Thus the draft articles on most-favoured-nation clauses³⁶ prepared by the Commission contained no final provisions or provisions on the settlement of disputes.

³⁶ Text adopted by the Commission at its thirtieth session, *Yearbook . . . 1978*, vol. II (Part Two), pp. 16 *et seq.*

CHAPTER III

Concluding note

51. This chapter concludes the eighth and final report on jurisdictional immunities of States and their property by the Special Rapporteur for the first reading of the draft articles submitted. It does not purport to draw conclusions—whether or not they may be justified by the eight reports—from the study undertaken, which must now draw to a close. Nevertheless, the draft articles as a whole, as structured, appear to lend themselves to some suggestions or even lessons to be learned, not by the imposition of imperative norms, nor by the deduction of dogmatic principles, but more realistically by dint of an empirical and pragmatic approach ensuring an inductive appreciation of the practical problems encountered and a thorough understanding of the delicate and intricate nature of the dilemmas with which the Commission is inevitably confronted.

52. As a balanced point of departure, a general position should obtain with a reasonable measure of consensus on the part of members of the Commission, having adopted an inductive method, to the effect that State immunity is a general rule which, being essentially relative, is applicable subject to a variety of exceptions based on, or inherently traceable to, consent, either in essence or in some other admissible form. This position may be contrasted with another proposition, based on an equally fundamental principle of international law, which recognizes the territorial sovereignty of each

State. From this point of view, State immunity may be considered as an exception, albeit a universally admitted one, to the principle of jurisdiction founded on the territorial sovereignty of every independent State. Exceptions to the principle of territorial sovereignty should, as such, be restrictively construed and applied and, as a matter of evidence, might have to be established in each case. Faced with this basic dilemma, the Commission appears favourably inclined to adopt the proposition that, although immunity is an exception to the more basic rule of jurisdiction, it has nevertheless become firmly established as a general principle of law, provided that certain conditions are fulfilled. This general proposition could be justified on different grounds in view of differing legal theories, based on contradictory and varying ideologies in the vastly diverse fields of international activities in which States and individuals are currently engaged.

53. It appears to be of paramount importance that there be a clear understanding and no disagreement on the first general proposition, otherwise there would be no point in proceeding any further. The danger is not far-fetched that absence of such an understanding or persistence of disagreement on this initial proposition would plunge the international community further into a sea of turmoil. The principle of immunity has been proven to be firmly ensconced in the practice of States

since the nineteenth century, following the vivid picture painted of it for the benefit of succeeding generations by Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812).³⁷ It is based squarely, though not exclusively, on sovereignty, but more precisely on the sovereign equality of States. The circumstances giving rise to State immunity originally were also clearly circumscribed and categorized as: (a) the exemption of the person of the sovereign from arrest and detention;³⁸ (b) the immunity which all civilized nations allow to foreign ministers (diplomatic agents);³⁹ (c) the implied cession of a portion of territorial jurisdiction when the sovereign or the State allows the troops of a foreign prince to pass through his dominion.⁴⁰ This principle was later clearly stated as follows:

The principle . . . is that, as a consequence of the absolute independence of every sovereign authority, . . . each and every [State] declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use . . .⁴¹

54. This principle, which is often expressed in the Latin maxim *par in parem non habet imperium* or *jurisdictionem*, was rendered in another legal system as follows:

Since the independence of States one from another is among the most widely acknowledged principles of international law; since it follows from this principle that Governments cannot, in respect of the commitments into which they enter, be subject to the jurisdiction of a foreign State; since the right of jurisdiction which every Government possesses over disputes arising out of its own orders and decrees is inherent in its sovereign authority and cannot be arrogated by another Government without risking a decline in the relations between them; . . .⁴²

55. The question has been raised whether the Commission's examination of State practice, having been confined initially to the case-law of a handful of European nations, was sufficiently exhaustive to warrant the establishment of the rule of State immunity. In response to this query, it was pointed out that the study covered all available reported decisions of every State on the topic and was not confined to any particular geographical regions or systems. The principles of State immunity were firmly established in the nineteenth century before the advent of socialism, State trading, or the emergence of new nations in Asia, Africa and the Americas.

56. However, it is significant to note that, even at the very beginning, the rule of State immunity was never expressed in absolute terms. The doctrine of "absolute immunity" has never found general acceptance. Indeed, the rule of State immunity was applied from the very

start subject to limitations, qualifications and exceptions, especially in the practice of Italy, Belgium and Egypt,⁴³ and in a very special way in France.⁴⁴

57. The adoption of an inductive approach has enabled the Special Rapporteur and the Commission to proceed on the solid basis of a general rule of State immunity, subject to exceptions in specified areas which are limited in scope and application. The Commission could have adopted a different approach, for example by considering simultaneously and on an equal footing the rule of State immunity as well as the exceptions to it, which could be regarded as the rules of non-immunity. But it did not. Thus, guided by the inductive approach, the Commission was able to formulate the draft articles as currently structured.

58. The only outstanding question appears to relate to the degree of readiness of the Commission to respond to the exigences of time. The topic was considered ripe for codification even during the time of the League of Nations, and this assessment has been reconfirmed time and again by the Commission. The time has come for the Commission to meet the challenge directly by not deferring the completion of its consideration of the draft on first reading. Eight years constitute a reasonable period of time within which to complete this part of the Commission's important task of codification of the topic. The sense of urgency is evident and the danger of retrogression presents a frightening prospect. The sooner the draft articles are finalized and adopted, the sooner greater certainty can be restored and problems resolved. The developing countries stand to benefit from the adoption of rules of international law on this topic perhaps appreciably more than others. The advanced countries with sophisticated legal systems might be prepared to wait, since any further pause in international efforts would afford greater opportunities to evolve yet more restrictive practices in the face of eroding State immunity at the expense of the vast majority of developing countries. More legislation could be expected from developed countries tending to impose yet further limitations on the existing restrictive doctrine of State immunity. In the absence of an agreed set of draft articles, further restrictions are encouraged, with further possibilities not only to exercise jurisdiction affecting foreign States, but also to adopt enforcement measures against their property or property in use by them or in which they have an interest.

59. The socialist countries of Europe and possibly other regions have overcome the obstacle of State immunity in their transnational commercial transactions by the formation of trading corporations with distinct legal personality, thus avoiding the confrontation of sovereign equality. The only remaining problem is one of educating non-socialist partners of the utter folly and futility of instituting proceedings against socialist States *eo nomine* instead of bringing actions against the trading corporations in question, or indeed the trade representatives or delegations accredited for that purpose. Developing countries, on the other hand, cannot

³⁷ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 116.

³⁸ *Ibid.*, p. 137.

³⁹ *Ibid.*, p. 138.

⁴⁰ *Ibid.*, p. 139. This applies also to national ships of war authorized to enter a port of a friendly Power (p. 143).

⁴¹ Opinion of Lord Justice Brett in *The "Parlement belge"* (1880) (United Kingdom, *The Law Reports, Probate Division*, vol. V (1880), pp. 214-215).

⁴² Judgment of the French Cour de cassation in *Gouvernement espagnol v. Casaux* (1849) (Daloz, *Recueil périodique et critique de jurisprudence*, 1849 (Paris), part 1, p. 9; Sirey, *Recueil général des lois et des arrêts*, 1849 (Paris), part 1, p. 93).

⁴³ See *Yearbook . . . 1983*, vol. II (Part Two), pp. 28-29, footnotes 97, 98 and 99 to paragraph (24) of the commentary to article 12.

⁴⁴ *Ibid.*, p. 30, footnote 103 to paragraph (25) of the commentary.

afford the luxury either of assimilating their trading enterprises completely to private companies, or of implicitly waiving immunities in general by the creation of separate legal entities for the specific purposes of international trade. The cries of developing countries should be heard in their own unorchestrated voice, undistorted by outside prompting. A compromise solution has to be found and the just and balanced measure of immunity recognized for States, especially developing nations, without sacrificing the principles of sovereignty and dignity, in order to ensure their economic survival. The problem is grave and genuine and requires immediate attention. The Commission is called upon at its thirty-eighth session to face the challenging task of reaching an agreement on the propositions of law that must clearly

be just and equitable as well as sustainable and accepted by all States of whatever size, ideology or stage of economic development. Special consideration should be given to the need to preserve the dignity, equality and sovereignty of developing countries in their struggle for survival.

60. The Special Rapporteur reiterates his implicit trust in the wisdom of the Commission and the reasonable and flexible attitude of its members, and expresses the hope that a timely conclusion of the first reading of the draft articles is not beyond reach. It is on this note of cautious optimism based on the realities of international life that this series of reports may now be brought to a close.

STATUS OF THE DIPLOMATIC COURIER AND THE DIPLOMATIC BAG NOT ACCOMPANIED BY DIPLOMATIC COURIER

[Agenda item 4]

DOCUMENT A/CN.4/400

Seventh report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur

[Original: English]
[2 April 1986]

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NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	United Nations, <i>Treaty Series</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	<i>Ibid.</i> , vol. 1155, p. 331.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.

Introduction

1. The present report is the seventh in a series of reports on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier submitted by the Special Rapporteur to the International Law Commission since 1980.¹ With the submission of the sixth report, a set of 43 draft articles had been presented by the Special Rapporteur, completing the series of 42 draft articles submitted in his previous reports.

2. By the end of its thirty-seventh session, in 1985, the Commission had provisionally adopted articles 1 to 27 on first reading, on the basis of draft articles 1 to 35 submitted by the Special Rapporteur. The remaining seven draft articles (arts. 36, 37 and 39 to 43) had been considered by the Commission and referred to the Drafting Committee, but, due to pressure of work, the Committee was unable to consider them before the end of that session.²

¹ For further details on the consideration of the topic by the Commission up to 1985, see:

(a) The reports of the Commission: (i) on its thirty-first session, *Yearbook . . . 1979*, vol. II (Part Two), pp. 170 *et seq.*, chap. VI; (ii) on its thirty-second session, *Yearbook . . . 1980*, vol. II (Part Two), pp. 162 *et seq.*, chap. VIII; (iii) on its thirty-third session, *Yearbook . . . 1981*, vol. II (Part Two), pp. 159 *et seq.*, chap. VII; (iv) on its thirty-fourth session, *Yearbook . . . 1982*, vol. II (Part Two), pp. 112 *et seq.*, chap. VI; (v) on its thirty-fifth session, *Yearbook . . . 1983*, vol. II (Part Two), pp. 44 *et seq.*, chap. V; (vi) on its thirty-sixth session, *Yearbook . . . 1984*, vol. II (Part Two), pp. 18 *et seq.*, chap. III; (vii) on its thirty-seventh session, *Yearbook . . . 1985*, vol. II (Part Two), pp. 28 *et seq.*, chap. IV.

(b) The previous reports of the Special Rapporteur: (i) preliminary report, *Yearbook . . . 1980*, vol. II (Part One), p. 231, document A/CN.4/335; (ii) second report, *Yearbook . . . 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2; (iii) third report, *Yearbook . . . 1982*, vol. II (Part One), p. 247, document A/CN.4/359 and Add.1; (iv) fourth report, *Yearbook . . . 1983*, vol. II (Part One), p. 62, document A/CN.4/374 and Add.1-4; (v) fifth report, *Yearbook . . . 1984*, vol. II (Part One), p. 72, document A/CN.4/382; (vi) sixth report, *Yearbook . . . 1985*, vol. II (Part One), p. 49, document A/CN.4/390.

² *Yearbook . . . 1985*, vol. II (Part Two), p. 30, paras. 175-176.

3. It is hoped that the Commission may complete the first reading of the entire set of draft articles at its thirty-eighth session, in accordance with its decision at the previous session on its programme of work,³ as approved by the General Assembly.⁴

4. In submitting the complete set of draft articles, the Special Rapporteur felt that it would not be appropriate at the present stage to propose further provisions by way of final clauses or on the settlement of disputes. Guided by the established practice of the Commission on that matter, he thought that such proposals should be examined only in conjunction with a decision concerning the final form to be given to the draft.

5. The main objective of the present report is to update the current status of the draft articles and present a brief analytical survey of the comments and observations made thereon in the Sixth Committee at the fortieth session of the General Assembly. Priority will be given to observations relating to the remaining seven draft articles, which are still before the Drafting Committee, in the hope that they may be provisionally adopted by the Commission on first reading at its thirty-eighth session before the conclusion of the term of office of its current membership.

6. In order to facilitate the completion of the first reading of the draft articles, the texts of articles 1 to 27 already provisionally adopted by the Commission are reproduced below for greater clarity. A brief account follows of the comments and observations made in the Sixth Committee on these and on the remaining draft articles 36, 37 and 39 to 43, with revised texts being introduced for some of these latter draft articles, as appropriate.

³ *Ibid.*, p. 72, paras. 298-299.

⁴ General Assembly resolution 40/75 of 11 December 1985, paras. 3-4.

I. Draft articles provisionally adopted so far by the Commission

A. Texts of the draft articles adopted by the Commission

7. Draft articles 1 to 27 already provisionally adopted by the Commission on first reading are derived from articles 1 to 35 of the series of draft articles submitted by the Special Rapporteur in his previous reports. The total number of these articles was reduced as a result of the deletion of some (arts. 9, 12, 22, 26 and 27) and the merging of others (arts. 15, 18 and 19).⁵

8. The texts of articles 1 to 27, provisionally adopted by the Commission on first reading at its thirty-fifth, thirty-sixth and thirty-seventh sessions, are reproduced below.⁶

Article 1. Scope of the present articles

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

Article 2. Couriers and bags not within the scope of the present articles

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

- (a) the legal status of such couriers and bags;
- (b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

Article 3. Use of terms

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

- (a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

⁵ See the Special Rapporteur's sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), para. 6 and footnotes 3 and 4.

⁶ For the commentaries to articles 1 to 7, provisionally adopted by the Commission at its thirty-fifth session, see *Yearbook . . . 1983*, vol. II (Part Two), pp. 53 *et seq.* For the commentary to article 8, provisionally adopted at the thirty-fifth and thirty-sixth sessions, and the commentaries to articles 9 to 17, 19 and 20, provisionally adopted at the thirty-sixth session, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 45 *et seq.* For the commentary to paragraph 2 of article 12 (from which paragraph the Commission decided at its thirty-seventh session to remove the square brackets appearing in the text provisionally adopted at the thirty-sixth session) and the commentaries to articles 18 and 21 to 27, provisionally adopted at the thirty-seventh session, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 39 *et seq.*

(2) "diplomatic bag" means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

- (a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;
- (c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or
- (d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

- (a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;
- (b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

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

Article 4. Freedom of official communications

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

Article 5. Duty to respect the laws and regulations of the receiving State and the transit State

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

Article 6. Non-discrimination and reciprocity

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

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

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

Article 7. Documentation of the diplomatic courier*

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

Article 8. Appointment of the diplomatic courier*

Subject to the provisions of articles 9 and 12, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

Article 9. Nationality of the diplomatic courier

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

Article 10. Functions of the diplomatic courier

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

Article 11. End of the functions of the diplomatic courier

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 12, it refuses to recognize the person concerned as a diplomatic courier.

Article 12. The diplomatic courier declared persona non grata or not acceptable

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.

* Provisional numbering.

Article 13. Facilities

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

Article 14. Entry into the territory of the receiving State or the transit State

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

Article 15. Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.

Article 16. Personal protection and inviolability

The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Article 17. Inviolability of temporary accommodation

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.

2. The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.

3. The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

Article 18. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Article 19. Exemption from personal examination, customs duties and inspection

1. The diplomatic courier shall be exempt from personal examination.

2. The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

Article 20. Exemption from dues and taxes

The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

Article 21. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (b), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

Article 22. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Article 23. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

Article 24. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

Article 25. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

Article 26. Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

Article 27. Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

B. Comments and observations made in the Sixth Committee of the General Assembly on the draft articles adopted by the Commission

9. At the fortieth session of the General Assembly, a number of representatives in the Sixth Committee made general comments on the topic as a whole and on specific draft articles provisionally adopted by the Commission or proposed by the Special Rapporteur.⁷

10. Note was taken with satisfaction of the substantial progress made by the Commission in its work on the topic with a view to elaborating an appropriate legal instrument. Several representatives expressed the hope that the Commission would complete the first reading of the draft articles at its thirty-eighth session, and some of them considered that the topic should therefore be accorded priority during this session.⁸

⁷ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. D.

⁸ *Ibid.*, paras. 247 and 259.

11. It was also indicated that the Commission's task was to consolidate the provisions of the existing conventions codifying diplomatic and consular law;⁹ to unify the rules so as to ensure similar treatment for all diplomatic couriers and bags; and to develop rules to solve practical problems not covered by the existing conventions.¹⁰

12. Some representatives considered that further efforts should be made to simplify the texts of the draft articles, adhering to the principle of functional necessity and maintaining a proper balance between the sending State's interest in the confidentiality and safety of its communications, on the one hand, and the security and other legitimate interests of receiving or transit States, on the other.¹¹

13. Most of the comments made on draft articles provisionally adopted by the Commission acknowledged the improvements made and expressed general support. At the same time, it was pointed out that there was a need in some instances for further drafting ameliorations in order to achieve greater clarity and precision. It was hoped that these observations would be taken into consideration during the second reading of the draft articles.

14. Some representatives remained unconvinced of the need to provide for the inviolability of the temporary accommodation of the diplomatic courier. They thought that the provisions of article 17 on this matter were not justified and could give rise to legal and practical problems.¹² The Special Rapporteur has on several occasions elaborated on the functional necessity of providing for adequate protection of the temporary accommodation of the courier.¹³

15. Most of the comments made were on article 18 (Immunity from jurisdiction) and more specifically on paragraph 1, regarding the immunity of the diplomatic courier from the criminal jurisdiction of the receiving State or the transit State. As on previous occasions when this issue was discussed, three main trends emerged from the discussion: (a) deletion of the special provision on immunity from criminal jurisdiction, since it was unnecessary; (b) according the courier absolute immunity from the criminal jurisdiction of the receiving or transit State; (c) adoption of a compromise solution to the effect that the immunity of the courier from the criminal jurisdiction of the receiving or transit

State should be confined to acts performed by him in the exercise of his functions.¹⁴

16. Some representatives were of the view that a special provision on the immunity of the diplomatic courier from criminal jurisdiction was unnecessary since, under article 16 (Personal protection and inviolability), the courier would enjoy personal inviolability and would not be liable to any form of arrest or detention. Thus the protection accorded a diplomatic courier under article 16 would be sufficient.¹⁵

17. Several representatives considered that the limitation of the courier's immunity from criminal jurisdiction to "acts performed in the exercise of his functions" was not a compromise, but a retreat from customary practice as reflected in the 1961 Vienna Convention on Diplomatic Relations, and would give rise to problems of interpretation and application. It was further argued that the diplomatic courier was an official of the sending State who performed official State functions connected with the protection and transportation of the diplomatic bag. Thus the safety of the diplomatic courier was a prerequisite for the normal exercise of his functions. Accordingly, it was necessary that the courier enjoy the same immunity from criminal jurisdiction as that enjoyed by members of the administrative and technical staff of missions and their families under the 1961 Vienna Convention and other relevant codification conventions.¹⁶

18. A number of representatives supported the provisions of paragraph 1 of article 18 as an acceptable compromise between the concept of absolute immunity of the courier from criminal jurisdiction and the proposition that the courier should not be accorded any immunity from such jurisdiction.¹⁷

19. Some comments were made on the expression "all acts performed in the exercise of his functions", used in paragraphs 1 and 2 of article 18, with a view to avoiding possible ambiguity and potential difficulties in its interpretation and application.¹⁸

20. There were some reservations with regard to paragraph 4 of article 18 containing a provision which made it mandatory for the diplomatic courier to give evidence.¹⁹

21. In summing up the discussion in the Sixth Committee on articles 1 to 27 provisionally adopted by the Commission on first reading,²⁰ it may be pointed out that, with a few exceptions, as indicated above, most of the comments and suggestions made concerned drafting points, and that, in substance, most of the articles were approved. It goes without saying that the specific observations on various articles will be taken into account during the second reading of the draft articles.

⁹ These four conventions adopted under the auspices of the United Nations (hereinafter referred to as "codification conventions") are: 1961 Vienna Convention on Diplomatic Relations; 1963 Vienna Convention on Consular Relations; 1969 Convention on Special Missions; and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

¹⁰ "Topical summary . . ." (A/CN.4/L.398), para. 251.

¹¹ *Ibid.*, paras. 250 and 252.

¹² *Ibid.*, paras. 267-268.

¹³ See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 69-79; and his fifth report, document A/CN.4/382 (see footnote 1 (b) (v) above), para. 52.

¹⁴ "Topical summary . . ." (A/CN.4/L.398), paras. 271-278.

¹⁵ *Ibid.*, para. 273.

¹⁶ *Ibid.*, para. 275.

¹⁷ *Ibid.*, para. 271.

¹⁸ *Ibid.*, paras. 274, 276 and 280.

¹⁹ *Ibid.*, paras. 281-282.

²⁰ *Ibid.*, paras. 260-315.

II. Draft articles considered by the Commission and referred to the Drafting Committee

A. Introductory note

22. In this section, the Special Rapporteur presents a brief analytical survey of the comments and observations made in the Sixth Committee at the fortieth session of the General Assembly on the remaining seven draft articles referred to the Drafting Committee (arts. 36, 37 and 39 to 43).²¹ The Special Rapporteur feels that it might be advisable, before adopting these articles on first reading, to examine the observations and suggestions made by representatives in the Sixth Committee. Such a procedure may provide an opportunity to make further improvements to the texts already considered by the Commission at its previous session.

23. Since these seven draft articles are still before the Drafting Committee, the Special Rapporteur suggests below certain amendments and proposes revised texts, as appropriate, in order to facilitate the Commission's work with a view to completing the first reading of the whole set of draft articles on the topic at the thirty-eighth session.

B. Inviolability of the diplomatic bag (art. 36)²²

24. The question of the inviolability of the diplomatic bag has given rise to much discussion, and opposing views have been expressed on the issue both in the Commission and in the Sixth Committee since the introduction of draft article 36 at the Commission's thirty-fifth session, in 1983.²³ This interest is well justified, since the legal protection of the diplomatic bag in general, and its

²¹ See footnote 2 above.

²² Draft article 36 as revised by the Special Rapporteur in his sixth report read:

"Article 36. Inviolability of the diplomatic bag

"1. The diplomatic bag shall be inviolable at all times and wherever it may be; unless otherwise agreed by the States concerned, it shall not be opened or detained and shall be exempt from any kind of examination directly or through electronic or other mechanical devices.

"2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 32, they may request that the bag be returned to its place of origin."

²³ See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 326-349; his fifth report, document A/CN.4/382 (see footnote 1 (b) (v) above), paras. 73-79; and his sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), paras. 30-42.

For the debate on draft article 36 in the Commission, see *Yearbook . . . 1984*, vol. II (Part Two), pp. 25 *et seq.*, paras. 101-102 and 136-143; and *Yearbook . . . 1985*, vol. II (Part Two), pp. 30 *et seq.*, paras. 179-184.

For the debate on the article in the Sixth Committee, see "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), paras. 184-191; and "Topical summary . . . fortieth session of the General Assembly" (A/CN.4/L.398), paras. 317-336.

inviolability in particular, have always been considered as among the most significant provisions of the whole set of draft articles on the present topic.²⁴

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

25. Several representatives expressed support for the revised text of draft article 36 submitted by the Special Rapporteur. It was pointed out that the new formulation went a long way towards striking a fine balance between the interests of sending, receiving and transit States, especially since the article would be applied on the basis of reciprocity. Some representatives considered the revised text a good basis for further efforts to find a generally acceptable formula by enabling a *rapprochement* between various positions. It was further noted that the merits of the revised text consisted in maintaining the principle of inviolability of the diplomatic bag as well-established State practice, while providing for some flexibility in its application.²⁵

26. Some representatives expressed reservations and opposing views regarding draft article 36. It was pointed out that the Commission should reconsider some of the main features of the rule of inviolability of the diplomatic bag, its scope and modalities for practical application.²⁶

27. The expression "unless otherwise agreed by the States concerned", in paragraph 1, was the subject of differing comments. Some representatives welcomed the inclusion of this expression as a practical means for reaching a reasonable compromise in the case of doubts concerning the contents of the bag. Other representatives, however, were of the view that such an expression was a departure from the principle of inviolability of the bag, and would have serious implications for the régime governing the diplomatic courier and the diplomatic bag established under the 1961 Vienna Convention on Diplomatic Relations. One representative favoured the deletion of the expression, since the residual entitlement to make contrary agreements was already set out in article 6, paragraph 2 (b).²⁷

28. The inclusion of the words "and shall be exempt from any kind of examination directly or through electronic or other mechanical devices", at the end of paragraph 1, also gave rise to differing comments. Several representatives supported the inclusion of the phrase and, in particular, considered electronic scanning of the bag not permissible. It was said, in this connection, that the full inviolability of the diplomatic bag was a basic guarantee of the freedom of official communications between States and their missions, and that that prin-

²⁴ See the Special Rapporteur's sixth report, document A/CN.4/390 (see footnote 1 (b) (vi) above), para. 30.

²⁵ "Topical summary . . ." (A/CN.4/L.398), paras. 317 and 319.

²⁶ *Ibid.*, paras. 318 and 327.

²⁷ *Ibid.*, para. 320.

ciple should therefore be set forth in the draft article. Prohibition of any kind of examination or inspection, whether direct or indirect, was of particular importance, since the use of electronic or mechanical devices might infringe the confidential character of the contents of the bag, especially in view of the rapid technological advances in that field. The use of such sophisticated devices would also, it was stated, place a number of countries, in particular developing countries which did not have such devices, at a disadvantage. In view of these considerations, it was suggested that examination of the diplomatic bag through electronic or other mechanical devices should be expressly prohibited. However, some representatives were of the view that the formulation "exempt from any kind of examination", in paragraph 1, was too broad in scope in that all forms of external examination would then be excluded.²⁸

29. Other representatives had serious reservations about the above-mentioned provision and were in favour of allowing electronic scanning of the bag. Some of them felt that scanning was designed solely to detect metallic objects in the bag and could not jeopardize diplomatic communications. It was also pointed out that electronic screening was in the interests of the safety of civil aviation. In the view of another representative, although electronic scanning should not be practised as a matter of routine, it should be allowed under specific circumstances when the grounds for suspicion were sufficiently strong.²⁹

30. Without underestimating the divergence of opinion on paragraph 1 of draft article 36 as revised by the Special Rapporteur, and the reservations expressed thereon, the discussion in the Sixth Committee seems to indicate that the well-established principle of complete inviolability of the diplomatic bag should be respected as a ground rule, with some flexibility being allowed in its application, as provided for in the article.³⁰

31. Paragraph 2 of the revised draft article 36 was also the subject of specific comments and suggestions for improvements.

32. Several representatives considered the provisions of paragraph 2 a step forward and an acceptable compromise solution. It was felt that the text ensured sufficient flexibility of application, and seemed to provide a reasonable safeguard against possible abuse by the sending State, in so far as it allowed the receiving State or the transit State to request the return of the bag to its place of origin if the authorities of those States had serious reason to believe that it contained something other than official correspondence, documents or articles intended for official use.³¹

33. Some representatives, although agreeing in substance with the principle underlying paragraph 2, indicated that the text should perhaps be improved to comprise as another option the opening of the bag in the

presence of representatives of the sending State. In this connection, it was proposed that the paragraph should be modelled along the lines of article 35 of the 1963 Vienna Convention on Consular Relations.³²

34. Some other representatives were critical of paragraph 2 as revised by the Special Rapporteur. Some of them thought that, in its current wording, the provision gave the receiving or transit State discretionary power to return a diplomatic bag to its place of origin, which amounted to extending the régime of the consular bag to all types of bag, including the diplomatic bag, dealt with by the 1961 Vienna Convention on Diplomatic Relations. It was further pointed out that paragraph 2 seemed to negate one of the principles governing the freedom of diplomatic communications and would modify the régime of the diplomatic bag *stricto sensu* by infringing its inviolability through a substantive derogation from the relevant provisions of the 1961 Vienna Convention. Therefore there were several suggestions to delete paragraph 2.³³

35. Several representatives referred to the interaction between draft article 36 and draft articles 42 and 43, particularly the possible legal implications of the optional declaration of exceptions under draft article 43 with regard to the status of bags under the 1961 and 1963 Vienna Conventions.³⁴

36. In connection with those legal implications, some representatives referred to the new text of draft article 36 proposed by one member of the Commission at its thirty-seventh session.³⁵

37. Several representatives expressed their support for that proposal. It was stated that the proposed new text was preferable for its clarity and more simplified wording, which avoided the controversial question of examination of the diplomatic bag by electronic devices. The explicit reference to the régime applicable to the consular bag under article 35 of the 1963 Vienna Convention was also noted.³⁶

²⁸ *Ibid.*, para. 326.

²⁹ *Ibid.*, para. 327.

³⁰ *Ibid.*, para. 328.

³¹ The proposed new text of draft article 36 read:

"1. The diplomatic bag shall not be opened or detained.

"2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag contains something other than the official correspondence, documents or articles referred to in article 25 of these articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

"3. Notwithstanding paragraph 1 of this article, a State may, when signing, ratifying or acceding to these articles or at any time thereafter, make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article.

"4. In relation to other States Parties to these articles, a State which has made a written declaration under paragraph 3 of this article shall not be entitled to raise objection to the application to its diplomatic bags of the rule stipulated in paragraph 2 of this article." (*Yearbook . . . 1985*, vol. II (Part Two), p. 31, para. 182.)

³⁶ "Topical summary . . ." (A/CN.4/L.398), paras. 329 and 331-333.

²⁸ *Ibid.*, paras. 321-322.

²⁹ *Ibid.*, para. 323.

³⁰ *Ibid.*, para. 324. See also *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 25th meeting, para. 29 (Turkey)*.

³¹ "Topical summary . . ." (A/CN.4/L.398), paras. 325-326.

38. The application of the rules of reciprocity provided for in paragraphs 3 and 4 of the proposed new text of draft article 36 was the subject of thorough examination. Some representatives who were in favour of that text as a whole felt that the provisions on reciprocity would require further elaboration.³⁷ Most of the reservations expressed with regard to the proposed new text concerned two main points: first, the plurality of régimes, which might lead to complications and confusion in practice; and secondly, the derogation from the general régime established for the diplomatic bag in the 1961 Vienna Convention and international customary law.³⁸ One representative stressed that his delegation could not agree to a State being given the possibility of making a unilateral declaration that it would apply to the diplomatic bag the rule applicable to the consular bag, for such an option would be absolutely contrary not only to the 1961 Vienna Convention, but also to international customary law. His delegation was also opposed to any agreement *inter se* and to any optional régime in that field.³⁹ Another representative stated that the proposed new formulation of article 36 would make part of the future convention dependent on declarations by the parties, possibly leading to uncertainty. He hoped that the Commission would decide on a provision applicable to all cases, along the lines of the revised text submitted by the Special Rapporteur, provided that the law concerning the contents of the bag was respected.⁴⁰

2. PROPOSED REVISED TEXT OF ARTICLE 36

39. This analysis of the debate in the Sixth Committee on draft article 36 indicates that the modalities for application of the principle of inviolability of the diplomatic bag deserve particular consideration. The existing proposals may provide a basis for further efforts to consolidate in a single instrument the existing rules of international law, as evidenced by prevailing State practice, concerning the legal protection of the diplomatic bag. In the view of the Special Rapporteur, article 36 should formulate the *general rule* that the diplomatic bag shall be inviolable and shall not be opened or detained and that it should be exempt from any examination which might be prejudicial to its inviolability and to the confidential character of its contents. The article could also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thus a dual régime would be established corresponding to the existing codification conventions. Such a solution may have certain merits, but it would not be consistent with the idea of a uniform régime applicable to all types of bag underlying paragraph 2 of the revised text submitted by the Special Rapporteur, which was considered favourably by several representatives during the discussion in the Sixth Committee.

40. It is hoped that members of the Commission will express their views on the above-mentioned questions

³⁷ *Ibid.*, para. 330.

³⁸ *Ibid.*, paras. 334-336.

³⁹ *Official Records of the General Assembly, Fortieth Session, Sixth Committee, 34th meeting, para. 45 (France).*

⁴⁰ *Ibid.*, 31st meeting, para. 26 (Australia).

relating to draft article 36 before its consideration by the Drafting Committee.

41. Taking into account the comments and observations made in the Commission and the Sixth Committee, and in view of the fact that draft article 36 has not yet been examined by the Drafting Committee, the Special Rapporteur submits a new revised text of the article. The amendments relate mainly to paragraph 1. In paragraph 2, only the reference to article 32 is amended as a result of the renumbering of the preceding draft articles.

42. In the light of the above considerations, the Special Rapporteur submits for examination and approval the following revised text of draft article 36:

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 25, they may request that the bag be returned to its place of origin.

C. Exemption from customs inspection, customs duties and all dues and taxes (art. 37)⁴¹

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

43. The new draft article 37 submitted by the Special Rapporteur in his sixth report, which was an amalgamation of former draft articles 37 and 38, was considered an improvement. The comments and suggestions made were mainly of a drafting nature.

44. The main proposed change to the article, which might affect its field of application, was the suggestion to confine its provisions to matters relating to exemption of the diplomatic bag from customs duties, dues and taxes. Consequently, all matters relating to customs control and inspection would fall under article 36.⁴²

2. PROPOSED REVISED TEXT OF ARTICLE 37

45. Taking into consideration the comments and drafting suggestions made during the discussion in the Sixth Committee, the Special Rapporteur submits for

⁴¹ The new draft article 37 submitted by the Special Rapporteur in his sixth report read:

"Article 37. Exemption from customs inspection, customs duties and all dues and taxes"

"The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of the diplomatic bag and shall exempt it from customs and other inspections, customs duties and all national, regional or municipal dues and taxes and related charges, other than charges for storage, cartage and other specific services rendered."

⁴² "Topical summary . . ." (A/CN.4/L.398), para. 339.

examination and approval the following revised text of draft article 37:

Article 37. Exemption from customs duties, dues and taxes

The receiving State or, as appropriate, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the free entry, transit or exit of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and other related charges, other than charges for storage, cartage and other specific services rendered.

D. Protective measures in circumstances preventing the delivery of the diplomatic bag (art. 39) and obligations of the transit State in case of force majeure or fortuitous event (art. 40)⁴³

46. Draft articles 39 and 40 are considered together since there were several proposals in the Sixth Committee to merge them into one article.

47. It may be recalled that, during the consideration of draft articles 39 and 40 by the Commission at its thirty-seventh session, it was also suggested that they be combined in a single article.⁴⁴

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

48. With regard to draft article 39, it was felt that the expression "in the event of termination of the functions of the diplomatic courier" might give rise to practical difficulties. It was further suggested that article 39 should cover all circumstances preventing the diplomatic courier from delivering the diplomatic bag to its destination, since article 11 (End of the functions of the

⁴³ Draft article 39 as revised by the Special Rapporteur in his sixth report and draft article 40, submitted in the fourth report and orally amended by the Special Rapporteur at the Commission's thirty-seventh session (see *Yearbook . . . 1985*, vol. II (Part Two), p. 33, para. 190), read:

"Article 39. *Protective measures in circumstances preventing the delivery of the diplomatic bag*

"The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State in the event of termination of the functions of the diplomatic courier, which prevents him from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State."

"Article 40. *Obligations of the transit State in case of force majeure or fortuitous event*

"If, as a consequence of *force majeure* or fortuitous event, the diplomatic courier or the diplomatic bag is compelled to deviate from his or its normal itinerary and remain for some time in the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier or the diplomatic bag the inviolability and protection that the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue his or its journey to his or its destination or to return to the sending State."

⁴⁴ *Yearbook . . . 1985*, vol. II (Part Two), p. 33, paras. 188-189 and 191.

diplomatic courier) and article 12 (The diplomatic courier declared *persona non grata* or not acceptable) contained specific reference to notification about the termination of the courier's functions. In that connection, it was suggested that draft article 39 be amended so as to cover other cases in which the courier might be temporarily unable to perform his functions, such as illness or accident.⁴⁵

2. PROPOSED NEW ARTICLE 39 TO REPLACE DRAFT ARTICLES 39 AND 40

49. In the light of the above considerations, the Special Rapporteur submits for examination and approval the following new draft article 39 combining and replacing draft articles 39 and 40:

Article 39. Protective measures in case of force majeure

1. The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag and shall immediately notify the sending State in cases of illness, accident or other events preventing the diplomatic courier from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a ship or aircraft from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

2. If, as a consequence of *force majeure*, the diplomatic courier or the diplomatic bag is compelled to pass through the territory of a State which was not initially foreseen as a transit State, that State shall accord to the diplomatic courier and the diplomatic bag inviolability and protection and shall extend to the diplomatic courier and the diplomatic bag the necessary facilities to continue their journey to their destination or to return to the sending State.

E. Non-recognition of States or Governments or absence of diplomatic or consular relations (art. 41)⁴⁶

50. When introducing draft article 41 in his fourth report, the Special Rapporteur pointed out that it was primarily intended to cover the exceptional circumstances in which a host State on whose territory an international conference was held, or a transit State, did not recognize the sending State or its Government or in

⁴⁵ "Topical summary . . ." (A/CN.4/L.398), paras. 341-343.

⁴⁶ Draft article 41 as resubmitted by the Special Rapporteur in his sixth report read:

"Article 41. *Non-recognition of States or Governments or absence of diplomatic or consular relations*

"1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State or by the non-existence or severance of diplomatic or consular relations between them.

"2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the receiving State, the host State or the transit State shall not by itself imply recognition by the sending State of the receiving State, the host State or the transit State, or of their Governments, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government."

which diplomatic or consular relations did not exist between them.⁴⁷ The purpose of the article was again emphasized by the Special Rapporteur in his sixth report.⁴⁸ However, the wording of the article proposed by the Special Rapporteur went somewhat further, referring not only to "host State", but also to "receiving State". This broadening of the scope of the article gave rise to some misgivings both in the Commission and in the Sixth Committee.

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

51. A number of representatives expressed approval of draft article 41. One representative considered the inclusion of the article essential since, although many States still did not maintain diplomatic or consular relations with other States, diplomatic couriers continued to maintain communications between the States concerned and their various representatives and missions abroad. It was further pointed out that the article met an important practical need.⁴⁹

52. Some representatives, while agreeing with the draft article in substance, felt that its wording could be improved.⁵⁰

53. Other representatives considered the draft article superfluous or out of place.⁵¹

2. PROPOSED REVISED TEXT OF ARTICLE 41

54. The Special Rapporteur feels that a provision on the legal protection of the diplomatic courier and the diplomatic bag in the circumstances described above is both necessary and useful, especially in relation to official communications between the sending State and its delegations to international conferences, special missions or permanent missions to international organizations in the territory of a State with which it does not maintain diplomatic or consular relations. It is hoped that redrafting the text of article 41 along these lines may provide a generally acceptable formulation.

55. Taking into consideration the above-mentioned comments and suggestions, the Special Rapporteur submits for examination and approval the following revised text of draft article 41:

Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the host State or the transit State or by the non-existence of diplomatic or consular relations between them.

⁴⁷ Document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), para. 382.

⁴⁸ Document A/CN.4/390 (see footnote 1 (b) (vi) above), paras. 54-55. See also *Yearbook . . . 1985*, vol. II (Part Two), p. 34, para. 192.

⁴⁹ "Topical summary . . ." (A/CN.4/L.398), paras. 348-350.

⁵⁰ *Ibid.*, para. 351.

⁵¹ *Ibid.*, paras. 352-353.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the host State or the transit State shall not by itself imply recognition by the sending State of the host State or the transit State, or of their Governments, nor shall it imply recognition by the host State or the transit State of the sending State or of its Government.

F. Relation of the present articles to other conventions and international agreements (art. 42)⁵²

56. The relationship between the present draft articles and the four codification conventions has always been considered as a common legal basis for a coherent and as uniform as possible a régime governing the status of the diplomatic courier and the diplomatic bag.⁵³ Therefore the main objective of a provision regarding this relationship should be to achieve harmonization and uniformity between the existing provisions and the new draft articles dealing with the legal régime of official communications through the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The progressive development and codification of the rules governing this régime should be based on the existing conventions and complement them with more specific provisions. The legal relationship should also encompass, as much as practicable, other international agreements in the field of diplomatic law. The legal relationship between the present draft articles and other international treaties in the field of diplomatic law has been considered within a certain framework of flexibility, as contemplated by articles 30 and 41 of the 1969 Vienna Convention on the Law of Treaties, regarding the application of successive treaties relating to the same subject-matter, and agreements to modify multilateral treaties between certain of the parties only, respectively. This flexible approach was emphasized by the Special Rapporteur in his fourth report in 1983, when he introduced the original text of draft article 42.⁵⁴

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

57. Several representatives expressed agreement with the revised text of draft article 42 submitted by the Special Rapporteur in his sixth report. It was pointed out that the main objective of the article was to indicate that the present articles should be considered as *lex*

⁵² Draft article 42 as revised by the Special Rapporteur in his sixth report read:

"Article 42. *Relation of the present articles to other conventions and international agreements*

"1. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or those in international agreements in force as between States parties thereto.

"2. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag confirming or supplementing or extending or amplifying the provisions thereof."

⁵³ See the Special Rapporteur's fourth report, document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), paras. 397-402.

⁵⁴ *Ibid.*, paras. 401 and 403.

specialis complementing the existing conventions relating to the status of the diplomatic courier and the diplomatic bag, and that there should be a measure of flexibility in their application.⁵⁵

58. With regard to paragraph 1, the view was expressed that it should be more clearly worded. Several observations were made on the expression "without prejudice to the relevant provisions in other conventions or those in international agreements". One representative submitted that this expression meant that the present articles were intended to complement the four codification conventions. However, another representative questioned whether "the provisions of the present articles" were really "without prejudice to the relevant provisions in other conventions or those in international agreements".⁵⁶

59. Some representatives, considering that the revised text of paragraph 1 contained certain ambiguities,⁵⁷ expressed their preference for the original text submitted by the Special Rapporteur in his fourth report.⁵⁸ Similar observations had also been advanced in the Commission.⁵⁹

60. With regard to paragraph 2, it was stated that its terms should be made more flexible.⁶⁰ It was further suggested that express reference should be made to article 6, paragraph 2 (b), requiring that a modification of the extent of facilities, privileges and immunities should not be "incompatible with the object and purpose of the present articles" and should not "affect the enjoyment of the rights or the performance of the obligations of third States".

61. One representative expressed the view that draft article 42 should be deleted altogether.⁶¹

2. PROPOSED REVISED TEXT OF ARTICLE 42

62. Considering the usefulness of a special provision on the relationship between the present articles and the codification conventions and other international agreements, the Special Rapporteur believes that draft article 42 has its *raison d'être* and a place in the set of draft articles. In the light of the above-mentioned comments and suggestions, the Special Rapporteur submits for examination and approval the following revised text of draft article 42:

Article 42. Relation of the present articles to other conventions and international agreements

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the

⁵⁵ "Topical summary . . ." (A/CN.4/L.398), para. 354.

⁵⁶ *Ibid.*, para. 356.

⁵⁷ *Ibid.*, para. 357.

⁵⁸ Document A/CN.4/374 and Add.1-4 (see footnote 1 (b) (iv) above), para. 403.

⁵⁹ See *Yearbook . . . 1985*, vol. II (Part Two), pp. 34-35, para. 196.

⁶⁰ "Topical summary . . ." (A/CN.4/L.398), para. 359.

⁶¹ *Ibid.*, para. 360.

Representation of States in Relations with International Organizations of a Universal Character of 14 March 1975.

2. The provisions of the present articles are without prejudice to other international agreements in force as between States Parties to them.

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and from modifying the provisions thereof, provided that such modifications are in conformity with article 6 of the present articles.

G. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags (art. 43)⁶²

1. COMMENTS AND OBSERVATIONS MADE IN THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

63. Several representatives agreed with the approach taken by the Special Rapporteur in draft article 43, which was designed to introduce a certain degree of flexibility in the application of the present articles. It was pointed out that the article made allowance for the fact that only two of the four codification conventions had so far come into force, and that it provided for the possibility of applying to the present articles reservations made in relation to the two conventions not yet in force.⁶³

64. A number of representatives expressed specific reservations concerning draft article 43, which they believed would introduce a plurality of régimes and uncertainty as to the interpretation and application of the present articles.⁶⁴

65. There were some comments and suggestions relating to the wording of the article.

2. PROPOSED REVISED TEXT OF ARTICLE 43

66. In addition to the suggestions made in the Sixth Committee, the Special Rapporteur has taken into account the proposals for drafting improvements made during the discussion in the Commission.⁶⁵ In the light

⁶² Draft article 43 as submitted by the Special Rapporteur in his sixth report read:

"Article 43. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags

"1. A State may, without prejudice to the obligations arising under the provisions of the present articles, when signing, ratifying or acceding to these articles, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

"2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it.

"3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions."

⁶³ "Topical summary . . ." (A/CN.4/L.398), paras. 361-362.

⁶⁴ *Ibid.*, paras. 363-368.

⁶⁵ See *Yearbook . . . 1985*, vol. II (Part Two), p. 35, para. 199.

of the above considerations, the Special Rapporteur submits for examination and approval the following revised text of draft article 43:

Article 43. *Optional declaration of exceptions to applicability in regard to designated types of couriers and bags*

1. A State may, when signing, ratifying or acceding to the present articles, or at any time thereafter, designate by written declaration those types of cour-

iers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it; the withdrawal must be in writing.

3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions.

Conclusion

67. In submitting the revised texts of draft articles 36, 37, 39 and 41 to 43, the Special Rapporteur believes that their consideration by the Commission will facilitate the work of the Drafting Committee with a view to their subsequent adoption by the Commission on first reading.

68. It is hoped that, following the consideration of these remaining draft articles and any further improvements that may be made, the whole set of draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier will be provisionally adopted by the Commission on first reading at its thirty-eighth session.

**DRAFT CODE OF OFFENCES AGAINST THE PEACE
AND SECURITY OF MANKIND**

[Agenda item 5]

DOCUMENT A/CN.4/398*

**Fourth report on the draft Code of Offences against the Peace and Security of Mankind,
by Mr. Doudou Thiam, Special Rapporteur**

[Original: French]
[11 March 1986]

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Introduction

1. This report deals with crimes against humanity, war crimes, other offences, general principles and the draft articles. It therefore consists of the following five parts:

- Part I. Crimes against humanity;
- Part II. War crimes;
- Part III. Other offences;
- Part IV. General principles;
- Part V. Draft articles.

PART I

Crimes against humanity

2. We shall first consider crimes against humanity prior to the 1954 draft code, and then crimes against humanity in that draft code.¹

A. Crimes against humanity prior to the 1954 draft code

3. The term "crime against humanity" first appeared in the London Agreement of 8 August 1945 establishing the International Military Tribunal.² In the course of the preparatory work, it had become apparent that certain crimes committed during the Second World War

were not, strictly speaking, war crimes. These were crimes whose victims were of the same nationality as the perpetrators, or nationals of an allied State.

4. These crimes were committed for different motives. As early as March 1944, the representative of the United States of America on the Legal Committee of the United Nations War Crimes Commission proposed that crimes committed against stateless persons or any other person by reason of their race or religion should be declared "crimes against humanity". In his view, these were crimes against the very foundations of civilization, wherever or whenever they were committed.³

5. Thus crimes against humanity were defined as offences separate from war crimes in the Charter of the

¹ Adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54); text reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

² United Nations, *Treaty Series*, vol. 82, p. 279.

³ *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, H.M. Stationery Office, 1948), p. 175.

International Military Tribunal' (art. 6 (c)), in Law No. 10 of the Allied Control Council' (art. II, para. 1 (c)), and lastly in the Charter of the International Military Tribunal for the Far East' (art. 5 (c)).

6. It should be recalled that crimes against humanity as defined in the aforementioned instruments were linked to the state of belligerency. For some time, this historical circumstance prevented crimes against humanity from being regarded as an autonomous concept, for the jurisdictions established to punish crimes against humanity considered only offences directly or indirectly related to the war. It must be acknowledged that war naturally provides the best opportunity and most propitious circumstances for the perpetration of crimes against humanity. War and crimes against humanity go hand in hand. As will be seen, most war crimes are also crimes against humanity. Although the term "crime against humanity" appeared only recently, the phenomenon to which it refers has a long history. It is as old as war. That is why war crimes and crimes against humanity were long confused with one another. The concept of war crimes encompassed that of crimes against humanity and the penalties inflicted for the former constituted punishment for the latter also.

7. In the introduction to his draft international criminal code,⁷ Cherif Bassiouni notes that the first treaties between the Egyptians and the Sumerians for the regulation of war were concluded before 1000 B.C.; that the ancient Greeks and Romans enacted laws on the right of asylum and the treatment of the wounded and prisoners; and that, from 623, the conduct of war by Muslims was regulated by the Koran. Later, the problem was also dealt with by the Catholic Church, particularly at the Lateran Councils and the Councils of Lyon in the twelfth and thirteenth centuries. The doctrinal bases for the regulation of armed conflicts were laid down in the *Summa theologiae* of St. Thomas Aquinas and *De Jure Belli ac Pacis* by Grotius.

8. In Asia, the civilizations of the Chinese (*The Art of War* by Sun Tzu, in the fourth century B.C.) and the Hindus (*Laws of Manu*, about the same period) likewise regulated war and adopted measures to protect the wounded and old people.

9. Humanitarian law has developed considerably in modern times: 1856 Paris Declaration; Red Cross Convention (Geneva, 1864); 1868 St. Petersburg Declaration; 1874 Brussels Declaration; 1899 and 1907 Hague Conventions; 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;

⁴ Hereinafter referred to as the "Nürnberg Charter"; annexed to the 1945 London Agreement (see footnote 2 above).

⁵ 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)).

⁶ Hereinafter referred to as the "Tokyo Charter"; published in *Documents on American Foreign Relations* (Princeton University Press), vol. VIII (July 1945-December 1946) (1948), pp. 354 *et seq.*

⁷ *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1980), pp. 5-6.

Geneva Conventions of 12 August 1949 and their Additional Protocols of 8 June 1977.

10. It is true that these instruments were primarily concerned with war crimes. However, as will be explained in greater detail below, war crimes are often indissolubly linked to crimes against humanity, and the distinction between the two is not always clear. In drawing up the Nürnberg Principles in 1950,⁸ the International Law Commission touched on this aspect of the question in Principle VI (c). The autonomy of crimes against humanity was merely relative, in so far as the repression of such crimes depended on the existence of a state of war.

11. However, this relative autonomy has now become absolute. Today, crimes against humanity can be committed not only within the context of an armed conflict, but also independently of any such conflict. It is, of course, necessary to define the content of this concept. This is an area which lends itself to romanticism; a lyrical style has sometimes been used even in judicial decisions, which are necessarily couched in terms that are strict and cold.

1. MEANING OF THE WORD "HUMANITY"

12. The first question to consider is the meaning of the word "humanity". As Henri Meyrowitz has observed: "the ambiguity of the very term 'humanity' invites us to be cautious when seeking to introduce this concept into the definition of incrimination".⁹ He refers to the three meanings that have been given to this term: that of culture (humanism, humanities), that of philanthropy and that of human dignity. A crime against humanity could then be conceived in the threefold sense of cruelty directed against human existence, the degradation of human dignity and the destruction of human culture. Viewed in the light of these three meanings, a crime against humanity becomes quite simply "a crime against the entire human race". In English it has been called a "crime against human kind".

13. Some writers prefer the term "crime against the human person" to the term "crime against humanity". But the former would certainly raise the difficult problem, which will be dealt with later, of whether a crime against humanity must necessarily be of a mass nature or not, i.e. whether any serious attack on an individual constitutes a crime against humanity. If the individual is viewed as the "custodian" and guardian of human dignity, the "custodian of the basic ethical values" of human society, an attack on a single individual may constitute a crime against humanity, provided that it has a specific character which shocks the human conscience. There is, as it were, a natural link between the human race and the individual: one is the expression of the other.

⁸ *Yearbook . . . 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127; reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 12, para. 45.

⁹ 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. 344.

14. The Constance Tribunal, ruling in application of Law No. 10 of the Allied Control Council, declared that "the legal good protected by that Law is the individual with his moral value as a human being, possessing all the rights that all civilized peoples clearly recognize he possesses".¹⁰ This was a judgment rendered by German courts trying crimes against German nationals committed by other German nationals. However, the same idea is found in a decision of the Supreme Court of the British Zone, ruling by virtue of the same law on acts committed by war criminals, in which it stated: "Law No. 10 is based on the idea that, within the sphere of civilized nations, there are certain standards of human conduct . . . which are so essential for the coexistence of mankind and the existence of any individual that no State belonging to that sphere has the right to abandon them."¹¹

15. To sum up, in the term "crime against humanity", the word "humanity" means the human race as a whole and in its various individual and collective manifestations.

2. MEANING OF THE WORD *CRIME* IN THE EXPRESSION *CRIME CONTRE LA PAIX ET LA SÉCURITÉ DE L'HUMANITÉ* (OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND)

16. In internal law, the word *crime* refers to the most serious offences, both in the three-tier division (*contraventions* (petty offences), *délits* (correctional offences) and *crimes* (criminal offences)) and in the two-tier division (correctional offences and criminal offences).

17. We may then pose the question whether the same holds true in international law. Article 19 of part 1 of the draft articles on State responsibility¹² deals with *crimes et délits internationaux* ("international crimes and international delicts") and states, in paragraph 4: "Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."

18. It may be asked, however, whether the meaning of the word *crime* as used in article 19 coincides exactly with its meaning in the expression *crime contre la paix et la sécurité de l'humanité*. That coincidence is not obvious; in any event, it has not always been obvious. Originally, the word *crime* in the expression *crime contre la paix et la sécurité de l'humanité* was a generic term synonymous with "offence". It covered all categories of criminal acts. Of course, in most cases the acts covered were *crimes* (criminal offences) in the technical sense of the term. But sometimes the term *crime* also covered correctional offences or even petty offences. The Charters of the international military tribunals (Nürnberg and Tokyo), as well as Law No. 10, used the word *crime* ("crime") in the general sense of "offence", whatever the gravity of the offence concerned. In that connection, attention may be drawn to a

decision of the Supreme Court of the British Zone rendered on appeal against a judgment of a court of first instance which, in consideration of the penalty inflicted, had wrongly described the act as a *délit contre l'humanité* ("offence against humanity").¹³ According to the court's decision, the word "offence" did not exist in Law No. 10, even if the penalty inflicted corresponded to that kind of transgression. The word *crime* ("crime") in the expressions "crime against humanity" and "war crime" was a general term covering acts of different degrees of gravity, although, as noted above, it referred in most cases to very serious acts. The word *crime* was synonymous with "offence" in the broadest sense of that term. It covered petty offences as well as the most serious acts. It is for that reason that article 50 of the 1949 First Geneva Convention¹⁴ subsequently drew a distinction between "grave breaches" and other breaches.

19. Today, the Commission has taken a decision on the matter. It has decided that the word *crime* (offence) should not cover all offences, but only the most serious ones.

3. CONTENT OF CRIMES AGAINST HUMANITY

20. Defining the content of the word "humanity" and that of the word "crime" is not sufficient to define the content of the expression "crime against humanity". This concept is so rich in substance that it is difficult to encapsulate it in a single formula. Several definitions have been suggested, but each has emphasized one or more essential elements of these crimes, without embracing all their elements.

21. Some definitions emphasize the *character* of the crime: its barbarity, brutality or atrocity. Thus the Austrian Constitutional Act of 26 June 1945 states: "Any person who, during the period of National Socialist tyranny, and in abuse of his authority, placed others in an intolerable situation . . . for motives of political animosity is guilty of the crime of barbarity and brutality."¹⁵ This formula has been criticized. According to some, barbarity and atrocity are not necessary elements. The *humiliating and degrading treatment* and the *outrages upon personal dignity* referred to in the 1949 Geneva Conventions likewise constitute crimes against humanity.

22. Other definitions stress the *infringement of a right*: "infringement of fundamental rights": the right to life, to health, to physical well-being, to freedom (resolution of the eighth International Conference for the Unification of Penal Law).¹⁶

¹⁰ *O.G.H. br. Z.* (see footnote 11 above), vol. 1, pp. 48-49; cited in Meyrowitz, *op. cit.*, p. 246. The expression "offence against humanity" is a translation of the Special Rapporteur's French text and not a quotation from the official text of the court's decision.

¹¹ United Nations, *Treaty Series*, vol. 75, p. 31.

¹² Constitutional Act on war crimes and other National Socialist outrages, art. 3, para. 1 (*Staatsgesetzblatt für die Republik Österreich*, 28 June 1945, No. 32, p. 56).

¹³ Resolution on crimes against humanity, adopted by the eighth Conference (Brussels, 10-11 July 1947); see *Actes de la Conférence* (Paris, Pedone, 1949), pp. 227-228.

¹⁰ *Tillessen case* (*Süddeutsche Juristenzeitung* (Heidelberg), 1947, col. 337, at col. 339); cited in Meyrowitz, *op. cit.*, p. 346, footnote 15.

¹¹ *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen* (*O.G.H. br. Z.*) (Berlin, 1949), vol. 2, p. 271; cited in Meyrowitz, *op. cit.*, p. 347.

¹² *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

23. Yet other definitions emphasize the *mass* nature of crimes against humanity (extermination or enslavement of peoples or groups of individuals). The question has, however, been widely discussed and the condition that such crimes must necessarily be mass crimes has not always been accepted. It is true that article 19 of part 1 of the draft articles on State responsibility refers to a breach "on a widespread scale" of an international obligation (para. 3 (c)). But this point of view is not unanimously accepted.

24. The concept is so rich in substance that the debate could go on forever. Some writers stress the legal personality of the perpetrator. In their view, crimes against humanity are State crimes. According to Eugène Aroneanu, "a crime against humanity, before being a 'crime', is an act of State sovereignty, an act by which a State attacks, for racial, national, religious or political reasons, the freedom, rights or life of a person or group of persons".¹⁷ Other writers, however, consider that crimes against humanity can also be committed by individuals, even if they are exercising a power of the State.

25. The only element which seems to be unanimously accepted is the *motive*. All writers, all judicial decisions and all the resolutions of international congresses agree that what characterizes a crime against humanity is the motive, i.e. the intention to harm a person or group of persons because of their race, nationality, religion or political opinions. What is involved is a special intention which forms part of the crime and gives it its specific nature.

26. In effect, article 6 (c) of the Nürnberg Charter, article II, paragraph 1 (c) of Law No. 10 of the Allied Control Council, and article 5 (c) of the Tokyo Charter all refer to the motive for the criminal act, although the wording used sometimes varies. That is why the drafters of those texts, in defining a crime against humanity, preferred not to limit themselves to a synoptic formula, but rather to combine a general definition with an illustrative list.

27. Even in this case, however, the autonomy of the concept remained limited and subordinated to the existence of a state of war, as noted above (para. 10). Such was the state of law prior to 1954.

B. Crimes against humanity in the 1954 draft code

28. The 1954 draft code first rendered crimes against humanity autonomous by detaching them from the context of war. It then endowed the concept with a bipartite content by drawing a distinction between the crime of genocide and other "inhuman acts". These two offences are covered in article 2, paragraphs (10) and (11), of the 1954 draft. The problem which arises at this stage is to determine why the 1954 draft separated "genocide" from "inhuman acts".

1. GENOCIDE

29. There is no doubt that genocide, as described in article 2, paragraph (10), and the "inhuman acts" described in paragraph (11) of that article constitute crimes against humanity. There are, however, divergent views concerning the specific nature of genocide, depending on the angle from which it is considered. In effect, it can be considered from two angles: its purpose and the number of victims involved.

(a) *The purpose of genocide*

30. If genocide is considered from the point of view of its purpose, there can be no doubt that a distinction must be drawn between this crime and other inhuman acts, for the purpose here, as specified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,¹⁸ is "to *destroy*,* in whole or in part, a national, ethnical, racial or religious *group**" (art. II). It is true that other inhuman acts may likewise be committed for national, racial or religious reasons, but the purpose is not necessarily to destroy a group considered as a separate entity. Genocide has specific features when viewed from this angle.

(b) *The number of victims*

31. If genocide is considered from the point of view of the number of victims, the question is what distinguishes it from other inhuman acts. Some writers see no difference between genocide and other crimes against humanity. According to Stefan Glaser, "it . . . seems certain that the drafters of the Convention on Genocide and of the draft code intended to acknowledge that genocide had been committed even when the act (murder, etc.) had been committed against a *single* member of a particular group, with the intention of destroying the latter 'in whole or in part' ".¹⁹ In his view, "it is the *intention** . . . which is decisive for the concept of genocide".

32. The question then arises whether the other crimes against humanity referred to as "inhuman acts" in the 1954 draft code also imply a mass element. This is an important question which arises in the decisions of the military tribunals established by virtue of Law No. 10 of the Allied Control Council.

33. A certain current of opinion emerged in favour of a mass element. According to the Legal Committee of the United Nations War Crimes Commission:

Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.²⁰

¹⁸ United Nations, *Treaty Series*, vol. 78, p. 277.

¹⁹ S. Glaser, *Droit international pénal conventionnel* (Brussels, Bruylant, 1970), p. 112.

²⁰ *History of the United Nations War Crimes Commission . . .*, *op. cit.* (footnote 3 above), p. 179.

¹⁷ E. Aroneanu, *Le crime contre l'humanité* (Paris, Dalloz, 1961), pp. 56-57.

34. However, contrary views were expressed.²¹ Thus the International Congress of the Mouvement national judiciaire français, in its resolution on the punishment of Nazi crimes against humanity, adopted in October 1946, declared: "Any persons who exterminate or persecute an *individual** or a group of individuals by reason of their nationality, race, religion or opinions are guilty of crimes against humanity and punishable as such."²²

35. Similar views are found in the reports submitted to the eighth International Conference for the Unification of Penal Law, held at Brussels in July 1947.²³

36. In the Brazilian report to that Conference, Roberto Lyra, professor in the Faculty of Law in Rio de Janeiro, proposed the following definition: "Any act or omission which constitutes a serious threat or physical or mental violence towards an *individual** by reason of his nationality, race, or religious, philosophical or political views shall be deemed a crime of *lèse-humanité*."²⁴

37. In their report, the delegates from the Netherlands, W. P. J. Pompe, Rector of the University of Utrecht, and B. H. Kazemier, adviser in the Ministry of Justice, proposed as a definition of a crime against humanity: "to exterminate or place in an intolerable situation, in breach of the general principles of law recognized by civilized peoples, an *individual** or a group of individuals by reason of their nationality, religion or opinions".²⁵

38. In the Polish report, submitted by Georges Sawicki, Advocate General in Warsaw, the following definition was proposed: "Any person who commits an offence jeopardizing the life, health, bodily integrity, liberty, honour or property of a *person** or a group of persons . . . shall, if the act was committed for reasons of nationality, religion, race or political beliefs, be guilty of a crime against humanity."²⁶

39. In the report of the Holy See, submitted by its delegate, Pierre Bondue, "any attack . . . upon the rights . . . of any human being by reason of his opinions, nationality, race, caste, family or profession"²⁷ was considered to constitute the crime.

40. The Swiss delegate, Jean Graven, professor in the Faculty of Law in Geneva, submitted the following draft definition in his report:

Any person who, without right and for reasons of race, nationality, religion, political beliefs or opinions, attacks or endangers the liberty, health, bodily integrity or life of a *person** or a group of persons, in particular by deportation, enslavement, ill-treatment or extermination,

whether in time of war or in time of peace, commits a crime against the human person (or humanity) and is punishable therefor.²⁸

41. Furthermore, André Boissarie, *procureur général* at the Court of Appeals of Paris, had, within the framework of the Mouvement national judiciaire français, prepared a draft convention, article 5 of which provided: "'Crimes against humanity' are crimes committed against a human *individual** or group by reason of nationality, race, religion or opinions."²⁹

42. Henri Meyrowitz discusses the question of a mass element at length in his remarkable work. He contends that:

. . . Crimes against humanity must in fact be interpreted as comprising not only acts directed against individual victims, but also acts of participation in mass crimes . . .

. . .

It is no longer necessary that there should be a plurality of victims or a plurality of acts. The concept of a crime against humanity doubtless derived from a historical criminal phenomenon, one of whose main characteristics was its mass nature: a great number of acts, a great number of agents, a great number of victims. . . . But [a mass nature] is a sociological condition of the phenomenon of crimes against humanity, not a constituent element of the offence.³⁰

43. Legal writers thus disagree on the question whether a crime against humanity is necessarily of a mass nature or not. The same disagreement appears in judicial practice.

44. The Supreme Court of the British Zone considered that the mass element was not essential to the legal definition of a crime against humanity, which refers not only to extermination—which implies a mass element—but also to murder, torture or rape, which can involve a single isolated act.³¹

45. The United States military tribunals, on the other hand, considered that the mass element formed an integral part of a crime against humanity. In the *Justice* case, senior officials of the Nazi judicial system were found guilty of "conscious participation in a nationwide Government-organized *system of cruelty** and injustice". The tribunal therefore stated that the definition should not cover isolated cases of atrocities or persecution.³²

46. The Legal Committee of the United Nations War Crimes Commission, after studying the definitions contained in the Nürnberg and Tokyo Charters and Law No. 10 of the Allied Control Council, expressed a similar view (see para. 33 above).

47. In the draft articles on State responsibility, the view that the crime must be of a mass nature appears to prevail, since, according to article 19, paragraph 3 (c),

²¹ See the memorandum prepared in 1950 by V. V. Pella at the request of the Secretariat (original French text published in *Yearbook . . . 1950*, vol. II, pp. 278 *et seq.*, document A/CN.4/39), para. 139 (at pp. 348-349).

²² *Revue internationale de droit pénal* (Paris), vol. 19 (1948), p. 384.

²³ *Actes de la Conférence, op. cit.* (footnote 16 above), pp. 108 *et seq.*

²⁴ *Ibid.*, p. 116.

²⁵ *Ibid.*, p. 130.

²⁶ *Ibid.*, p. 137.

²⁷ *Ibid.*, p. 149.

²⁸ *Ibid.*, p. 157.

²⁹ *Revue internationale de droit pénal* (Paris), vol. 19 (1948), p. 382.

³⁰ *Op. cit.* (footnote 9 above), pp. 255 and 280.

³¹ *O.G.H. br. Z.* (see footnote 11 above), vol. 1, pp. 13 and 231; cited in Meyrowitz, *op. cit.*, p. 254.

³² 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. 3, vol. III, p. 985; cited in Meyrowitz, *op. cit.*, pp. 252-253.

an international crime may result from “a serious breach on a *widespread scale** of an international obligation of essential importance for safeguarding the human being”.

48. The distinction resulting from the mass nature of the act is, in any case, not conclusive. There are those who still consider that the systematic violation of a single human right is a crime against humanity.

49. The question therefore arises whether the element of seriousness could serve as a differentiating factor. Stefan Glaser believes that genocide is “only an aggravated case” of a crime against humanity. The two concepts differ only in degree and not in nature.³³ According to Glaser, the distinction is all the more difficult to maintain because, when the motives are considered, the difference between destroying an “ethnic group” and destroying a “political group” is not apparent.

50. Vespasien V. Pella, however, does not share that view. According to him, the concepts of genocide and crimes against humanity do not overlap:

Indeed, there is no genocide within the meaning of the Convention of 9 December 1948 if the act was directed against a *political group*. By contrast, persecution for political reasons may constitute a crime against humanity within the meaning of article 6 (c) of the Charter of the Nürnberg Tribunal.³⁴

Carrying his reasoning to its limit, he considers that the difference between the two concepts is such that genocide should be excluded from the code. According to him, the fact that there is a separate Convention on Genocide makes superfluous its inclusion in a code of offences against the peace and security of mankind, and he believes that “the independence and separate existence of the Convention on Genocide should be maintained”.³⁵

51. That extreme argument seems unacceptable; moreover, it was not accepted by the Commission in 1954. If all the wrongful acts which are the subject of a convention had to be excluded from the code, the latter would be nothing more than an empty shell. Furthermore, most of the conventions do not cover the criminal aspect of wrongful acts, which is precisely the subject of the present draft code.

(c) *Belligerency*

52. It was also considered that belligerency might constitute an element that would serve to differentiate between the two concepts. The Nürnberg Charter linked crimes against humanity with the state of belligerency. The military tribunals discussed the problem at great length. The United Nations War Crimes Commission summarized the debate in the following terms: “while the two concepts may overlap, genocide is different from crimes against humanity in that, to prove it, no connection with war need be shown”.³⁶

³³ *Op. cit.* (footnote 19 above), p. 109.

³⁴ See memorandum, *Yearbook . . . 1950*, vol. II, p. 351, document A/CN.4/39, para. 141.

³⁵ *Ibid.*, p. 142.

³⁶ 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. XV, p. 138.

53. In 1954, the Commission excluded belligerency as a factor for distinguishing between genocide and crimes against humanity. However, in the draft code, it retained the distinction between the two concepts, each of those offences being the subject of a separate paragraph (paragraphs (10) and (11) of article 2).

54. The Special Rapporteur considers that, for reasons which are based on the specific nature of the crime of genocide, the latter should be assigned a separate place among crimes against humanity.

55. As for the formulation of the draft article, it must first be noted that the word “genocide” does not appear in the 1954 draft. However, article 2, paragraph (10), deals expressly with that phenomenon, and all the acts listed in that paragraph are acts of genocide. Moreover, the word “genocide” is used and defined in article II of the Convention of 9 December 1948. Except for that difference, the 1954 text reproduces the 1948 text word for word.

56. With regard to the elements contained in the two texts, it may be asked whether the words “national, ethnic, racial” do not sometimes overlap, and whether there are not pleonasms, particularly in the use of the words “ethnic” and “racial”. It is clear that, although those concepts may overlap, they are not identical.

57. A national group often comprises several different ethnic groups. States which are perfectly homogeneous from an ethnic point of view are rare. In Africa, in particular, territories were divided without taking account of ethnic groups, and that has often created problems for young States shaken by centrifugal movements which are often aimed at ethnic regrouping. With rare exceptions (Somalia, for example), almost all African States have an ethnically mixed population. On other continents, migrations, trade, the vicissitudes of war and conquests have created such mixtures that the concept of the ethnic group is only relative or may no longer have any meaning at all. The nation therefore does not coincide with the ethnic group but is characterized by a common wish to live together, a common ideal, a common goal and common aspirations.

58. The difference between the terms “ethnic” and “racial” is perhaps harder to grasp. It seems that the ethnic bond is more cultural. It is based on cultural values and is characterized by a way of life, a way of thinking and the same way of looking at life and things. On a deeper level, the ethnic group is based on a cosmogony. The racial element, on the other hand, refers more typically to common *physical* traits. It therefore seems normal to retain these two terms, which give the text on genocide a broader scope covering both physical genocide and cultural genocide.

59. The other category of crimes against humanity to be discussed is that referred to in the 1954 draft code as “inhuman acts”.

2. INHUMAN ACTS

60. Article 2, paragraph (11), of the 1954 draft code does not give a general definition of inhuman acts but provides a list of such acts. However, while the list in

paragraph (10) concerning genocide is limitative, the list in paragraph (11) is illustrative.

61. Indeed, this area includes very diverse acts which are very varied in their manifestations. The nature of crimes against humanity changes with technological progress. The expression "crime against humanity" dates back to the Second World War precisely because of the cruelty made possible by such progress. Because of that evolving nature, any attempt to list all the crimes against humanity would narrow the scope of the subject and might allow offences which are sometimes difficult to imagine before they are committed to go unpunished.

62. Without anticipating what will be said elsewhere about war crimes (some of which are confused with crimes against humanity), we can recall the method followed in the Hague Convention (IV) of 18 October 1907,³⁷ the preamble to which states:

... the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*,* and the dictates of the public conscience.

63. Although there is no such reference in the 1954 draft code to the principles of the law of nations, the usages established among civilized peoples, the laws of humanity and the dictates of the public conscience, it is certain that those were the principles which governed that text. Moreover, the code makes it clear that inhuman acts are not limited to those listed in it.

³⁷ Convention respecting the Laws and Customs of War on Land, see J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, Oxford University Press, 1918), pp. 101-102.

3. APARTHEID

64. There is no doubt whatsoever that *apartheid* is a crime against humanity: only those who resist the course of history could have such doubts. In his second report,³⁸ the Special Rapporteur listed all the international instruments relating to *apartheid*. Moreover, if the concept of *jus cogens* has any meaning, this case provides one of its most justified applications.

65. Without questioning the criminal nature of *apartheid*, some thought that the term was too much linked to a specific system to be the basis of a general rule. But that is not the prevailing argument. *Apartheid*, like many other crimes, has its specific traits. Involuntary and voluntary homicide and murder are crimes which have specific characteristics, but which nevertheless derive from the same basic act: killing. But that same act has a different degree of seriousness according to each case. *Apartheid*, like genocide, has a certain degree of autonomy in the code, even though both are inhuman acts.

C. Serious damage to the environment

66. According to article 19, paragraph 3 (d), of part 1 of the draft articles on State responsibility, "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" is an international crime.

67. It is not necessary to emphasize the growing importance of environmental problems today. The need to protect the environment would justify the inclusion of a specific provision in the draft code.

³⁸ *Yearbook* . . . 1984, vol. II (Part One), p. 89, document A/CN.4/377, para. 44 (3) and footnote 34.

PART II

War crimes

68. The concept of war crimes calls for some comments concerning terminology problems, followed by substantive comments, and lastly some remarks concerning methodology problems.

A. Terminology problems

69. Here we are faced at the outset with a terminological difficulty. In traditional international law, the term "war" did not refer only to a sociological and political phenomenon, but first and foremost to a legal concept reflecting a state of international relations which created rights and obligations for those who waged it. War itself was a right linked to sovereignty. The purpose of international conventions was therefore not to prohibit war, but merely to regulate it. The idea

of an international convention prohibiting war, except in cases of self-defence, is relatively recent, dating from the 1928 Kellogg-Briand Pact.³⁹ It gained ground especially after the Second World War, with the adoption of the Charter of the United Nations.

70. However, although war is today a wrongful act, it is an enduring phenomenon. Unfortunately, the same is true for many other crimes. It is not enough to declare an act illegal and prohibit it for mankind to be rid of it. The injunction against voluntary homicide and murder is age-old. Nevertheless, regrettably, voluntary homicide and murder occur every day. If prohibiting an act were enough to banish it from human behaviour, there would be no police, no legal system and no penal systems.

³⁹ League of Nations, *Treaty Series*, vol. XCIV, p. 57.

71. Thus the prohibition of war did not make it disappear. It can be said, however, that prohibiting war placed it in a new perspective which entails legal implications. The first is, naturally, that the "declaration of war" becomes a wrongful act. Nowadays, war, even when declared in the manner formerly required, is considered as aggression.

72. Yet even though war has become a wrongful act and can no longer legitimate any right, the basic phenomenon—that is, armed conflict—still exists and one would have to be very naïve indeed not to continue to be concerned by it. The 1954 draft code prohibited acts "in violation of the laws or customs of war" (art. 2, para. (12)). In order to find a formula in conformity with the law, it was suggested that the term "war" should be deleted from that expression. But it would be absurd to consider an act criminal and, at the same time, seek to lay down rights and duties for its perpetrators. However, to refrain, for that reason, from limiting the excesses and abuses which are committed during armed conflicts would be more than naïve; it would be foolish and wrong.

73. Moreover, the prohibition of war does not rule out situations (self-defence, peace-keeping operations) in which the use of force, although allowed, must be restricted to well-defined limits.

74. A law of armed conflict thus remains essential. The only problem that arises in this regard is one of terminology, namely whether the term "war" should be abandoned and replaced by "armed conflict".

75. There are arguments in favour of this idea, particularly since the appearance of new types of armed conflict which do not always pit State against State but may pit State entities against non-State entities (national liberation movements, partisan movements, etc.). Non-international armed conflicts were covered as early as 1949 by article 3 of the First Geneva Convention. The two Additional Protocols of 1977 to the 1949 Geneva Conventions, concerning armed conflicts,⁴⁰ confirmed this idea, namely that the conflict need not be one between States for the "laws or customs of war" to be applicable. Article 1, paragraph 4, of Protocol I provides that the situations referred to in article 2 common to the Geneva Conventions include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". As a result of this provision, combatants and prisoners of wars of national liberation have been put in the same category as combatants and prisoners of war "of any other armed conflict" within the meaning of article 2 common to the four Geneva Conventions.

76. It follows from these brief remarks that the concept of war in the traditional sense has been shattered. It no longer applies exclusively to inter-State relations, but encompasses any armed conflict pitting State entities against non-State entities. In other words, it is no longer war in the formal sense, but war in the material sense,

i.e. its content (the use of armed force), which is referred to here. Therefore the term "war" is used in this report in the material sense of armed conflict, not in the formal and traditional sense of inter-State relations.

B. Substantive problems: war crimes and crimes against humanity

77. The substantive problems concern the distinction between war crimes and crimes against humanity. It is not always easy to draw a distinction between a war crime and a crime against humanity. Whether one considers the two concepts from the point of view of their content or that of their scope, they will be seen to overlap, and this often makes it difficult to distinguish between them.

78. Although the two concepts are distinct, the same act may, at the same time, constitute a war crime and a crime against humanity. If voluntary homicide and murder are committed during an armed conflict, they may constitute crimes against humanity as well as war crimes. To be deemed as such, it is enough for them to have been committed for political, racial or religious motives. The same deeds, committed for the same motives outside the context of armed conflict, are simply crimes against humanity.

79. This possible dual characterization has its advantages. Indeed, characterization as a crime against humanity makes it possible to punish acts that cannot be characterized as war crimes. Crimes committed in time of war by nationals against other nationals might go entirely unpunished if they could not be characterized as crimes against humanity.

80. Because of the motive involved, the two offences do not have the same content and therefore do not have the same scope. A war crime is narrower in scope. It can be committed only in time of war, whereas a crime against humanity can be committed in time of peace as well. A war crime can be committed only among enemies, whereas a crime against humanity can be committed against victims who are not enemies, and even by a State against its own nationals.

C. Methodology problems

81. The question arises as to what is the best way of indicating what constitutes a war crime: a general definition or an enumeration?

82. Enumeration has always presented difficult problems. It is difficult, if not impossible, to draw up an exhaustive list of "war crimes". In 1919, the Preliminary Peace Conference had prepared a list of the violations of the laws and customs of war by the German and Allied forces during the First World War; the list consisted of 32 types of violation.

83. During the Second World War, Sir Cecil Hurst, representative of the United Kingdom and Chairman of the United Nations War Crimes Commission, once again raised the question of what should be considered a "war crime". The War Crimes Commission was

⁴⁰ United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95 (Protocol I) and p. 135 (Protocol II).

daunted by the enormous scope of the undertaking. It simply revived the list drawn up in 1919, while recognizing the principle that the list was not exhaustive and that there might be other crimes that should appear on it, in view of subsequent developments. There were in fact new proposals. For example, the taking of hostages was added on the proposal of the representative of Poland. Likewise, random mass arrests were defined as crimes. It was also acknowledged that it was necessary to bear in mind the preamble to the Hague Convention (IV) of 1907,⁴¹ which proved that war crimes were not limited to the violations of the laws of war as embodied in the Hague Conventions, and that the general principles of law recognized by civilized nations should make it possible to characterize as war crimes all acts which seriously contravened those principles.⁴²

84. The Charter of the Nürnberg Tribunal mentions "violations of the laws or customs of war", which "shall include, *but not be limited to*,* murder, ill-treatment", etc. (art. 6 (b)). Law No. 10 of the Allied Control Council refers to "violations of the laws or customs of war, including *but not limited to** murder, ill-treatment . . ." (art. II, para. 1 (b)).

85. The Tokyo Charter, on the other hand, referred to "conventional war crimes: namely, violations of the laws or customs of war" (art. 5 (b)). But there was no enumeration, not even a non-limitative one.

86. The debate is open once again. In the case under consideration, it is best to leave well alone and to temper idealism with realism. Sir David Maxwell Fyfe said:

⁴¹ See paragraph 62 and footnote 37 above.

⁴² *History of the United Nations War Crimes Commission . . .*, *op. cit.* (footnote 3 above), pp. 170-172.

"I do not think it practicable to produce a code of elaborate and detailed definitions."⁴³ Vespasien Pella was more categorical: "It is impossible in the present circumstances to draw up a complete list of violations of the laws and customs of war."⁴⁴ Jean Spiropoulos, Rapporteur for the 1954 draft code, was of the same mind:

. . . In connection with the draft code, the view has been expressed that one should set up an *exhaustive* enumeration of all acts which would constitute war crimes. . . .

In our opinion such an undertaking would meet with the most serious difficulties, since there are deep divergencies of opinion on very important subjects concerning the laws and customs of war. . . .⁴⁵

He thought it necessary to adopt a general definition of war crimes and leave to the judge the task of deciding whether the case under consideration involved such a crime. But he added: "We do not object to adding a list of violations of the rules of war to the general definition, provided, however, that this list does not exhaust the acts to be considered as 'war crimes'".⁴⁶

87. In 1954, the Commission adopted the method of a general definition and nothing more.

88. We are once again at the crossroads. The draft article on war crimes submitted by the Special Rapporteur thus consists of two alternatives: one is a synthesis based on the 1954 draft, and the other a combination of the two methods (see article 13 in part V of the present report).

⁴³ Cited in Pella's memorandum, *Yearbook . . . 1950*, vol. II, p. 352, document A/CN.4/39, para. 145, *in fine*.

⁴⁴ See memorandum, *ibid.*, para. 147.

⁴⁵ First report by J. Spiropoulos on the draft code of offences against the peace and security of mankind, *Yearbook . . . 1950*, vol. II, p. 266, document A/CN.4/25, paras. 78-79.

⁴⁶ *Ibid.*, p. 267, para. 82.

PART III

Other offences

89. It has been said that the nature of offences against the peace and security of mankind often implies a *concursum plurimum ad delictum*. The phenomenon of participation is the rule in this regard, hence the importance of the concepts of complicity and conspiracy when considering these crimes.

90. Attempt to commit such crimes will also be considered as a related offence.

91. The 1954 draft code simply described these acts as offences without analysing or defining them, and no comments on them are to be found in the preparatory work. Now the transposition of certain concepts of internal law to international law sometimes results in incoherence. Here, however, these concepts become really distorted when they enter the sphere of international law and sometimes their content or meaning changes. It will therefore be interesting to see what becomes of the concepts of complicity and conspiracy when they enter that sphere.

A. Complicity

92. In a criminal act committed through participation, the accomplice plays a role distinct from that of the principal. The two are not accused of the same acts. For example, in the case of murder, the physical act of *kill-ing* is distinct from *providing the means to kill*. While the two offences are related (theoretically, one is linked to the other), each retains its own character. As their material content differs, they constitute two concepts having two distinct legal characterizations. In some cases, however, it is difficult to determine the legal content of either. In internal law, the content of complicity varies in scope, depending upon the legislation concerned.

1. COMPLICITY IN INTERNAL LAW

(a) *Limited content*

93. Article 60 of the French Penal Code sets forth the various cases of complicity. The latter may take the

form of *instigation, provision of means, or aiding and abetting*.

94. In general, under French law, complicity does not include acts committed after the principal offence. Concealment, for instance, is an offence distinct from complicity.

95. Of course, French penal law also recognizes cases of extended complicity. For example, article 61 of the Penal Code equates certain cases of concealment with complicity: concealment of robbers or perpetrators of crimes against the security of the State or the public peace. According to the Code, the perpetrator of such an act, committed after the principal act, "shall be punished as an accessory". But this kind of complicity owes its autonomy to the law alone. Although the penalty incurred is the same as that incurred by the principal, the offence is autonomous: it is covered by a special provision of the Penal Code and is not a jurisprudential application of the general theory of complicity.

96. The laws of many other countries limit complicity to acts committed prior to or concomitantly with the principal act; acts committed later do not constitute complicity and are defined as autonomous offences. The Penal Code of the Federal Republic of Germany limits complicity to the provision of advice or assistance, i.e. to prior or concomitant acts. The 1951 Penal Code of Yugoslavia (art. 265), that of the German Democratic Republic (art. 234) and that of Hungary (art. 184) make concealment a separate offence.

(b) *Extended content*

97. Extended complicity tends to include acts committed after the principal act instead of making them autonomous offences. According to Igor Andrejew, some Soviet writers are in favour of the concept of "contact" with the offence. They believe that any intentional activity related to an offence that is being committed or has already been committed by other persons may constitute a case of complicity: for example, any act interfering with the prevention or discovery of the offence. There are four kinds of contact: concealment of the perpetrator, non-denunciation of the offence, consent to the offence and concealment of property.⁴⁷

98. Anglo-American law recognizes both the *accessory before the fact* and the *accessory after the fact*. The accessory after the fact is guilty of a form of extended complicity, a concept which, as will be seen, was used in the decisions of the Nürnberg Tribunal and the Allied tribunals. Other legal systems also incorporate the concept of "originator" (*auteur intellectuel*) within the idea of complicity. According to these systems, some forms of participation, such as instigation, conception of the act, or sometimes even the giving of an order, in which there is no physical participation, are considered as complicity.

99. These brief references to comparative law show how difficult it is to assign a content to the concept of

complicity in internal law. Depending on the legislation concerned, the boundary between the concepts of perpetrator, co-perpetrator, accomplice and receiver or concealer shifts, thereby affecting the content of complicity. Consequently, the content of the concept of complicity may be either extended or limited. Sometimes the accomplice is confused with the co-perpetrator, the originator and even the receiver or concealer. Sometimes the accomplice is simply the instigator or the person who aided and abetted.

2. COMPLICITY IN INTERNATIONAL LAW

100. In international law, too, the word "accomplice" may have a limited or an extended meaning, depending on the circumstances.

(a) *Limited content*

101. The limited content appears to derive from the Charters of the International Military Tribunals. The Nürnberg Charter, in the last paragraph of article 6, and the Tokyo Charter, in article 5 (c), single out "leaders, organizers, instigators and accomplices". Law No. 10 of the Allied Control Council, in article II, paragraph 2, singles out any person who:

(a) was a *principal*;

(b) was an *accessory* to the commission of a crime or *ordered* or *abetted* the same;

(c) took a *consenting part* therein;

(d) was *connected* with *plans* or enterprises involving the commission of a crime;

(e) was a *member* of any organization or group connected with the commission of a crime;

(f) with reference to paragraph 1 (a), i.e. crimes against peace, held a *high political, civil or military position* or a *high position* in financial, industrial or economic life.

102. One observation comes immediately to mind: the texts appear to draw a distinction between complicity and certain related concepts. Thus the Nürnberg Charter separated accomplices from leaders, organizers and even instigators. The Tokyo Charter drew the same distinction. Law No. 10 established several categories of perpetrators within which the accessory was separated from the person who "ordered or abetted" the crime, the person who "took a consenting part" therein, and the person who, with respect to certain crimes (crimes against peace), held "a high political, civil or military position" or "a high position in financial, industrial or economic life".

103. On reading these texts, one wonders what constitutes complicity: what is an accomplice if he is not the instigator or the person who ordered, directed, organized, or took a consenting part in the crime? Perhaps complicity consists solely in *aiding and abetting* or the *provision of means*, the only elements not expressly referred to.

104. In fact, the drafters of these texts were prompted more by concern for efficiency than by concern for legal exactitude or rationality. The use of varied terms and expressions that are often synonymous and that overlap can be explained by the desire to let no act go unpun-

⁴⁷ I. Andrejew, *Le droit pénal comparé des pays socialistes* (Paris, Pedone, 1981), pp. 61-62.

ished. In an era in which crime had taken on the most varied, subtle and insidious forms, it was essential to let no act slip through the net, to neglect no aspect of such a complex situation. It was difficult to know in what capacity an individual had acted. Often those having the most responsibility, those at the top of the hierarchy, those who conceived of and ordered the crimes that were committed were not the actual perpetrators, and one could hardly consider them as accomplices and their subordinates as the principals. In the context of the times, group crime predominated and it was difficult to distinguish protagonists from accomplices and even, generally speaking, from all those who had participated in a mass action.

105. The fact remains that, by characterizing the various kinds of participation in an autonomous way, the texts limited the content of complicity proper.

(b) *Extended content*

(i) *Complicity of leaders*

106. In certain cases, domestic legislation had not hesitated to extend the concept of complicity to include leaders, thereby broadening its content. It was considered that they had *organized* or *tolerated* the act defined as a crime, or even *conceived* of the act, complicity thereby being extended to cover the originator.

107. Thus, for example, the French Ordinance of 28 August 1944 on the punishment of war crimes provides in article 4:

Where a subordinate is prosecuted as the actual perpetrator of a war crime, 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.

Luxembourg's Law of 2 August 1947 on the punishment of war crimes contains a similar provision in article 3:

... the following may be charged, according to the circumstances, as co-authors or as *accomplices** in the crimes and delicts set out in article 1 of the present law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts.

Similarly, in the Netherlands, the Law of 10 July 1947 on the judgment of persons guilty of crimes against humanity provides in article 27, paragraph 3:

Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2.

The Greek Constitutional Act No. 73 of 8 October 1945 on the trial and punishment of war criminals provides in article 4:

When a subordinate is charged as principal of a war crime and his superiors in the hierarchy cannot be punished also as principals in accordance with articles 56 and 57 of the Penal Law, the said superiors are considered as accessories if they have *organized** the criminal act or have *tolerated** the criminal act of their subordinate.

The Chinese Law of 24 October 1946 on the trial of war criminals provides in article 9:

Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the *accomplices** of such war criminals.

108. It follows from these provisions that the concept of complicity may encompass acts which have consisted of organizing, directing, ordering or tolerating. This extension of complicity rests upon the assumption of responsibility attaching to the superior in rank. It is assumed that the latter has knowledge of all the activities of his subordinates, and the fact of not preventing a criminal act or plan is equivalent to complicity.

109. The same view is to be found in judicial decisions. The United States Supreme Court, in the *Yamashita* case, rejected a request for habeas corpus from the Japanese General Yamashita in the following terms:

... it is urged that the charge does not allege that petitioner has either committed or directed the commission of *such acts**, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result."⁴⁸

The reply given by the Court was affirmative. It is assumed that complicity attaches to a commanding officer whose subordinates have committed a criminal act, and the commanding officer must produce proof that it was impossible for him to prevent the commission of the crime under consideration.

110. This assumption was extended to members of the Government. The Tokyo Tribunal ruled that responsibility for prisoners of war rested not only upon officials having direct and immediate control of them, but also, in general, upon members of the Government, military or naval officers in command of formations having prisoners of war in their possession, and officials in departments concerned with the well-being of prisoners, for: "It is the duty of *all** those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment".⁴⁹ Dereliction of this duty, whether through voluntary abstention or negligence, makes superiors in rank accomplices in the crimes which may be committed.

111. Furthermore, in the *Hostage* case, the United States Military Tribunal stated that "a corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or *ought to have known about**".⁵⁰

112. The concept of complicity understood in this way is therefore broader than that referred to in the Nürnberg and Tokyo Charters and in Law No. 10 of the Allied Control Council and goes beyond aiding and

⁴⁸ *Law Reports of Trials of War Criminals*, op. cit. (footnote 36 above), vol. IV, p. 43; and *United States Reports* (Washington, D.C.), vol. 327 (1947), pp. 14-15.

⁴⁹ *Law Reports of Trials* . . . , vol. XV, p. 73.

⁵⁰ American Military Tribunals (see footnote 32 above), case No. 7, vol. XI, p. 1303.

abetting. This form of complicity now constitutes an autonomous offence, according to article 86, paragraph 2, of Additional Protocol I to the Geneva Conventions.

(ii) *Complicity and concealment*

113. Complicity has on occasion been extended to include concealment. This was particularly true of cases of illegal appropriation or disposal of goods which had belonged to Jews who were exterminated. In the *Funk* case, the accused, in his capacity as Minister of Economics of the Third Reich and President of the Reichsbank, had concluded an agreement under which the SS were to deliver to the Reichsbank the jewellery, articles of gold and banknotes having belonged to the persons exterminated. The gold obtained from the frames of spectacles and from teeth had been deposited in the Reichsbank vaults. According to the Nürnberg 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."⁵¹ There was express or tacit consent to acts of concealment of goods improperly acquired by the bank, subsequent to the death of their owners.

114. The judgment rendered in the *Pohl* case is even more explicit. The United States Military Tribunal stated: "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."⁵²

(iii) *Complicity and membership in a group or organization*

115. Within an organization, all members do not play the same role. There is an internal hierarchy of leaders and subordinates, of those who organize and those who execute orders. As the above discussion of the links between complicity and the position of leader has shown, it is difficult to separate these two categories into actual perpetrators and accomplices. They could as well be separated into physical perpetrators and originators, into direct perpetrators and indirect perpetrators.

116. Here, however, the act characterized as a crime is of a different nature, namely voluntary *membership* in the organization, or voluntary *participation* in a group. Rather than trying in vain to establish who within the group or organization is the perpetrator and who is the accomplice, Law No. 10 of the Allied Control Council,

in article II, paragraph 2 (e), makes membership in a group or organization an autonomous offence from the moment when the entity in question becomes implicated in a criminal affair. The necessary and sufficient condition is membership in the group or organization.

117. The Commission will have to consider whether the code should conform with Law No. 10 and the Nürnberg Charter by making membership a separate offence, or whether, on the contrary, it should defer to the general theory of participation and entrust to the judge the task of determining, in each specific case, the role played by the member of the organization.

B. The limits of extended complicity: *complot* and conspiracy

118. The question here concerns the limits of complicity, *complot* and conspiracy. This is the situation envisaged in the last paragraph of article 6 of the Nürnberg Charter, which relates in particular to "accomplices participating in the formulation or execution of a *common plan** or conspiracy". According to that provision, persons who have participated in such a plan "are responsible for all acts performed by *any persons** in execution of such plan". Law No. 10 deals with a similar situation in article II, paragraph 2 (d) and (e).

119. It will be noted that, in this case, criminal responsibility is particularly broad since it goes beyond the act committed by a person. It involves a collective responsibility which goes even further than the concept of *complot* as recognized in Continental law. In French law, for example, a *complot* is regarded as an autonomous offence and punished as such. If a *complot* has been followed by commencement of execution, aggravating circumstances come into play which increase the penalty incurred, since individual responsibility is involved. On the other hand, a *complot* is strictly limited to acts which may affect the authority of the State or the integrity of national territory, or which may lead to civil war.

120. In the case of the last paragraph of article 6 of the Nürnberg Charter and of article II, paragraph 2 (d) and (e), of Law No. 10, the offence referred to rests, as already stated, upon a collective responsibility and is not dependent upon commencement of execution. Moreover, it is not limited, at least in the Nürnberg Charter, to a single category of crimes, but covers all crimes specified in that Charter: crimes against peace, war crimes and crimes against humanity. It is true that the Nürnberg Tribunal did not maintain this broad definition and restricted the application of the concept to crimes against peace. Nevertheless, the provisions of the Charter went much further.

121. The reservations embodied in the decisions of the Nürnberg Tribunal may be explained by the fact that the provisions in question were based on a concept peculiar to common law, namely *conspiracy*. Conspiracy is an original concept which characterizes as a crime an agreement between individuals with a view to committing a criminal act. It is the agreement itself which is criminal, independently of the criminal act which may have been

⁵¹ 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.* (footnote 9 above), p. 377.

⁵² American Military Tribunals (see footnote 32 above), case No. 4, vol. V, p. 989.

committed. The agreement to commit murder is punishable even if the murder has not been committed and even if there has been no commencement of execution. This offence is based on collective responsibility. Contrary to the general principle of criminal law under which an individual is responsible only for his own acts, for acts which may be ascribed to him personally, conspiracy attaches collective criminal responsibility to all those who have participated in the agreement. This responsibility is added to that incurred personally by each individual for the acts which he has actually committed as a result of this agreement. It was this concept of conspiracy which inspired the drafting of the above-mentioned texts and it was on this same concept that the charge was based.

122. The Nürnberg Tribunal did not agree with the interpretation advanced by the prosecution and was of the opinion that the wording of the last paragraph of article 6 did "not add a new and separate crime to those already listed", but was simply "designed to establish the responsibility of persons participating in a common plan".⁵³ Even in this case, the Tribunal set aside the charge of conspiracy for war crimes and crimes against humanity and retained it only for crimes against peace. In other words, the Tribunal regarded it solely as a crime of responsible government officials, for a crime against peace can be committed only by such officials.

123. Chief Prosecutor Robert Jackson, however, had requested the broadest possible application of conspiracy, for which he offered an impressive and systematic explanation. Among the principles enforced every day in the courts of Great Britain and the United States of America in dealing with conspiracy, the following are the most important:

No formal meeting or agreement is necessary. It is sufficient, although one performs one part and other persons other parts, if there be concert of action and working together understandingly with a common design to accomplish a common purpose.

Secondly, one may be liable even though he may not have known who his fellow conspirators were or just what part they were to take or what acts they committed, and though he did not take personal part in them or was absent when the criminal acts occurred.

Third, there may be liability for acts of fellow conspirators although the particular acts were not intended or anticipated, if they were done in execution of the common plan. . . .

Fourth, it is not necessary to liability that one be a member of a conspiracy at the same time as other actors, or at the time of the criminal acts. When one becomes a party to a conspiracy, he adopts and ratifies what has gone before and remains responsible until he abandons the conspiracy with notice to his fellow conspirators.

. . .

Members of criminal organizations or conspiracies who personally commit crimes, of course, are individually punishable for those crimes exactly as are those who commit the same offences without organizational backing. The very essence of the crime of conspiracy or membership in a criminal association is liability for acts one did not personally commit, but which his acts facilitated or abetted. The crime is to combine with others and to participate in the unlawful common effort, however innocent the personal acts of the participants, considered by themselves.⁵⁴

The Chief Prosecutor explained that the basis and justification for these sweeping principles was the need to defend society "against the accumulation of power through aggregations of individuals".

124. The system thus described is therefore based upon a twofold responsibility: individual responsibility and collective responsibility, which are not mutually exclusive, but coexist. This concept of conspiracy, unknown in Continental law, does not coincide precisely with any concept of Continental law. It is not precisely the same thing as either complicity or *complot*. It is close to complicity, in that the participants "facilitate or abet", as the Chief Prosecutor said. But it is close to *complot* to the extent that it involves an *agreement* to execute a common plan.

125. In accepting the concept of conspiracy only for crimes against peace and rejecting it for war crimes and crimes against humanity, the Nürnberg Tribunal seems to have accepted only the *complot* aspect of the concept. In fact, where crimes against peace as defined in the Nürnberg Charter are concerned (the preparation, initiation or waging of a war of aggression or a war in violation of international treaties or agreements; participation in a plan or agreement for the accomplishment of any of these crimes), the agents, as has been said, can only be *responsible government officials* linked to each other by their joint action. They are co-perpetrators and not accomplices, and their action may be seen as a plot against the external security of another State.

126. However, the question may be asked whether conspiracy is closely related only to *complot*, or whether it is not also to some extent similar to complicity. Chief Prosecutor Jackson himself used the expression "facilitate or abet" in respect of the concept of conspiracy, an expression which enters into the definition of complicity. Conspiracy really seems to include the notion of complicity when the plan is executed within an organization involving hierarchical relations between the leaders and the actual perpetrators, because, in that case, complicity may operate between leaders and subordinates. According to Claude Lombois,⁵⁵ conspiracy, as a crime against peace, is a collective responsibility based on the solidarity of responsible government officials. As a war crime or a crime against humanity, conspiracy becomes a general theory of criminal participation which "makes it possible to hold responsible those who planned the whole no less than those who executed the details". Thus conspiracy may include both the principal acts (aggression) and acts of complicity (execution of an order).

127. With regard to the limits of complicity, the question is whether complicity, even in a broad sense, should encompass acts committed by a member of an organization or acts committed in the execution of a common plan, or whether membership in a criminal organization or participation in a common plan should be qualified directly as separate offences.

⁵³ *Trial of the Major War Criminals . . .*, *op. cit.* (footnote 51 above), vol. I, p. 226; cited in Meyrowitz, *op. cit.* (footnote 9 above), p. 426.

⁵⁴ *Trial of the Major War Criminals . . .*, vol. VIII, pp. 365-366; cited in Meyrowitz, *op. cit.*, pp. 427-428.

⁵⁵ C. Lombois, *Droit pénal international*, 2nd ed. (Paris, Dalloz, 1979), p. 155.

128. There are cases in internal law where these offences are autonomous. In French law, for example, apart from *complot*, the aim of which is to undermine the authority of the State, there is the association of persons for unlawful purposes, the aim of which is attacks on persons and property. These offences are autonomous: they have been created by the law and do not arise from a jurisprudential construction based on the theory of complicity. Generally speaking, it appears that, when the offence presents certain specific characteristics (preparation or execution within the framework of an *organization* or a *common plan*), this circumstance induces the national legislator to make it an autonomous offence, even if it might have been penalized on the basis of complicity.

129. The Charters of the international military tribunals did the same in distinguishing between acts of complicity and acts committed within the framework of an organization.

130. As for the 1954 draft code, it was confined to complicity on the one hand, and conspiracy on the other, with no definition of their content. Moreover, it included no provision relating to membership in an organization or participation in a common plan. The Commission will have to discuss this point.

131. If the Commission decides to abide by what was done in 1954, i.e. to make complicity an offence without defining it, it would then have to indicate in a commentary what content this concept should have in international law: instigation, aiding, abetting, provision of means, order, express or tacit consent, or subsequent acts of participation aimed at concealing the offender or the *corpus delicti*. These concepts, in the view of the Special Rapporteur, should be part of the content of complicity. In other words, complicity should be understood in the broad sense. On the other hand, the need to extend it to membership in an organization or participation in a common plan must first be carefully discussed. Even though criminal responsibility is in principle based on individual and identifiable acts attributable to a specific perpetrator, it should not be forgotten that this is an area in which most actions are undertaken or executed jointly. Groups and organizations are the privileged means for perpetrating mass crimes, as the crimes involved here often are, and it is sometimes difficult to isolate the role of each person. These organizations, which provide a haven of criminal anonymity, must be discouraged. If the Commission decides not to make such phenomena autonomous offences, they will then come within the ambit of extended complicity, and this theory might, perhaps, cover the situations concerned. It is useful to note in this connection that the Convention on Genocide specifically refers, in article III (b), to "conspiracy to commit genocide", which is typically an application of the theory of conspiracy. The difficulty of the problems dealt with in this section derives from the fact that they involve concepts whose limits are not clearly defined. Complicity and conspiracy are undoubtedly different at the conceptual level, but there is always a certain degree of complicity among the members of a conspiracy.

C. Attempt

132. The 1954 draft code makes attempt an offence, but again does not indicate the content of the concept. It is therefore necessary to consider whether attempt should be regarded in international criminal law, and particularly in the case of offences against the peace and security of mankind, as having the same content as in internal law.

1. CONTENT IN INTERNAL LAW

133. The content of attempt in internal law is not always easy to determine. We know that attempt means any criminal enterprise which has failed only as a result of circumstances independent of the perpetrator's intention, but there is still lively debate about when attempt begins and what its point of departure is.

134. It is customary to divide the criminal process into phases. The *iter criminis*, the "path of the crime" or the "trajectory of the crime", includes four successive stages: the project phase, which may be oral or written; the preparatory phase, which may involve tangible acts (organization, plans, setting up of necessary equipment, etc.); the commencement of execution; and lastly the actual commission of the crime. The problem is to determine at what stage attempt begins, which is somewhat like trying to square the circle. Following their own inclinations, some consider that attempt begins with the intention, whereas others consider that it begins with the preparatory acts, and still others link it to the commencement of execution.

135. It would certainly be going too far to equate a simple intention, even one that is publicly expressed, with attempt. It is true that certain legislations have defined simple intentions (threat, association of persons for unlawful purposes, conspiracy, etc.) as separate crimes, but those acts were identified and defined as crimes because of their particular seriousness. In general, however, a simple intention, even if expressed out loud, does not constitute attempt.

136. Consideration of the theory that attempt exists when there are preparatory acts likewise indicates that a positive reply cannot be taken for granted. The operations which enter into the preparation of an act may have many purposes, and it cannot be determined in advance what the author's purpose was. Some might tear down a fence to prevent a fire from spreading, but they might also tear it down to take advantage of the fire and enter somebody else's house. Someone might break down a door to save a person in danger, but they might also do so to take advantage of that person's difficulties in order to commit theft, and so forth.

137. The question then arises whether it is commencement of execution which constitutes attempt. That is the solution adopted, for example, in the French Penal Code, which regards as attempt any commencement of execution which failed or was halted only because of circumstances independent of the perpetrator's intention. Even so, it is necessary to determine what constitutes commencement of execution. It is not easy to draw a distinction between commencement of execution and preparatory acts. Some turn to objective criteria: the ac-

quisition of the physical means for committing the crime, for example, would constitute a preparatory act, but when one "starts to make use of them", that is the commencement of execution. Others turn to subjective criteria: the intention to use those means.

138. Certain national legislations did not, at first, concern themselves with these subtleties. Soviet law, for example, in the *Leading Principles of Criminal Legislation of the RSFSR* (1919) specifically stated that "the stage of execution of the intention of the perpetrator does not in itself influence the penalty, which is determined by the extent of the danger which the offender" (art. 20) "and the act he has committed represent" (art. 21). In a circular relating to the draft penal code of 1920, it was stated that "the outward forms of execution of the act, the degree to which intentions were realized, the forms of complicity in violating the law lose their meaning as limits necessarily defining the extent of the punishment or the penalty itself". Today, the *Fundamental Principles of Criminal Legislation of the USSR and the Union Republics* (1958) provide for the penalization of both attempt and preparatory acts, and the court is obliged to take into consideration "the nature and degree of social danger of the acts committed, the extent to which the criminal intent is realized and the factors which prevented the offence from being perpetrated" (art. 15).⁵⁶

139. As regards the penalization of attempt, the socialist countries can be divided into three groups. The first group consists of those which abide by the general principle of penalizing attempt and preparatory acts. Apart from the USSR, these include Albania, Czechoslovakia, the Democratic People's Republic of Korea and Poland. In the second group, attempt is penalized as a general rule, but preparatory acts are penalized only in the cases provided by law: this is the case, for example, of the Bulgarian Code (art. 17) and the Hungarian Code (art. 11 (1)). In the last group, attempt and preparatory acts are penalized only in the cases stipulated by law. For example, in Yugoslavia, the 1951 Penal Code (art. 16) and the 1976 Penal Code (art. 19) penalize attempt to commit offences that are punishable by imprisonment of five years or more.⁵⁷

140. This is a solution closely related to that adopted in the French Penal Code, which lays down the general rule that attempt is punishable only in the case of criminal offences, but that attempt to commit correctional offences may be qualified as an offence only in the cases stipulated by law.

141. It is clear, therefore, that legal systems vary. As for the content, some legislations draw a distinction between attempt and preparatory acts, with each category being the subject of separate provisions. Other legislations do not draw this distinction and make attempt a crime only in the case of serious offences; others make attempt a crime without drawing a distinction between serious offences and other offences. All, however, recognize attempt as a juridical concept.

2. CONTENT IN INTERNATIONAL LAW

142. Where offences against the peace and security of mankind are concerned, the problem is more delicate. The 1954 draft code made preparatory acts and attempt two separate offences.

143. If those two offences are maintained, drawing a distinction between preparatory acts and attempt will be even more difficult. In fact, many preparatory acts are *ambiguous* ones which can just as easily be interpreted as acts preparing a defence as acts preparing an aggression. Their lawfulness depends on the intention, and that is not always easy to determine. The borderline between attempt and preparation will be a moving one and often elusive.

144. If the Commission does not retain preparatory acts, the difficulty will remain; but it will not, as in the previous case, be a matter of establishing the borderline between two wrongful acts, but rather of establishing the borderline between what is lawful and what is unlawful. The scope of attempt may be more or less extended depending on the jurisdiction that is required to consider, in each case, whether or not the act involved falls within the ambit of attempt. The Charters of the international military tribunals contained no provisions relating to attempt. Is that because in the minds of their drafters attempt was confused with preparatory acts? We cannot say. On the other hand, we may assume that, since those Charters were designed to deal with a specific set of circumstances, namely the need to punish acts committed by a régime, they did not need to refer to a crime which was unlikely to occur. In fact, abortive actions, i.e. criminal enterprises which failed despite the intentions of their perpetrators, were rare during the régime of that brutal and domineering dictatorship, which for a time encountered no insurmountable obstacle in its path. But attempt does not exist unless the enterprise has been thwarted by an event outside the control of its perpetrator.

145. Today, attempt has entered international law by way of the 1948 Convention on Genocide, article III (d) of which refers specifically to this offence.

⁵⁶ See Andrejew, *op. cit.* (footnote 47 above), p. 60.

⁵⁷ *Ibid.*, pp. 60-61.

PART IV

General principles

146. The general principles may be classified according to whether they relate to:

- (a) The juridical nature of an offence against the peace and security of mankind;
- (b) The official position of the offender;
- (c) The application of criminal law in time;
- (d) The application of criminal law in space;
- (e) The determination and extent of responsibility.

A. Principles relating to the juridical nature of an offence against the peace and security of mankind

147. This part needs no lengthy explication. Its content has already been established in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, affirmed by the General Assembly in its resolution 95 (I) of 11 December 1946. The offences involved are crimes under international law, defined directly by the Nürnberg Charter, independently of national law. Hence the fact that an act may or may not be punishable under internal law does not concern international law, which has its own criteria, concepts, definitions and characterizations.

B. Principles relating to the international offender

1. THE OFFENDER AS A SUBJECT OF INTERNATIONAL LAW

148. We shall not revert to the disputes which, throughout the consideration of previous reports, have pitted the partisans and adversaries of the criminal responsibility of States against each other. The Commission has decided for the time being to confine itself to the criminal responsibility of individuals; consequently any individual guilty of a crime under international law is subject to punishment.

2. THE OFFENDER AS A HUMAN BEING

149. The rights of the offender are those of any human being appearing before a criminal jurisdiction to answer for an offence. According to this principle, every individual accused of a crime enjoys the jurisdictional guarantees granted to every human being, as provided, for example, in the Nürnberg Charter (art. 16), the Tokyo Charter (art. 9), the Universal Declaration of Human Rights (art. 11, para. 1) and Additional Protocol II to the Geneva Conventions (art. 6, para. 2).

C. Principles relating to the application of criminal law in time

150. Two principles are involved here: that of the non-retroactivity of criminal law and that of the applicability

of statutory limitations in criminal law. We shall now consider how these two principles of internal law are applied in international law.

1. THE NON-RETROACTIVITY OF CRIMINAL LAW

(a) *Content of the rule*

151. The content of the rule *nullum crimen sine lege, nulla poena sine lege* may vary according to the sources of law cited.

152. According to a legalistic conception preferred in certain systems of law, the only law is written law. According to this school of thought, a system of law based on custom necessarily ignores the principle *nullum crimen sine lege*, because custom is not law, just as general principles, natural law and moral or philosophical maxims and prescriptions are not law. The strictness of this theory finds its origin and justification in the break with the often arbitrary practices of the *Ancien Régime*.

153. The rule first appeared in France during the Revolution, and spread throughout Continental Europe. Even though it disappeared for a time in certain countries (in Germany, for example, under the National Socialist régime, with the application in 1935 of article 2 of the Penal Code, which introduced "the sound instinct of the people" as the source of criminal law), or underwent certain changes when recourse was made to interpretation by analogy, the rule *nullum crimen sine lege* has remained a fundamental principle of Continental criminal law and of the legal systems based on it. In refusing to surrender the ex-Emperor of Germany, William II, to the Allies in 1920, the Netherlands declared that "if in the future the League of Nations were to set up an international jurisdiction competent to try, in the case of a war, acts described as offences in and subject to penalties prescribed by pre-existing legislation, it would be a matter for the Netherlands to associate itself with the new system".⁵⁸

154. The idea was referred to again a quarter of a century later by André Gros, the representative of France at the International Conference on Military Trials (London, 1945).⁵⁹ Proceeding from the principle that, under existing international law, a war of aggression was still not a wrongful act, he declared:

We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression. . . . It is said very often that a war of aggression is an international crime, as a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction. It implies only an obligation to repair damage. We think it will turn out

⁵⁸ Cited in Pella's memorandum, *Yearbook . . . 1950*, vol. II, p. 311, document A/CN.4/39, para. 61.

⁵⁹ See the Jackson Report, cited in footnote 96 below.

that nobody can say that launching a war of aggression is an international crime—you are actually inventing the sanction.⁶⁰

155. This point of view, which in the context of current international law seems almost heretical, was not so at the time, at least for the supporters of written law as the source of criminal law. Vespasien Pella thought that “international order can be maintained or secured only on the basis of written law. . . . Governments and public opinion will . . . never agree to a system under which a few judges, however eminent and respected, have sovereign discretion and are bound by no written law.”⁶¹ The dissenting opinion of Henri Bernard, a Judge of the Tokyo Tribunal, was similar: “the Charter of the Tribunal itself was not based on any law in existence when the offences took place . . . [So] many principles of justice were violated during the trial that the Court’s judgment certainly would be nullified on legal grounds in most civilized countries.”⁶²

156. However, this rigid idea is not widely shared. Everything depends on what meaning is ascribed to the word *lex* in the maxim *nullum crimen sine lege*. If the word *lex* is understood to mean not written law, but *droit* in the sense of the English word “law”, then the content of the rule will be broader. It will cover not only written law, but also custom and general principles of law. It has been said that the rule *nullum crimen sine lege* is foreign to the Anglo-American system precisely by reference to written law alone. But that is incorrect. The rule *nullum crimen sine lege, nulla poena sine lege* is based upon the protection of the individual against arbitrary action. But protection of the individual is one of the most solid traditions of common-law countries. The fact that the rule is not explicitly formulated in certain countries in no way means that it is unknown there.

157. It is this flexible content which is best suited to the spirit of international law and the techniques for its elaboration. Nevertheless, precisely because of the debates to which its content gave rise, the application of this rule was disputed at the Nürnberg trial.

(b) *The rule nullum crimen sine lege and the Nürnberg trial*

158. For some, the rule was violated; for others, it was respected.

(i) *The rule was violated*

159. According to one theory, the Nürnberg Charter and Law No. 10 of the Allied Control Council were subsequent to the acts described as offences, and those acts, at least in the case of crimes against peace and crimes against humanity, did not constitute criminal offences. For the supporters of this theory, the violation was even more flagrant in respect of crimes against humanity, that concept being very recent, since it dated

⁶⁰ Jackson Report, p. 295, document XXXVII, minutes of session of 19 July 1945; cited by Pella, *Yearbook . . . 1950*, vol. II, pp. 311-312, document A/CN.4/39, para. 62.

⁶¹ *Yearbook . . . 1950*, vol. II, p. 314, document A/CN.4/39, para. 66.

⁶² *New York Herald Tribune*, 14 November 1948, p. 27; cited by Pella, *Yearbook . . . 1950*, vol. II, p. 312, document A/CN.4/39, para. 62.

from the Charter of the Nürnberg Tribunal. According to Henri Donnedieu de Vabres, the French Judge on the Tribunal, incrimination for crimes against humanity constituted a flagrant violation of the spirit and letter of the principle of the legality of offences and penalties.⁶³

(ii) *The rule was respected*

160. Those who maintain that the rule was respected ascribe to it a different content. For them, the rule of non-retroactivity is not limited to formulated law; it also relates to natural law, which existed before the acts described as crimes were committed. Even if the texts were new, the law which inspired them was not new law. From this standpoint, the judgment had a declaratory character. That was the argument of the Nürnberg Tribunal. But the judgment was also based on considerations of justice. Law, to be worthy of the name, must also meet the requirements of justice. If the maxim *nullum crimen sine lege* is not confined to sovereignty, it is a rule only generally adhered to. To assert that it is unjust to punish those who in defiance of solemn assurances and treaties have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong. Far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

161. This concept of justice, going beyond the letter of the law, was the decisive factor. *Summum jus, summa injuria*, the formula of Cicero, could not find a better application. Many writers have recalled it at suitable moments. According to the United States Judge Francis Biddle: “The question then was not whether it was *lawful** but whether it was *just** to try Goering and his associates for letting loose, without the slightest justification, the brutally aggressive war which engulfed and almost destroyed Europe. Put thus the answer is obvious.”⁶⁴ Jean Graven also stressed the idea of justice:

It is incorrect to think that this principle—the principle of a reaction which is just at a given time or in given circumstances—is necessarily the guarantee of the law and that it may not be disregarded without violating the law. The traditional rule does not, and cannot, constitute an absolute, constant obstacle to prosecution and punishment. It must, and should, protect the innocent, not the criminal. The higher principle underlying the law must be sought not in the form but in the substance. It must not be forgotten that the form is only a way of ensuring respect for the law.⁶⁵

Kelsen had the same thought when he declared that “justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails”.⁶⁶

⁶³ H. Donnedieu de Vabres, *Le procès de Nuremberg*, doctoral course (Paris, Domat-Montchrestien, 1948), p. 243; cited in Meyrowitz, *op. cit.* (footnote 9 above), pp. 350-351.

⁶⁴ F. Biddle, “The Nürnberg trial”, *Proceedings of the American Philosophical Society* (Philadelphia, Pa.), vol. 91, No. 3 (1947), p. 297.

⁶⁵ Discussion on the principle *nullum crimen sine lege* and its application to the Nürnberg trial, Radio Geneva, 28 January 1946.

⁶⁶ H. Kelsen, “Will the judgment in the Nuremberg trial constitute a precedent in international law?”, *The International Law Quarterly* (London), vol. 1, No. 2 (1947), p. 165.

(c) *Non-retroactivity and contemporary law*

162. Non-retroactivity in contemporary international law derives from international instruments. The Universal Declaration of Human Rights,⁶⁷ in article 11, paragraph 2, provides:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The European Convention on Human Rights⁶⁸ uses approximately the same wording in article 7, paragraph 1, but adds in paragraph 2 a very explicit provision concerning general principles:

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

163. In conclusion, the rule *nullum crimen sine lege, nulla poena sine lege* is applicable in international law; but the word "law" must be understood in its broadest sense, which includes not only conventional law, but also custom and the general principles of law.

2. NON-APPLICABILITY OF STATUTORY LIMITATIONS TO OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

164. It must be noted at the outset that the application of statutory limitations in *internal* law is neither a general rule nor an absolute one.

165. This concept is unknown in the internal law of many countries. It is unknown in Anglo-American law. It did not exist until recently in the laws of countries such as Austria, Italy and Switzerland. It appeared in the French Code during the time of Napoleon, dictated by considerations of convenience or criminal policy. It is justified by the need to refrain from reopening closed wounds or reawakening calmed emotions or passions.

166. Nor is the application of statutory limitations an absolute rule, because, even in the countries which do apply them, there are exceptions. In France, for example, such limitations are not applicable to serious military offences or offences against national security.

167. Lastly, many regard the application of statutory limitations not as a substantive rule, but only as a procedural rule. Of course, this opinion is not unanimous. Some feel that the application of statutory limitations is a substantive rule because it deals with punishment. But the very existence of this controversy shows how relative the scope of the rule is.

168. In international law, the application of statutory limitations is not recognized in the writings of jurists. One would also seek it in vain in the conventions and declarations that appeared before or after the Second World War. The concept is not mentioned in the 1942 St. James Declaration, the 1943 Moscow Declaration or the 1945 London Agreement. The fact that the problem

subsequently became a source of concern is due to the circumstances. After Nürnberg, the prosecution and trial of war criminals had to continue; but the rule concerning the application of statutory limitations in certain national legal systems might have prevented their extradition.

169. Pending the drafting of an international convention, several countries tried to solve the problem in their own internal law. The Soviet Union, for example, promulgated the law of 4 March 1965 on the non-applicability of statutory limitations to war crimes and crimes against humanity committed by the National Socialist régime, "whatever time has elapsed" since the crimes were committed. Poland introduced a similar provision in its new Penal Code (19 April 1969). In France, the Act of 26 December 1964 declared that statutory limitations were not applicable to crimes against humanity *because of their nature*.

170. In other States, the limitation period was extended or distinctions were made between categories of offences. In the Federal Republic of Germany, for example, the limitation period was extended from 20 years to 30 years for murder, whereas statutory limitations were declared to be non-applicable in the case of genocide (art. 78 of the Penal Code).

171. The Council of Europe, for its part, recommended that the Committee of Ministers:

invite member Governments to take immediately appropriate measures for the purpose of preventing that, by the application of the statutory limitation or any other means, crimes committed for political, racial and religious motives before and during the Second World War, and more generally crimes against humanity, remain unpunished.⁶⁹

It should be noted, however, that the French Act of 26 December 1964 and the Recommendation of the Council of Europe referred only to crimes against humanity.

172. These examples, cited by way of illustration, do not exhaust the question, but indicate the various approaches taken by States when the Economic and Social Council of the United Nations prepared a draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, which was adopted on 26 November 1968. This Convention⁷⁰ is simply declaratory in character. Because the offences involved are crimes by their very nature, statutory limitations are not applicable to them, regardless of when they were committed.

D. Principles relating to the application of criminal law in space

173. There is hardly any need to recall the principles which determine the rules of competence in criminal cases: the principle of the territoriality of criminal law, the principle of the personality of criminal law, the principle of universal competence, etc. Whereas the principle of territoriality gives competence to the judge of

⁶⁷ General Assembly resolution 217 A (III) of 10 December 1948.

⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

⁶⁹ Council of Europe, Recommendation 549 (1969), para. 8 (a) (document 2506).

⁷⁰ United Nations, *Treaty Series*, vol. 754, p. 73.

the place where the crime was committed, the principle of the personality of criminal law gives competence either to the judge of the nationality of the perpetrator or to the judge of the nationality of the victim. The third principle, however, gives competence to the court of the place of arrest, regardless of where the offence was committed. Lastly, there could also be a system giving competence to an international court.

174. After the Second World War, several systems were combined, including that of international competence with the establishment of the International Military Tribunal at Nürnberg, reservation being made for the dispute which arose as to whether that Tribunal was international or not.⁷¹ For some writers, the Nürnberg Tribunal was an inter-Allied court rather than an international one; for others, it was a court of occupation. But that is not the problem under consideration here. Parallel to that Tribunal, which had competence to try the major war criminals regardless of where the crimes may have been committed, there were courts established under Law No. 10 of the Allied Control Council. Those courts were not national courts either, but international courts established pursuant to the 1945 London Agreement. Those courts did not differ in nature from the Nürnberg Tribunal. There was only a distribution of competence, or, as Georges Scelle would have said, a division of functions. Lastly, there were national courts established by Governments with competence to judge war crimes at the places where they had been committed. The various systems described above were thus combined.

175. Such crimes were punished not only on the basis of territorial competence, but also, at times, on the basis of universal competence. This system, based on the right to punish, dates back a long time. Even Grotius had taught that:

... kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.⁷²

This principle gives rise to the maxim *aut dedere aut punire*. There are numerous examples of such universal competence being applied to war crimes. A British military tribunal, for example, judged crimes committed in France against British prisoners of war (Wuppertal, May 1946).⁷³ Another British tribunal judged crimes committed in Norway against British prisoners of war (Brunswick, July-August 1946).⁷⁴ It might, of course, be concluded that competence was assumed in those cases because the victims had been British. But there is also an example of a British tribunal, sitting at Almelo in the Netherlands (November 1945), judging crimes committed in the Netherlands one of the victims of which was a

Netherlands civilian.⁷⁵ The United States courts proceeded in the same way. At Wiesbaden (October 1945), a United States military commission judged crimes committed in Germany against more than 400 Soviet and Polish nationals.⁷⁶

176. It is clear from the foregoing that, in the absence of an international jurisdiction, the system of universal competence must be accepted for offences against the peace and security of mankind. Because of their nature, they clearly affect the human race wherever they are committed and irrespective of the nationality of the perpetrators or the victims.

E. Principles relating to the determination and extent of responsibility

1. GENERAL CONSIDERATIONS

177. Having established the principle that any wrongful act entails the responsibility of its author, the exceptions to this principle, also known as "justifying facts", must be examined. We shall also examine the concepts of extenuating circumstances and exculpatory pleas, which, however, are not on the same level.

178. Justifying facts concern primary rules, that is to say the basis of responsibility. In the case of the international responsibility of States, there are circumstances precluding wrongfulness, which are dealt with in chapter V of the present draft articles on that topic; similarly, in the case of the criminal responsibility of individuals, the question arises whether the existence of certain facts does not remove the criminal character of an act. Thus posed, the problem is whether or not an act is lawful. What is in question is not the material existence of the act, but rather its wrongful character.

179. On the other hand, extenuating circumstances and exculpatory pleas are situated on the level of secondary rules, in that they concern not the basis, but the scope of responsibility. Once the criminal character of a given act has been established, the consequences arising therefrom for the perpetrator may vary according to the degree to which he is responsible. We come here to the question of *penalty* or punishment. In internal law, it is the judge who, on the basis of *objective* and *subjective* considerations, determines the penalty to be imposed on the perpetrator of the act, within a given range of penalties and taking into account the circumstances of the offence, the personality of the perpetrator, his background, his family situation, and so forth.

180. Extenuating circumstances differ from exculpatory pleas in that, unlike the latter, they do not preclude the imposition of a penalty but can only mitigate it. However, both exculpatory pleas and extenuating circumstances are situated at the level of the imposition of penalties. Unlike justifying facts, they do not efface the wrongful character of the act. Justification, on the other hand, does efface its wrongful character. In a sense, it constitutes an exception to the

⁷¹ P. Reuter, "Le jugement du Tribunal militaire international de Nuremberg", *Recueil Dalloz 1946* (Paris), *chronique* XX.

⁷² H. Grotius, *De Jure Belli ac Pacis, Libri Tres* (1646), book II, chap. XX, para. XL.1 (trans. F. W. Kelsey, in *The Classics of International Law*, J. B. Scott, ed. (Oxford, Clarendon Press, 1925), vol. II, p. 504).

⁷³ *Law Reports of Trials* . . . , *op. cit.* (footnote 36 above), vol. V, pp. 45 *et seq.*

⁷⁴ *Ibid.*, vol. XI, pp. 18 *et seq.*

⁷⁵ *Ibid.*, vol. I, pp. 35 *et seq.*

⁷⁶ *Ibid.*, pp. 46 *et seq.* On all these points, see Meyrowitz, *op. cit.* (footnote 9 above), pp. 163-166.

principle of criminal responsibility in that an act which, as a general rule, constitutes an offence loses its wrongful character as a result of a justifying fact.

181. It is clear that consideration of penal justification falls within the scope of the present study, since it relates to the basis of responsibility, but it may be questioned whether extenuating circumstances and exculpatory pleas should be considered here. We have seen that these concepts are related to the imposition of penalties. However, the Commission has not yet decided clearly whether the draft under consideration should also deal with the penal consequences of an offence. If, as seems likely, the present draft is to be limited to a list of offences, leaving it to States to decide on their prosecution and punishment, then it will be for States to apply their own internal laws in the matter of criminal penalties. However, there is no reason why consideration should not be given to the possibility of the draft indicating the offences for which exculpatory pleas could be offered or extenuating circumstances raised, leaving it to judges in national courts to accept or reject such pleas.

182. The application of the principle *nullum crimen sine lege* would lead us to consider the complete autonomy of the code of offences *vis-à-vis* the draft on State responsibility. There is also a second reason: the code will also apply to individuals, whatever definition of the subjects of law is agreed upon. The responsibility of individuals, however, is necessarily governed by a régime different from that of State responsibility. Moreover, certain concepts which exist in criminal law and which are applicable here are not applicable to the draft on State responsibility. This is so in the case of command of the law or superior order, since States have no superiors and receive orders only from themselves. Moreover, in the case of States, the question of the capacity in which they acted does not arise, whereas, in the case of individuals, it is not immaterial to know whether they acted in their personal or official capacity.

183. Differences also appear when the question is examined from another standpoint. Although an international crime is defined in part 1 of the draft articles on State responsibility, that draft is concerned primarily with the "civil" consequences of such a crime, that is to say principally with reparation (*restitutio in integrum* or compensation); it is not concerned with the punitive consequences.

184. It therefore seems necessary to consider here, from the angle of individual criminal responsibility, the facts which preclude that responsibility or which constitute exceptions to it.

2. EXCEPTIONS TO CRIMINAL RESPONSIBILITY

185. In certain legal systems, exceptions to the principle of criminal responsibility may have two sources: a legal source and a source in judicial practice. In French law, for example, some legal authors draw a distinction between justifying facts, which are exceptions based on the law, and causes of non-imputability, a jurisprudential construction which goes beyond legal exceptions. Legal exceptions are necessarily limited. Since the rule is

that there must be a legal basis for every offence—in application of the principle *nullum crimen sine lege*—any exception to this rule must likewise have a legal basis. One principle is the corollary of the other.

186. The very rigidity of this system, however, quickly led legal writers and judicial organs to go beyond the narrow confines of formal law to seek solutions better suited to the complex realities of criminal responsibility. There are situations for which the law makes no provision, in which to condemn a person would be to commit an injustice, even if such condemnation were irreproachable in the strictly legal sense. Culpability is often based on the intention to commit an offence. As a result of this evident fact, legal writers and judicial organs have elaborated a whole theory of penal justification by taking into account the concepts of will, intention, good faith, judgment and discernment. On the basis of these concepts, they have expanded the scope of exceptions to criminal responsibility to include cases for which the law makes no provision.

187. Thus, besides legal justifications which eliminate the wrongful character of an act, such as self-defence, a command of law or order of a lawful authority, there is also state of necessity, which derives from judicial practice. Naturally, this expansion has been effected prudently and with restraint so as not to undermine the principle of responsibility itself. However, the existence of these two sources, which are to be found in certain legal systems, is explained by the fact that written law, which predominates in such systems, is incapable of adapting to and expressing all the contours and nuances of a reality that is ever-changing, particularly in the field of human psychology. Thus French legal writers distinguish between the *objective* causes and the *subjective* causes of non-responsibility, the first having their origin in law and the second in judicial practice.

188. In reality, the distinction drawn between exceptions that are legal in origin, known as justifying facts, and exceptions originating from judicial practice, known as causes of non-culpability, is of interest only from the doctrinal angle, in so far as it classifies these concepts according to their source, and in so far as, in the first case, the offence does not exist, whereas in the second case it exists but cannot be attributed to its author in the absence of culpability. In both cases, however, the consequences are identical so far as criminal responsibility is concerned. Both preclude such responsibility.

189. Such considerations are not of particular significance in common law, where the legal element is not predominant in the definition of the offence. An offence is constituted by a material element, which is the *act*, and a moral element, which is the *intention*. The intervention of written law is not necessary.

190. This brief overview enables us to define the content of the concept of the *justifying fact* for the purposes of the draft under consideration. One cannot adopt a strictly legalistic approach in defining this concept. Rather, it must be interpreted in its broad sense as any fact, whatever its provenance, which contributes to the elimination of responsibility, any fact which con-

stitutes an exception to the principle of criminal responsibility. We will therefore consider the following:

- (a) Coercion;
- (b) State of necessity and *force majeure*;
- (c) Error;
- (d) Superior order;
- (e) The official position of the perpetrator of the offence;
- (f) Reprisals and self-defence.

(a) *Coercion*

191. Coercion involves the threat of an imminent peril from which it is impossible to escape except by committing the offence. The peril itself must constitute a grave threat, its gravity being determined by precise criteria: an immediate threat to life or to physical well-being. Of course, coercion can be either moral or physical. In both cases, it is considered a justifying fact.

192. In the *Krupp* case, the United States military tribunal ruled that the question of coercion "is to be determined from the standpoint of the honest belief of the particular accused in question" and that "the effect of the alleged compulsion is to be determined not by objective but by subjective standards".⁷⁷ In that case, it was moral coercion that was involved. In the *Einsatzgruppen* case, the tribunal was even more explicit: it ruled that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. . . . No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."⁷⁸

193. In other words, the exception of coercion may be accepted if it constitutes an *imminent* and *grave* peril to life or physical well-being. It goes without saying that this peril must be irremediable and that there must be no possibility of escaping it by any other means.

(b) *State of necessity and force majeure*

194. Unlike coercion, state of necessity takes account of the will of the perpetrator. A person faced with a danger *chooses* to commit a wrongful act in order to escape that danger. The case of the mother who steals a loaf to prevent her children from starving to death is the classic example of an offence committed through necessity. In French law, an offence committed through necessity is a construction derived from judicial practice. But judicial practice has attached strict conditions to state of necessity, notably the condition that a necessary offence is justified only in so far as it has safeguarded an interest greater than or at least equal to the interest sacrificed. This is somewhat similar to the rule contained in article 33 of part 1 of the draft articles on State responsibility, which provides that state of necessity cannot be invoked against a preemptory norm of international law (para. 2 (a)).

195. State of necessity must be distinguished from certain similar concepts, particularly coercion and *force*

majeure. Whereas, in the case of coercion, the perpetrator has no choice, in the case of state of necessity a choice does exist. By making a choice, the perpetrator avoids one event rather than another. This is an important element, which also distinguishes state of necessity from *force majeure*. In the case of *force majeure*, as in the case of coercion, the perpetrator is subjected to an unforeseeable and irresistible force. The concept of state of necessity therefore possesses a certain conceptual autonomy, despite the similarities and the elements which it has in common with the other concepts we have just examined.

196. Despite the differences mentioned above, the exceptions of necessity, coercion and *force majeure* are subject to the same basic conditions:

- (i) There must be a grave and imminent peril;
- (ii) The perpetrator must not have contributed to the emergence of this peril;
- (iii) There should be no disproportion between the interest sacrificed and the interest protected.

197. These last two conditions have been explicitly set out also in judicial decisions. In the *I. G. Farben* case, the tribunal stated that "the defence of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative".⁷⁹ The situation was the same in the *Flick* case, where the defendants had not only obeyed instructions, but, on their own initiative, had requested an abnormal increase in the number of workers assigned to them.⁸⁰ Thus fault on the part of a defendant who invokes the exception renders his argument inadmissible.

198. In the *Krupp* case, the condition of proportionality was formulated in the following terms:

. . . in all fairness it must be said that in any view of the evidence the defendants, in a concentration camp, would not have been in a worse plight than the thousands of helpless victims whom they daily exposed to danger of death, great bodily harm from starvation, and the relentless air raids upon the armament plants; to say nothing of involuntary servitude and the other indignities which they suffered. The disparity in the number of the actual and potential victims is also thought provoking."

In other words, there must be proportionality between the interest being protected and the interest sacrificed, which excludes from the scope of application crimes against humanity and crimes against peace. Such crimes are out of proportion to any other act.

199. The basic conditions applicable to the three concepts of coercion, state of necessity and *force majeure* being the same, the distinctions that have just been discussed do not exist in all legal systems. In common law, for example, *force majeure*, state of necessity and coercion are sometimes indistinguishable.

200. The Commission, in chapter V of part 1 of the draft articles on State responsibility, devoted separate

⁷⁷ *Ibid.*, case No. 6, vol. VIII, p. 1179.

⁷⁸ *Ibid.*, case No. 5, vol. VI, p. 1202.

⁷⁹ *Ibid.*, case No. 10, vol. IX, p. 1446. Concerning the above-mentioned judgments, see Meyrowitz, *op. cit.* (footnote 9 above), pp. 404-405.

⁷⁷ American Military Tribunals (see footnote 32 above), case No. 10, vol. IX, p. 1438.

⁷⁸ *Ibid.*, case No. 9, vol. IV, p. 480.

articles to *force majeure* and state of necessity. Moreover, it dealt with coercion in chapter IV, in connection with the responsibility of a State for an act of another State (art. 28, para. 2).

201. The question might be asked whether a special article should be devoted here to *force majeure*. This concept, at least in certain legal systems, is more closely related to the general theory of civil liability, and if it arises in criminal law, it does so in connection with unintentional offences such as homicide by negligence, resulting for example from a traffic accident. The Special Rapporteur has nevertheless introduced this exception because of the different meaning which it may have in other legal systems and in order to cover all possible cases. It is for the Commission to decide.

(c) Error

202. The question arises whether error should be included among the exceptions to responsibility. If culpability rests upon intention, i.e. the will to commit the offence, then error must be included, if not among the causes which eliminate the offence, at least among the causes of non-imputability. Error, indeed, removes the culpable intention. It is essential, of course, that the error should not derive from an inexcusable fault on the part of the person committing it.

203. There can be two forms of error: error of law and error of fact.

(i) Error of law

204. Error of law is clearly related to the implementation of an order which has been received, when the agent is called upon to assess the degree to which the order is in conformity with the law. It may also exist independently of any order, when the agent acts upon his own initiative, believing that his action is in conformity with the rules of law. Lastly, the error may exist on two levels: the legality of the act in question in relation to the internal order and the legality of the same act in relation to the international order.

a. Internal legality

205. The act in question may be in conformity with the author's national law. It may also violate that law. But, in either case, the problem is one of internal legality, which is not the concern of the present study.

b. Lawfulness of the act in international law

206. It nevertheless happens that an act which is in conformity with internal law may violate international law. The case then involves a conflict between the internal order and the international order, which must be settled in favour of the latter. This follows from the application of the general principle whereby a crime under international law exists independently of the internal order, a principle which is consistent with the Nürnberg Charter (art. 6 (c)). An application of this principle is also found in Law No. 10 of the Allied Control Council (art. II, para. 1 (c)), which set aside the benefits of an amnesty granted under the National Socialist régime and reinstated the criminal nature of the acts.

207. While an exception based on error of law is not readily admissible in internal law—a citizen may not claim ignorance of his own national legislation—the question is treated differently in international law, particularly with regard to war crimes and crimes against humanity. Sometimes, on account of the evolution of international law and of the techniques of war, certain concepts become obsolete and others emerge. Furthermore, this is an area where rules and customary practices which do not derive from any agreement tend to prevail.

208. It is for this reason that the decisions of the international military tribunals admitted error of law in international law in certain cases. In the *High Command* case, the tribunal expressed the view that a military commander "cannot be held criminally responsible for a mere error in judgment as to disputable legal questions".⁸² Error of law was also invoked in the *I. G. Farben* case, when the tribunal stated:

. . . As custom is a source of international law, customs and practices may change and find such general acceptance in the community of civilized nations as to alter the substantive content of certain of its principles. . . . Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare.⁸³

209. It therefore appears that error of law may, in certain circumstances, be accepted as a defence; but only in certain circumstances. A distinction must be made here between war crimes and crimes against humanity. While the argument based on error of law may be accepted with respect to war crimes, on account of certain doubts concerning the rules in question, it appears to be much more difficult to accept with respect to crimes against humanity. These crimes may not, in principle, be justified on the grounds of error regarding wrongfulness. The judicial precedents set a condition which is almost impossible to fulfil: the error must have been unavoidable. In other words, the agent must have brought into play all the resources of his knowledge, imagination and conscience and, despite that effort, he must have found himself unable to detect the wrongful nature of his act. The Supreme Court of the British Zone decided that: "it is not necessary that the agent should have *characterized* his action and its consequences as wrongful; it suffices that he could have made *this characterization*, a condition which will generally be fulfilled. When an inhuman act has been committed, no one may exonerate himself from blame by pleading that he did not detect or was blind to it. *He has to answer for that blindness.*"⁸⁴ If the perpetrator was blinded by deep faith in a political ideology or led astray by the propaganda of a régime, that would not exonerate him from blame. He should have known, by consulting his conscience, that the act of which he is accused was wrongful.

210. The basis of this judicial practice appears, in the final analysis, to be the concept of fault. To be unaware

⁸² American Military Tribunals, case No. 12, vol. XI, p. 511.

⁸³ *Ibid.*, case No. 6, vol. VIII, p. 1138.

⁸⁴ *O.G.H. br. Z.* (see footnote 11 above), vol. 1, p. 225; cited in Meyrowitz, *op. cit.*, p. 296.

of a rule of law is a fault. In particular, a defendant who invokes internal legality should have been aware that this legality was inconsistent with international law. Thus a physician who believes in a political ideal and who kills a mental patient in the name of that ideal may perhaps be acting in conformity with the internal law of his country, but he is violating international law. His blindness is a fault. He has not drawn upon his internal resources or upon "that tension of conscience" which would have enabled him to detect the error regarding the wrongfulness of his act. The German Federal Court, upon an appeal by the public prosecutor, quashed the judgment of an assize court which had acquitted a defendant on the grounds that he had not been aware of the unlawful nature of the act with which he was charged, and declared that "if the agent had subjected his conscience to the tension which one is entitled to expect of him, he would have found the right answer to the question of knowing what is lawful and what is unlawful".⁸⁵

211. As a result of these judicial decisions, a crime against humanity may not in practice admit of any justifying fact through an error of law. No error of law can excuse a crime which is motivated by racial hatred or political prejudices.

(ii) *Error of fact*

212. Error of fact relates to a false representation of a material fact, unlike error of law, which relates to a false representation of a rule of law. In both cases, the error must not involve fault if the person who commits it is to be exonerated from responsibility.

213. Error of fact has been invoked, at times before the international tribunals. In the *Carl Rath and Richard Thiel* case, judged by a British military tribunal (Hamburg, January 1948), the Judge Advocate stated that it would be a good defence to the charge of having executed certain Luxembourg nationals if an accused could show that he honestly believed he had participated in the execution of someone who had been conscripted into the German army and had been sentenced to death.⁸⁶

214. However, as was the case with respect to error of law, this concept cannot breach the barrier of crimes against humanity. This barrier is unbreachable, for no error of fact can justify a crime against humanity. A person who mistakes the religion or race of a victim may not invoke this error as a defence, since the motive for his act was, in any case, of a racial or religious nature.

215. With regard to war crimes, on the other hand, the error must be of an unavoidable nature, i.e. it must assume the characteristics of *force majeure*, in order to relieve the person who commits it from any responsibility. An error which derives from negligence or imprudence, in other words an error which could have been avoided, does not exonerate the person who com-

mits it from responsibility. In that case, the error may simply constitute a reason for reducing the penalty, but such a situation is not under consideration here.

216. To sum up, the error, whether of law or of fact, must be of an *unavoidable* nature in order to exonerate the person who commits it from responsibility for a war crime. It cannot in any circumstances justify a crime against humanity or a crime against peace.

(d) *Superior order*

217. With regard to the question whether superior order constitutes an autonomous justifying fact, it should be noted that, in the case of compliance with a wrongful order, three situations may arise. The person who executes the order may have complied with it in full knowledge of its implications, in which case he has committed a fault which may be considered an act of complicity; or he may have acted under coercion; or he may have been the victim of an error. The two latter cases fall within the scope of the subject under discussion. Accordingly, we shall consider the relationship of the order to, respectively, coercion and error.

(i) *The order and coercion*

218. The principle of compliance with superior orders gives rise to a very difficult problem, to which there are three possible solutions: one can admit the theory of passive compliance, with the corollary that the person who executes the order is freed from responsibility in all cases; one can admit the responsibility of that person, which implies that he has the right to criticize the order and to refuse to execute it: this is the so-called "intelligent bayonets" theory; or, lastly, one can adopt an intermediate solution which makes a distinction according to whether the wrongfulness was *obvious* or not.

219. Both the theory of passive compliance and the so-called "intelligent bayonets" theory have been rejected in judicial practice and the writings of jurists, which have taken the concept of an *obviously illegal order* as constituting the borderline between the duty to comply and the duty not to comply. When the wrongfulness of an order is obvious, it is the duty of a subordinate to refuse to execute it. He may not, in principle, avoid criminal responsibility when he executes an order whose wrongful character is beyond question.

220. However, it may be asked whether this rule should not be applied with some flexibility in the case of coercion. Coercion has been defined (para. 191 above) as a grave, imminent and irremediable peril which threatens life or physical well-being. In such circumstances, it would be too much to demand that compliance be refused in all cases. Despite the strictness of the principle set forth in article 8 of the Nürnberg Charter, whereby an order from a superior does not free the perpetrator of a crime from responsibility, it cannot be forgotten that criminal responsibility rests on freedom and that, in the absence of freedom, there can be no responsibility. The Nürnberg Tribunal, commenting on article 8 of the Charter, stated: "The true test [for criminal responsibility], which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in

⁸⁵ *Juristenzeitung* (Tübingen), vol. 8, No. 12 (1953), pp. 377-378; cited in Meyrowitz, *op. cit.*, p. 298.

⁸⁶ See *Law Reports of Trials* . . . , *op. cit.* (footnote 36 above), vol. XV, p. 184, footnote 4.

fact possible.”⁸⁷ The Tribunal thus stated clearly that the fact to be taken into consideration was not the order itself but the freedom of the perpetrator to execute or not to execute that order.

221. The rule which links the order, as a source of non-responsibility, to coercion was later set out in Principle IV of the Nürnberg Principles⁸⁸ and in the 1954 draft code, article 4 of which reads:

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

This provision is less strict than the principle set forth in the Nürnberg Charter, where the strictness may be explained by the fact that the Charter applied to major war criminals, persons whose level of authority was such that it was incompatible with blind obedience or coercion. The offences of which they were accused were not offences of persons executing orders, but offences which were regarded as constituting abuse of their positions of command. Here, on the other hand, it is a question of taking account of different circumstances, whereby the agent may have acted under the influence of external factors which affected, guided or weakened his will.

222. These circumstances must certainly be carefully examined in each case. It is a question of specifics. All the objective and subjective elements, including the personality of the perpetrator, the nature of his duties and the context in which the order was given, must of course be assessed. In the *High Command* case, the tribunal established the bases upon which the defence of coercion might be accepted:

The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the *defence of coercion or necessity** in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to *deprive him of freedom to choose** the right and refrain from the wrong.⁸⁹

Coercion was also judged by the Supreme Court of the British Zone to absolve a person from his duty not to comply with an order which was obviously wrongful. The Court stated that article II, paragraph 4 (b), of Law No. 10 of the Allied Control Council, despite its formal strictness, left room for the defence of coercion. What had to be established was whether the text ruled out the application of articles 52 and 54 of the German Penal Code concerning moral coercion in the case of an obviously illegal order. The response of the Supreme Court was negative.⁹⁰

223. However, this relaxation of article 8 of the Nürnberg Charter and of article II, paragraph 4 (b), of Law No. 10 should not give rise to the belief that the dams

have been breached and that any fact may be considered as a peril or a serious threat which may be equated with coercion. The circumstances must be analysed and examined with a fine-tooth comb. It is through consideration of the circumstances that the judge must become convinced that the order was accompanied by coercion.

224. Thus he must be certain that it was coercion *alone* which led to compliance with the order. If it were established that, despite the reality of the coercion, the agent was prompted by another motive, coercion would not be retained as an admissible defence. Likewise, account must be taken of the *nature* of the agent's duties and of the *degree of risk* associated with them. Thus, if the agent was aware in advance of the risk to which he would be exposed as a result of the responsibilities which he accepted, he would not be able to invoke coercion in his defence. An intelligence agent or a secret service agent would not be able to invoke in his defence the risk to which he was exposed by his duties if, under coercion, he were to commit an act which was inconsistent with his allotted tasks. The Supreme Court of the British Zone judged that he had taken on his clandestine political work with full knowledge of the implications, and that his was “one of those situations where the legal order requires of a person, by exception, behaviour going beyond human nature and consisting in overcoming the instinct of self-preservation. Just as sailors, policemen, firemen . . . and soldiers in the course of war . . . are obliged to endure the danger which threatens their life or their physical well-being . . . so might the defendant be required to endure the danger which he faced as a result of a freely taken decision”.⁹¹

225. Nevertheless, despite the necessary strictness of the conditions mentioned above, compliance with an obviously wrongful order may, if the order takes the form of an act of coercion, constitute an admissible defence in certain circumstances.

226. Naturally, the unbreachable barrier of crimes against humanity remains, and no exception of any kind can circumvent it. As has been stated, a crime against humanity, on account of its very characteristics, can admit of no justification. No act of coercion can justify genocide or *apartheid*, for example.

(ii) *The order and error*

227. It may be asked whether an order can constitute an exception on the grounds of non-responsibility in cases other than that of coercion.

228. When an order is not obviously wrongful, its appraisal may leave room for a margin of error. We shall not revert to the previous discussion on error of law. An agent who receives an order may believe that it is lawful if the wrongfulness is not obvious. He does not even have any reason *a priori* to suspect the order which he has received if it emanates from a competent higher authority. Moreover, it must be emphasized that, in principle, a lawful order is the rule and a wrongful order the exception. A commander generally takes care not to exceed the limits of the law: that is, indeed, the basis of his authority. Furthermore, since discipline is, as they

⁸⁷ *Trial of the Major War Criminals . . .*, *op. cit.* (footnote 51 above), vol. I, p. 224.

⁸⁸ See footnote 8 above.

⁸⁹ American Military Tribunals, case No. 12, vol. XI, p. 509.

⁹⁰ *O.G.H. br. Z.* (see footnote 11 above), vol. I, p. 313; cited in Meyrowitz, *op. cit.*, p. 405.

⁹¹ *O.G.H. br. Z.*, vol. 3, p. 130; cited in Meyrowitz, *op. cit.*, p. 406.

say, the strength of armies, and since promptness of execution is the prerequisite for efficiency, a subordinate cannot be expected to go too far in exercising his right to criticize in this context.

229. Apart from this fact, legal rules are not always easy to interpret, and this is particularly true in the case of rules of international law. In such cases, the execution through error of a wrongful order presents the problem of the responsibility of the person who complied with it.

230. Certain legislative bodies have already attempted to solve the problem within the context of internal law. Thus paragraph 509 (a) of the United States Army field manual, *The Law of Land Warfare*, provides:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defence in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. . . .⁹²

It has already been noted that error cannot constitute a cause of non-responsibility unless it was unavoidable, given the circumstances in which it was committed, and it is this idea which is expressed in the text just cited.

231. As for judicial practice, the same idea was expressed by the tribunal in the *Hostage* case, concerning Field Marshal List: "An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature."⁹³ In the *High Command* case, the tribunal declared with regard to Field Marshal von Leeb and the other defendants: "in determining the criminal responsibility of the defendants in this case, it becomes necessary to determine not only the criminality of an order in itself, but also . . . whether or not such an order was criminal on its face".⁹⁴

232. It follows from these various elements that compliance through error with a wrongful order may constitute an admissible exception. But here, as in the case of an order executed under coercion, the factor to be considered is not the order but the error. The error must possess the characteristics specified in the paragraphs dealing with that concept. Provided that the error demonstrates those characteristics, it may exonerate the person who executed the order.

233. In conclusion, it may be asked whether compliance with a wrongful order resulting from coercion or error constitutes an autonomous concept within the context of reasons for admitting absence of criminal responsibility. It may also be asked why, in the writings of jurists, a separate place is reserved for it among justifying facts or reasons for absence of responsibility. An

order is not in itself a justification. It is an attribute of the position of command resulting from the normal exercise of authority, without which there would be neither rigour nor discipline. Its corollary is compliance. Compliance is as normal as the order, and neither should in itself justify a theory allowing exceptions to criminal responsibility. If that has been the case, it is because they have mistakenly been confused with other concepts with which they may coincide, but must never be confused.

234. That being said, the Special Rapporteur nevertheless proposes a provision on compliance with the orders of a superior, with the aim of opening a debate on the question (see article 8 in part V of the present report). It will perhaps be found that compliance through coercion or error formally demonstrates, despite everything, certain distinctive characteristics linked to the existence of the order itself. That would also be an acceptable theory. Moreover, the concept of superior order already bears the stamp of respectability and now has a measure of acceptance in the manuals, and one should not always seek to upset established practice.

(e) *Official position of the perpetrator of the offence*

235. A distinction must be drawn between political responsibility and criminal responsibility.

236. Political responsibility obeys the constitutional rules of the country concerned. This form of responsibility is outside the scope of the present study. International law cannot intervene in the process whereby peoples choose their form of government, at least in the present circumstances. Similarly, the criminal responsibility of heads of State can be implemented at the internal level without involving international law. This is so, for example, in the case of high treason, where the accused are brought before national courts in application of internal law.

237. On the other hand, there are cases where the question arises whether the position of head of State, precisely because a head of State embodies the sovereignty of his country, would not be an obstacle to the implementation (*mise en œuvre*) of international criminal responsibility. In principle, a State organ acting in this capacity is not responsible under international law. This principle, however, admits of one exception today, in the case of offences against the peace and security of mankind. The previous report dealt at length with the two capacities in which an individual can act: either as a private individual or as an organ of a State.⁹⁵ The emergence of the individual as a subject of international law coincided with the occurrence of offences imputable to individuals as organs of a State. It has been said that offences against the peace and security of mankind are often inseparable from the power of command. If heads of State, members of Governments or responsible government officials were protected by immunity, international criminal law would be rendered inoperative. The official position of the perpetrator of

⁹² United States of America, Department of the Army Field Manual FM 27-10 (July 1956).

⁹³ American Military Tribunals, case No. 7, vol. XI, p. 1271.

⁹⁴ *Ibid.*, case No. 12, vol. XI, p. 512. Concerning the above-mentioned judgments, see Meyrowitz, *op. cit.*, pp. 397-399.

⁹⁵ *Yearbook . . . 1985*, vol. II (Part One), pp. 65-66, document A/CN.4/387, paras. 11-17.

an international crime should not constitute a protective shield.

238. This rule was confirmed by article 7 of the Nürnberg Charter. That article was the subject of two drafts submitted to the 1945 London Conference, one by the United States of America and the other by the Soviet Union.⁹⁶ According to the United States draft, submitted on 30 June 1945: "Any defence based upon the fact that the accused is or was the head or purported head or other principal official of a State is legally inadmissible and will not be entertained."⁹⁷ According to the Soviet draft, submitted on 2 July 1945: "The official position of persons guilty of war crimes, their position as heads of States or as heads of various departments shall not be considered as freeing them from or in mitigation of their responsibility."⁹⁸ The text finally adopted is article 7 of the Nürnberg Charter, according to which:

The official position of defendants, whether as Heads of State or responsible officials in government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

239. Article 6 of the Tokyo Charter provides:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his Government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

240. The divergence between the two Charters with regard to mitigating circumstances is not of interest in this part of the report, which is devoted exclusively to justifying facts.

(f) Reprisals and self-defence

(i) Reprisals

241. Reprisals are defined as an act by which a State responds to an earlier act by another State committed in violation of international law. The aim of reprisals may be to stop the earlier act, to prevent it from recurring, or simply to avenge and punish.

242. The question arises whether reprisals, thus defined, are lawful, in other words whether they constitute a justifying fact that would absolve their perpetrator from all responsibility. The assumption here, of course, is that these are armed reprisals; unarmed reprisals do not figure in the context of the present report. Armed reprisals may be seen in two different ways. They may be considered as an aggression and constitute a *crime against peace*; or they may constitute a war crime if they have occurred during an armed conflict.

243. When armed reprisals are directed against another State, in one of the forms set out in the Definition of Aggression,⁹⁹ the question arises whether these acts lose their wrongful character because they con-

stitute a response to an earlier wrongful act. The problem was discussed in the Commission during the preparation of the draft code, in 1950. The lawfulness of reprisals was defended by the Special Rapporteur, Jean Spiropoulos, in the following terms:

... In spite of the serious fears which have been expressed for the authority of the code to be drafted, in the event of its acknowledging the plea of reprisals, we cannot see how the plea of reprisals could not be admitted.

...

... we conclude that there cannot be any doubt that the plea of reprisals must be admitted, provided the reprisals are legal, i.e. are exercised in conformity with international treaties and customary law. . . .¹⁰⁰

Under this system of law, reprisals, although lawful, were bound by certain limits and were subject to pre-conditions; moreover, the measure of reprisal was not to be manifestly disproportionate to the earlier act (*Naulilaa* incident (1928))¹⁰¹.

244. Today, the trend has been reversed, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations provides that "States have a duty to refrain from acts of reprisal involving the use of force".¹⁰²

245. The problem that arises with regard to the draft under consideration is whether there should be a special provision indicating that armed reprisals do not constitute a justifying fact. It seems that the reply should be negative, for recourse to armed force under conditions not provided for in the Charter of the United Nations constitutes aggression as already defined in the draft code and by the General Assembly in its resolution of 14 December 1974.

246. Another problem is that of reprisals in time of war, which raise questions of humanitarian law. As Jean-Jacques Rousseau said:

War is not a concern between man and man but between State and State, in which individuals are enemies only accidentally, not as men, or as citizens, but as soldiers; not as members of a country, but as its defenders.¹⁰³

247. Seen in this light, reprisals should be examined in relation to humanitarian law, i.e. from the point of view of their consequences for prisoners of war and civilian populations, in other words persons who are not or are no longer combatants. These categories of persons were often not spared during the Second World War. Reprisals occurred particularly in the form of the execution of hostages. Regrettably, such acts occur even today, in various theatres of operations throughout the world.

248. The problem of protecting these categories of persons has been dealt with only in occasional and fragmentary provisions: article 50 of the Regulations

⁹⁶ See the Jackson Report, *International Conference on Military Trials, London, 1945*, Department of State publication 3080 (Washington (D.C.), 1949), p. 165, document XXIII (comparative texts of the two drafts).

⁹⁷ *Ibid.*, p. 180, para. 16 of the annex to the draft.

⁹⁸ *Ibid.*, art. 28 of the draft.

⁹⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁰⁰ First report by J. Spiropoulos, *Yearbook . . . 1950*, vol. II, pp. 273-274, document A/CN.4/25, paras. 141 and 147.

¹⁰¹ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1011, at pp. 1025 *et seq.* (*Question des représailles*).

¹⁰² General Assembly resolution 2625 (XXV) of 24 October 1970, annex, first principle, sixth paragraph.

¹⁰³ *The Social Contract*, book I, chap. IV.

annexed to the Hague Convention (IV) of 18 October 1907 respecting the Laws and Customs of War on Land;¹⁰⁴ article 87, third paragraph, of the Geneva Convention (III) of 12 August 1949 relative to the Treatment of Prisoners of War;¹⁰⁵ article 33 of the Geneva Convention (IV) of 12 August 1949 relative to the Protection of Civilian Persons in Time of War.¹⁰⁶

249. The first systematic attempt at a solution was very recent, in the form of Additional Protocol I¹⁰⁷ to the Geneva Conventions. According to the provisions of part IV of the Protocol, reprisals are prohibited: against the civilian population (art. 51, para. 6); against civilian objects (art. 52, para. 1) or cultural objects (art. 53, sub-para. (c)); against objects indispensable to the survival of the civilian population (art. 54, para. 4); and against the natural environment (art. 55, para. 2). As the representative of ICRC indicated at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, the application of this law was not based on reciprocity; the representative of the Ukrainian Soviet Socialist Republic stated that, if it were, it would amount to introducing the law of retaliation.¹⁰⁸ The debate concerning the effectiveness of the prohibitions set forth in the Protocol will not be discussed here. Some writers have considered that the law relating to reprisals set out in Protocol I is "fictional law".

250. The problem that arises, *de lege ferenda*, is whether reprisals carried out in violation of the above-mentioned provisions should be defined as a separate offence. It would seem not. Indeed, such an offence would quite simply be a violation of the "laws and customs of war", or, if one prefers, the law of armed conflicts. This question is already dealt with in the draft code.

(ii) *Self-defence*

251. Self-defence can be invoked as a justifying fact only in the case of aggression. Where there is aggression, the responsibility of the State and the responsibility of the individual have the same content *ratione materiae*. These two responsibilities, however, are superimposed on each other and do not merge. They do not have the same content *ratione personae*. Yet there is a tendency to confuse them simply because, in the case of aggression, the individuals in question are of necessity responsible government officials. But the two concepts cannot be governed by the same rules, because of the diversity of juridical persons, and must therefore be treated separately.

252. Whereas self-defence can, as has just been said, be invoked as a justifying fact in the case of aggression,

it can never be invoked in the case of war crimes. When hostilities have broken out, armed conflict has begun and a state of war exists, one cannot speak of self-defence between the combatants, because the attack unfortunately becomes as legitimate as the defence as long as the "laws and customs of war" are respected.

253. There will be no separate article on self-defence; it will be dealt with in relation to aggression under the general heading of justifying facts.

3. SUMMARY

254. In brief, it can be seen that the theory of justifying facts, *in practice* and despite the generality of the wording used in the draft articles, involves varying applications and has a different scope depending on the offences or categories of offences in question. The following three propositions can be stated:

(a) Crimes against humanity cannot be justified by the motives which inspire them and from which they are inseparable. No justification can be found in the fact of killing in order to destroy an ethnic group, or killing for racial or religious reasons;

(b) Crimes against peace can have no justification other than self-defence in the case of aggression;

(c) Justifying facts and causes of non-responsibility may apply only in relation to war crimes—and in a very limited number of cases. Even then, it should be specified—but is it really necessary?—that this is true only if these war crimes do not, at the same time, constitute crimes against humanity.

4. EXCULPATORY PLEAS AND EXTENUATING CIRCUMSTANCES

255. To speak of exculpatory pleas and extenuating circumstances in respect of offences against the peace and security of mankind may appear incongruous. Could the perpetrators of the most serious, hateful and monstrous crimes on the scale of offences be allowed to offer exculpatory pleas or invoke extenuating circumstances?

256. The reply could be affirmative in some cases. But such exemptions or mitigation of punishment are then linked to questions of fact and not to questions of law, and are not likely to be found in a code if that code is limited to primary rules. Moreover, as has been said, they are linked to the application of penalties and are often taken into consideration within the scale of penalties. A code which does not prescribe penalties cannot contain provisions on exculpatory pleas or extenuating circumstances.

257. The Nürnberg and Tokyo Charters left to the judge the responsibility for establishing the applicable penalty, which could be the death penalty. As a result, those Charters contained provisions concerning extenuating circumstances. The Nürnberg Charter (art. 8) admitted extenuating circumstances when the defendant had acted pursuant to order of his Government or of a superior. The Tokyo Charter (art. 6) allowed the Tribunal the possibility of considering extenuating circumstances either by reason of an order received or even by reason of the official position of the accused.

¹⁰⁴ See footnote 37 above.

¹⁰⁵ United Nations, *Treaty Series*, vol. 75, p. 135.

¹⁰⁶ *Ibid.*, p. 287.

¹⁰⁷ See footnote 40 above.

¹⁰⁸ See the discussion at the Conference on draft article 74, on repression of breaches of Protocol I, in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974-1977)*, vol. IX (Berne, 1978), especially summary records of the 46th and 48th meetings.

258. Since the code, in its present state, does not prescribe penalties, it cannot prescribe measures concerning ways of applying penalties.

F. Conclusion

259. These seem to be the offences and the principles governing the matter. It will undoubtedly be noted that the texts and judicial decisions analysed are, unfortunately, too closely linked to the circumstances of the

Second World War. However, it should be recalled that the expression "offence against the peace and security of mankind" is itself a result of those circumstances. Some decisions have, of course, been rendered by national courts since that war, particularly concerning war crimes. Those decisions do not contribute anything particularly new in relation to the judicial practice which has been analysed here and from which we have sought to isolate certain elements which, detached from their context, may be general and abstract enough to be raised to the level of legal concepts and rules.

PART V

Draft articles

260. The draft articles relate to the subject as a whole. The following remarks may be made:

(a) Draft articles 1, 2 and 3 as originally submitted¹⁰⁹ have been reworded. A number of members of the Commission and representatives in the Sixth Committee of the General Assembly did not consider it necessary to include a precise definition of an offence against the peace and security of mankind. In addition, the definitions proposed, and particularly the one taken from article 19 of part 1 of the draft articles on State responsibility, were very controversial. The new article 1 now proposed avoids these difficulties;

(b) Any reference to political organs and any elements that would encroach on the domain of the judge have been removed from the definition of aggression;

(c) The definitions of the other offences are based on existing conventions, sometimes reproducing the texts thereof in full or in part. More general alternatives are also proposed, however, so as to enable the Commission to choose between the texts or combine them;

(d) The general principles have emerged either from the study of existing conventions or from the study of judicial precedents. Some principles will apply more generally to crimes against peace or to crimes against humanity, while others will apply more generally to war crimes. They are, however, formulated according to a somewhat synoptic approach, in order to respect the unity of the subject-matter, while provision is made for exceptions and restrictions in certain individual cases.

261. The draft articles comprise two chapters: one contains an introduction and the other a list of offences.

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and penalty

Any person who commits an offence against the peace and security of mankind is responsible therefor and liable to punishment.

Article 4. Universal offence

1. An offence against the peace and security of mankind is a universal offence. Every State has the duty to try or extradite any perpetrator of an offence against the peace and security of mankind arrested in its territory.

2. The provision in paragraph 1 above does not prejudge the question of the existence of an international criminal jurisdiction.

¹⁰⁹ *Yearbook . . . 1985*, vol. II (Part One), pp. 81 *et seq.*, document A/CN.4/387, chap. III.

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to offences against the peace and security of mankind, because of their nature.

Article 6. Jurisdictional guarantees

Any person charged with an offence against the peace and security of mankind is entitled to the guarantees extended to all human beings and particularly to a fair trial on the law and facts.

Article 7. Non-retroactivity

1. No person shall be convicted of an act or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. The above provision does not, however, preclude the trial or punishment of a person guilty of an act or omission which, at the time of commission, was criminal according to the general principles of international law.

Article 8. Exceptions to the principle of responsibility

Apart from self-defence in cases of aggression, no exception may in principle be invoked by a person who commits an offence against the peace and security of mankind. As a consequence:

(a) The official position of the perpetrator, and particularly the fact that he is a head of State or Government, does not relieve him of criminal responsibility;

(b) Coercion, state of necessity or *force majeure* do not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(c) The order of a Government or of a superior does not relieve the perpetrator of criminal responsibility, unless he acted under the threat of a grave, imminent and irremediable peril;

(d) An error of law or of fact does not relieve the perpetrator of criminal responsibility unless, in the circumstances in which it was committed, it was unavoidable for him;

(e) In any case, none of the exceptions in subparagraphs (b), (c) and (d) eliminates the offence if:

- (i) the fact invoked in his defence by the perpetrator is a breach of a peremptory rule of international law;
- (ii) the fact invoked in his defence by the perpetrator originated in a fault on his part;
- (iii) the interest sacrificed is higher than the interest protected.

Article 9. Responsibility of the superior

The fact that an offence was committed by a subordinate does not relieve his superiors of their criminal responsibility, if they knew or possessed information enabling them to conclude, in the circumstances then existing, that the subordinate was committing or was go-

ing to commit such an offence and if they did not take all the practically feasible measures in their power to prevent or suppress the offence.

Comments concerning articles 1 to 9

Articles 1 to 7 do not call for any particular comment, except to point out, with regard to the principle of non-retroactivity, that paragraph 2 of article 7 ensures that this rule is not restricted to sources of written law.

With regard to article 8, it will be noted that subparagraph (e) ensures that crimes against humanity and crimes against peace are in effect excluded. The scope of the exceptions will be limited, in certain cases, mainly to war crimes.

With regard to article 9, the Commission may also leave the hypothesis in question to be covered by the general theory of complicity. It should be remembered, however, that these are offences committed within the framework of a hierarchy, which therefore almost always involve the power of command. It may therefore be useful to provide a separate basis and an independent written source to cover the responsibility of the leader.

CHAPTER II

OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

Article 10. Categories of offences against the peace and security of mankind

Offences against the peace or security of mankind comprise three categories: crimes against peace, crimes against humanity and war crimes or [crimes committed on the occasion of an armed conflict].

PART I. CRIMES AGAINST PEACE

Article 11. Acts constituting crimes against peace

The following constitute crimes against peace:

1. The commission by the authorities of a State of an act of aggression.

(a) Definition of aggression

(i) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition;

(ii) EXPLANATORY NOTE. In this definition, the term "State":

a. is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

b. includes the concept of a "group of States", where appropriate.

(b) Acts constituting aggression

Any of the following acts, regardless of a declaration of war, shall qualify as an act of

aggression, without this enumeration being exhaustive:

- (i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (iii) the blockade of the ports or coasts of a State by the armed forces of another State;
- (iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;
- (v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (vi) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (vii) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

(c) *Scope of this definition*

- (i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;
- (ii) Nothing in this definition, and in particular subparagraph (b), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Comments

This definition is taken from General Assembly resolution 3314 (XXIX) of 14 December 1974, but it

does not reproduce the passages relating to evidence and the consequences of aggression or to interpretation. This is because interpretation and evidence are matters within the competence of the judge. The penal consequences are the subject of the present draft.

2. Recourse by the authorities of a State to the threat of aggression against another State.

3. Interference by the authorities of a State in the internal or external affairs of another State, including:

(a) fomenting or tolerating the fomenting, in the territory of a State, of civil strife or any other form of internal disturbance or unrest in another State;

(b) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

Comments

Paragraph 2 does not call for any comment; it is taken from the 1954 text. Paragraph 3, concerning interference, is a revised version of the 1954 text. It is intended to cover not only the fomenting of civil strife, but all forms of internal disturbance or unrest. Paragraph 3 (b) expands the scope of interference beyond political forms, and includes *coercive* measures of an economic nature.

4. The undertaking, assisting or encouragement by the authorities of a State of terrorist acts in another State, or the toleration by such authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(a) *Definition of terrorist acts*

The term "terrorist acts" means criminal acts directed against another State or the population of a State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

(b) *Terrorist acts*

The following constitute terrorist acts:

- (i) any act causing death or grievous bodily harm or loss of freedom to a head of State, persons exercising the prerogatives of the head of State, the hereditary or designated successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;
- (ii) acts calculated to destroy or damage public property or property devoted to a public purpose;
- (iii) any act calculated to endanger the lives of members of the public through fear of a common danger, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;
- (iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives

or harmful substances with a view to the commission of a terrorist act.

Comments

This text reproduces, as regards the definition of terrorism, the terms of the 1937 Convention,¹¹⁰ but also covers certain new forms of terrorism, such as the seizure of aircraft and violence against diplomats.

5. A breach of obligations incumbent on a State under a treaty which is designed to ensure international peace and security, particularly by means of:

- (i) prohibition of armaments, disarmament, or restrictions or limitations on armaments;
- (ii) restrictions on military preparations or on strategic structures or any other restrictions of the same kind.

6. A breach of obligations incumbent on a State under a treaty prohibiting the deployment or testing of weapons, particularly nuclear weapons, in certain territories or in space.

Comments

This text supplements the 1954 draft by envisaging certain acts covered by subsequent conventions on the deployment or testing of weapons.

7. The forcible establishment or maintenance of colonial domination.

8. The recruitment, organization, equipment and training of mercenaries or the provision to them of means of undermining the independence or security of States or of obstructing national liberation struggles.

A mercenary is any person who:

- (i) is specially recruited locally or abroad in order to fight in an armed conflict;
- (ii) does, in fact, take a direct part in the hostilities;
- (iii) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (iv) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (v) is not a member of the armed forces of a party to the conflict;
- (vi) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

Comments

This definition is taken from article 47 of Additional Protocol I¹¹¹ to the 1949 Geneva Conventions.

¹¹⁰ Convention for the Prevention and Punishment of Terrorism, signed at Geneva on 16 November 1937 (League of Nations, document C.546.M.383.1937.V.).

¹¹¹ See footnote 40 above.

PART II. CRIMES AGAINST HUMANITY

Article 12. Acts constituting crimes against humanity

The following constitute crimes against humanity:

1. Genocide, in other words any act committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) killing members of the group;
- (ii) causing serious bodily or mental harm to members of the group;
- (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) imposing measures intended to prevent births within the group;
- (v) forcibly transferring children from one group to another group.

Comments

This definition is taken from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹¹² (art. II).

2 (FIRST ALTERNATIVE). *Apartheid*, in other words the acts defined in article II of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid* and, in general, the institution of any system of government based on racial, ethnic or religious discrimination.

2 (SECOND ALTERNATIVE). *Apartheid*, which includes similar policies and practices of racial segregation and discrimination to those practised in southern Africa, and shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:

- (i) by murder of members of a racial group or groups;
- (ii) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;
- (iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial

¹¹² See footnote 18 above.

group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;

(d) any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, and the expropriation of landed property belonging to a racial group or groups or to members thereof;

(e) exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour;

(f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*.

Comments

This definition is taken from the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*¹¹³ (art. II).

3. Inhuman acts which include, but are not limited to, murder, extermination, enslavement, deportation or persecutions, committed against elements of a population on social, political, racial, religious or cultural grounds.

4. Any serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

PART III. WAR CRIMES

Article 13. Definition of war crimes

FIRST ALTERNATIVE

(a) Any serious violation of the laws or customs of war constitutes a war crime.

(b) Within the meaning of the present Code, the term "war" means any international or non-international armed conflict as defined in article 2 common to the Geneva Conventions of 12 August 1949 and in article 1, paragraph 4, of Additional Protocol I of 8 June 1977 to those Conventions.

SECOND ALTERNATIVE

(a) Definition of war crimes

Any serious violation of the conventions, rules and customs applicable to international or non-international armed conflicts constitutes a war crime.

(b) Acts constituting war crimes

The following acts, in particular, constitute war crimes:

(i) serious attacks on persons and property, including intentional homicide, torture, inhuman

treatment, including biological experiments, the intentional infliction of great suffering or of serious harm to physical integrity or health, and the destruction or appropriation of property not justified by military necessity and effected on a large scale in an unlawful or arbitrary manner;

(ii) the unlawful use of weapons, and particularly of weapons which by their nature strike indiscriminately at military and non-military targets, of weapons with uncontrollable effects and of weapons of mass destruction (in particular first use of nuclear weapons).

Comments

The first alternative uses the term "war" in its material sense and not in its formal sense. The second alternative uses the term "armed conflict" in preference to the word "war". Subparagraphs (i) and (ii) are common to the two alternatives.

PART IV. OTHER OFFENCES

Article 14

The following also constitute offences against the peace and security of mankind:

A (FIRST ALTERNATIVE). Conspiracy [*complot*] to commit an offence against the peace and security of mankind.

A (SECOND ALTERNATIVE). Participation in an agreement with a view to the commission of an offence against the peace and security of mankind.

Comments

The two alternatives for A will enable the Commission to hold a discussion on the content of conspiracy [*complot*]. The question arises whether an agreement to commit an offence, i.e. "conspiracy", should also be treated as an offence.

B. (a) Complicity in the commission of an offence against the peace and security of mankind.

(b) Complicity means any act of participation prior to or subsequent to the offence, intended either to provoke or facilitate it or to obstruct the prosecution of the perpetrators.

Comments

If the Commission does not wish to define complicity, the content of subparagraph (b) could be included in a commentary.

C. Attempts to commit any of the offences defined in the present Code.

Comments

Since the offences defined in the present Code are the most serious offences, attempts to commit them are necessarily punishable and there is no need to distinguish here between instances in which the attempt would be punishable and instances in which it would not.

¹¹³ United Nations, *Treaty Series*, vol. 1015, p. 243.

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 6]

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

[Original: English]
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CHAPTER I

Status of work on the topic

A. Survey of developments from 1970 to 1979

1. The Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,¹ in response to the recommendation made by the General Assembly in its resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international water-

courses.² At the same session, the Commission established a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report³ which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee at the same session and also appointed Mr. Kearney Special Rapporteur for the topic.⁴

¹ *Yearbook* . . . 1971, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

² *Yearbook* . . . 1974, vol. II (Part Two), p. 265, document A/CN.4/274.

³ *Yearbook* . . . 1974, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

⁴ *Ibid.*, p. 301, para. 159.

2. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States⁵ to the questionnaire⁶ which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.⁷ At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments, and dealt with in the report of the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session

led to general agreement . . . that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses.⁸

3. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission.⁹ Mr. Schwebel made a statement to the Commission in 1978 and, at the Commission's thirty-first session, in 1979, submitted his first report,¹⁰ which contained 10 draft articles. At that session, the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

B. Action taken by the Commission at its thirty-second session, in 1980

4. Mr. Schwebel submitted a second report, containing six draft articles, at the Commission's thirty-second session, in 1980.¹¹ At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and X, which read as follows:

Article 1. Scope of the present articles

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

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

⁵ *Yearbook . . . 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1.

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

⁷ *Yearbook . . . 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

⁸ *Yearbook . . . 1976*, vol. II (Part Two), p. 162, para. 164.

⁹ *Yearbook . . . 1977*, vol. II (Part Two), p. 124, para. 79.

¹⁰ *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

¹¹ *Yearbook . . . 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

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

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

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

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only

to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.¹²

6. In its report to the General Assembly on its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses, in terms both of their physical characteristics and of the human needs they served. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in that regard of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as of the sovereign rights of riparian States.

7. By its resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

C. Survey of developments from 1981 to 1983

8. The Commission did not consider the topic at its thirty-third session, in 1981, owing to the resignation of Mr. Schwebel from the Commission upon his election to the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.¹³ Also at that session, the Commission had before it the third report of Mr. Schwebel, who had begun its preparation prior to his resignation from the Commission.¹⁴

9. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.¹⁵ That report contained an outline for a draft convention, to serve as a basis for discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and on that of an international watercourse system as a shared natural resource.

¹² *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

¹³ *Yearbook* . . . 1982, vol. II (Part Two), p. 121, para. 250.

¹⁴ *Yearbook* . . . 1982, vol. II (Part One), p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

¹⁵ *Yearbook* . . . 1983, vol. II (Part One), p. 155, document A/CN.4/367.

D. Consideration of the topic by the Commission at its thirty-sixth session, in 1984

10. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by Mr. Evensen.¹⁶ That report contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses; that text consisted of 41 draft articles arranged in six chapters, as follows:

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention

Article 2. Scope of the present Convention

Article 3. Watercourse States

Article 4. Watercourse agreements

Article 5. Parties to the negotiation and conclusion of watercourse agreements

CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

Article 6. General principles concerning the sharing of the waters of an international watercourse

Article 7. Equitable sharing in the uses of the waters of an international watercourse

Article 8. Determination of reasonable and equitable use

Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

Article 10. General principles of co-operation and management

Article 11. Notification to other watercourse States. Content of notification

Article 12. Time-limits for reply to notifications

Article 13. Procedures in case of protest

Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13

Article 15. Management of international watercourses. Establishment of commissions

Article 15 bis. Regulation of international watercourses [based on article 27 of the original draft]

Article 15 ter. Use preferences [based on article 29 of the original draft]

Article 16. Collection, processing and dissemination of information and data

Article 17. Special requests for information and data

Article 18. Special obligations in regard to information about emergencies

Article 19. Restricted information

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES

Article 20. General provisions on the protection of the environment

Article 21. Purposes of environmental protection

Article 22. Definition of pollution

Article 23. Obligation to prevent pollution

Article 24. Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution

¹⁶ *Yearbook* . . . 1984, vol. II (Part One), p. 101, document A/CN.4/381.

- Article 25. Emergency situations regarding pollution*
Article 26. Control and prevention of water-related hazards
 [Article 27 of the original draft was replaced by article 15 bis]
Article 28. Safety of international watercourses, installations and constructions, etc.
Article 28 bis. Status of international watercourses, their waters and constructions, etc. in armed conflicts [new article]
 [Article 29 of the original draft was replaced by article 15 ter]
Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites

CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

- Article 31. Obligation to settle disputes by peaceful means*
Article 31 bis. Obligations under general, regional or bilateral agreements or arrangements [new article]
Article 32. Settlement of disputes by consultations and negotiations
Article 33. Inquiry and mediation
Article 34. Conciliation
Article 35. Functions and tasks of the Conciliation Commission
Article 36. Effects of the report of the Conciliation Commission. Sharing of costs
Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal
Article 38. Binding effect of adjudication

CHAPTER VI. FINAL PROVISIONS

- Article 39. Relationship to other conventions and international agreements*

11. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1 to 9 as contained in the second report and on questions related thereto. At the conclusion of the discussion, the Commission decided to refer draft articles 1 to 9 to the Drafting Committee. It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 5 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see para. 4 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report.¹⁷

1. THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

12. The outline for a draft convention proposed by the Special Rapporteur in his first report had seemed broadly acceptable. Consequently, the Special Rapporteur had made only minor changes in and a few additions to the outline itself in his second report. More significant changes were proposed, however, in the texts of certain draft articles, as indicated below.

13. The "framework agreement" approach had likewise seemed to be broadly acceptable to the Commission and was also the approach that had been endorsed by the Sixth Committee of the General Assembly (see paras. 32-33 below). The Special Rapporteur believed that the term "framework agreement" should be

applied in a broad and flexible manner, and shared the position of his predecessor, Mr. Schwebel, that

... the product of the Commission's work should serve to provide . . . the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. . . .¹⁸

It seemed to be generally recognized by the Commission that, in a framework text, it would be necessary or useful to use, to a reasonable extent, general legal formulations or standards such as "good-neighbourly relations", "good faith", participation in the benefits of a resource "in a reasonable and equitable manner" and the duty not to cause "appreciable harm" to the rights or interests of others. While some members supported this broad approach to the topic, others believed that the legal principles proposed were formulated too generally. Furthermore, certain members felt that recommendations and guidelines did not belong in a framework agreement, while others were of the view that recommendations and guidelines might be useful for the elaboration of specific watercourse agreements.

14. Finally, it was recognized that the general approach suggested by the Special Rapporteur in his second report was based on certain changes which he had introduced in his revised draft articles, most notably in article 1, where the term "international watercourse system" had been replaced by the term "international watercourse", and in article 6, where the expression "the watercourse system and its waters are . . . a shared natural resource" had been changed to "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". These changes also were the subject of different views within the Commission, as indicated below. While no final resolution of the various issues was achieved during the thirty-sixth session, it was expected that further discussions on those issues would assist the Commission in its future work. As stated in the Commission's report on its thirty-sixth session:

... the Commission anticipates that it will continue its work on this topic in the light of the debate to be held in the Sixth Committee of the General Assembly on the report of the Commission on the work of its present session, in the light of future proposals and suggestions to be made by the Special Rapporteur, and on the basis of future reports of the Drafting Committee on its consideration of draft articles 1 to 9.¹⁹

2. ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

15. As proposed by the Special Rapporteur, articles 1 to 9 comprise the first two chapters of the draft. Chapter I, entitled "Introductory articles", contains articles 1 to 5, and chapter II, entitled "General principles, rights and duties of watercourse States", contains articles 6 to 9. As indicated above (para. 11), the Commission focused its discussion at its thirty-sixth session, in 1984, on draft articles 1 to 9 and referred those articles to the Drafting Committee. Consequently, the present summary of the Commission's consideration of the topic at its 1984 session will concentrate on those articles.

¹⁷ *Yearbook . . . 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250.

¹⁸ *Yearbook . . . 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

¹⁹ *Yearbook . . . 1984*, vol. II (Part Two), p. 89, para. 290, *in fine*.

16. Views were divided in the Commission on the revised text of draft article 1²⁰ submitted in the Special Rapporteur's second report. While article 1 as submitted in his first report had been patterned closely on the provisional working hypothesis accepted by the Commission in 1980 as to what was meant by the expression "international watercourse system" (see para. 5 above), the Special Rapporteur, in his second report, had recommended abandonment of the "system" concept in favour of the simpler notion of an "international watercourse". The Special Rapporteur had recommended this change because of his conclusion that there was opposition to the "system" concept, both in the Commission and in the Sixth Committee of the General Assembly, on the ground that it represented a doctrinal approach similar to the "drainage basin" concept earlier discarded by the Commission.

17. Some members of the Commission endorsed the change in approach suggested by the Special Rapporteur in the revised text of article 1. They believed the abandonment of the "system" concept removed a major stumbling-block to progress on the topic and resulted in a purely geographical definition which could form the basis of a comprehensive draft, while avoiding the territorial connotations which, in their view, the "system" concept had implied.

18. Some members viewed the abandonment of the "system" concept as regrettable but indicated that they did not object to the suggested change, provided it represented nothing more than a change of wording. In their view, however, the elimination of the "system" concept presented the conceptual problem of dealing with the relativity aspect highlighted in the provisional working hypothesis accepted by the Commission in 1980: there could be different systems with respect to different uses of the same watercourse at one and the same time.

19. To other members, the revised draft article 1 represented a major departure from the approach adopted by the Commission at its thirty-second session, in 1980. Those members were of the view that the articles provisionally adopted in 1980 (see para. 4 above) constituted a coherent whole and that the elimination of

the "system" concept necessitated a rethinking of all the provisions, in particular articles 4, 5 and 6.

20. Finally, certain members questioned the omission from the text proposed by the Special Rapporteur of an indication, even a non-exhaustive one, of the possible hydrographic components of an international watercourse. Those members thought it preferable to include in the text of the article the examples given in the Special Rapporteur's second report (rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers),²¹ with a view to determining whether they should form the subject of separate articles or at least a very detailed commentary.

21. Draft articles 2²² and 3²³ as submitted in the Special Rapporteur's second report did not give rise to significant differences of view. Draft article 4²⁴ was the subject of some comment, principally on the question whether the revised text of paragraph 1 was preferable to that submitted in the first report. There was general agreement, however, that the article should safeguard and protect existing agreements and give every possible encouragement to States to enter into agreements concerning international watercourses.

²¹ *Yearbook . . . 1984*, vol. II (Part One), p. 106, document A/CN.4/381, para. 24.

²² Revised draft article 2 as submitted in the second report read as follows:

"Article 2. Scope of the present Convention"

"1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

"2. The use of the waters of international watercourses for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation."

²³ Revised draft article 3 as submitted in the second report read as follows:

"Article 3. Watercourse States"

"For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State."

²⁴ Revised draft article 4 as submitted in the second report read as follows:

"Article 4. Watercourse agreements"

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

"The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

"2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements."

²⁰ Revised draft article 1 as submitted in the second report read as follows:

"Article 1. Explanation (definition) of the term 'international watercourse' as applied in the present Convention"

"1. For the purposes of the present Convention, an 'international watercourse' is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).

"2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.

"3. Watercourses which in whole or in part are apt to appear and disappear (more or less regularly) from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

"4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention."

22. Comments on draft article 5²³ focused particularly on paragraph 2. The usefulness of the criterion of "an appreciable extent", although it had been taken verbatim from article 4, paragraph 2, as provisionally adopted by the Commission in 1980, was questioned by some members of the Commission. Others expressed doubts concerning the fact that paragraph 1 allowed watercourse States to become parties to watercourse agreements, whereas paragraph 2 allowed them only to participate in the negotiation thereof.

23. Chapter II, containing articles 6 to 9, was considered by some members to be the most important chapter of the draft articles, since it set out the rights and obligations of watercourse States. Draft article 6²⁴ was the subject of extensive discussion relating in particular to the replacement of the words "the watercourse system and its waters are . . . a shared natural resource" by the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". The Special Rapporteur indicated that, while it had been accepted in the Commission and in the Sixth Committee that watercourse States were entitled to a reasonable and equitable share of the benefits arising from an international watercourse, the use of the term "shared natural resource" as a concept had given rise to strong objection.

24. Some members of the Commission considered that the revised text of article 6 constituted a major improvement, since the new wording provided a more acceptable basis for an equitable international watercourse régime. Some members, however, thought it should not be excluded that a watercourse agreement for a particular project could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed.

²³ Revised draft article 5 as submitted in the second report read as follows:

"Articles 5. Parties to the negotiation and conclusion of watercourse agreements"

"1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

"2. A watercourse State whose use of the waters of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected."

²⁴ Revised draft article 6 as submitted in the second report read as follows:

"Article 6. General principles concerning the sharing of the waters of an international watercourse"

"1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse."

25. Other members of the Commission questioned the deletion of the "shared natural resource" concept. According to this view, the proposition that water constituted a shared natural resource was supported by various international instruments and was only a reflection of a fact of nature. It was also remarked that it would be necessary to determine how the removal of this central concept would affect the remainder of the draft.

26. In his summing-up on draft article 6, the Special Rapporteur said that the deletion of the "shared natural resource" concept in the revised text appeared to be generally acceptable. He stated, however, that he could not accept the suggestion made during the debate that all reference to "sharing" be deleted from article 6. According to the Special Rapporteur, the whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, entailed the sharing of the utilization and benefits of the waters of an international watercourse.

27. Draft article 7²⁵ was generally supported by some members, who noted that it introduced the important concept of development, use and sharing of the waters of an international watercourse in a reasonable and equitable manner. Different views were expressed on the inclusion in the article of the principles of good faith and good-neighbourly relations: while certain members approved of their inclusion, certain others considered those concepts, particularly the latter, to be too vague and uncertain. Doubts were also voiced concerning the reference to "optimum utilization". The Special Rapporteur concluded that at least the first part of the article had received considerable support and thus merited retention. He recognized that the second part posed certain difficulties, which he hoped could be satisfactorily resolved. He also expressed the view that the notion of "good-neighbourly relations" had emerged as a concept of international law.

28. Draft article 8²⁶ was viewed by some members of the Commission as an important element of the draft, since it would facilitate the determination of what constituted "reasonable and equitable" use in concrete

²⁵ Revised draft article 7 as submitted in the second report read as follows:

"Article 7. Equitable sharing in the uses of the waters of an international watercourse"

"The waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the international watercourse and its components."

²⁶ Revised draft article 8 as submitted in the second report read as follows:

"Article 8. Determination of reasonable and equitable use"

"1. In determining whether the use by a watercourse State of the waters of an international watercourse is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the international watercourse concerned. Among such factors are:

"(a) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse concerned;

situations. Other members considered a non-exhaustive list of factors such as that contained in article 8 to be of limited value. The latter members were of the view that article 8 should be limited essentially to the first sentence of paragraph 1.

29. Draft article 9²⁹ was the subject of extensive comment. Certain members generally approved of the text submitted in the Special Rapporteur's second report and considered that the entire draft could be built upon the basic principle enunciated in this article, namely *sic utere tuo ut alienum non laedas*, which was the basis of the principles contained in articles 7 and 8. Some members, however, urged that the article be clarified in order to specify that the obligation to refrain from an activity that might cause "appreciable harm" was not applicable where a watercourse agreement provided for

"(b) the special needs of the watercourse State concerned for the use or uses in question in comparison with the needs of other watercourse States;

"(c) the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned;

"(d) the contribution by the watercourse State concerned of waters to the international watercourse in comparison with that of other watercourse States;

"(e) development and conservation by the watercourse State concerned of the international watercourse and its waters;

"(f) the other uses of the waters of an international watercourse by the State concerned in comparison with the uses by other watercourse States, including the efficiency of such uses;

"(g) co-operation with other watercourse States in projects or programmes to obtain optimum utilization, protection and control of the watercourse and its waters, taking into account cost-effectiveness and the costs of alternative projects;

"(h) pollution by the watercourse State or States concerned of the international watercourse in general or as a consequence of the particular use, if any;

"(i) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other watercourse States including, but not restricted to, the adverse effects upon existing uses by such States of the waters of the international watercourse and its impact upon protection and control measures of other watercourse States;

"(j) availability to the State concerned and to other watercourse States of alternative water resources;

"(k) the extent and manner of co-operation established between the watercourse State concerned and other watercourse States in programmes and projects concerning the use in question and other uses of the waters of the international watercourse in order to obtain optimum utilization, reasonable management, protection and control thereof.

"2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the watercourse States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the watercourse States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention."

²⁹ Revised draft article 9 as submitted in the second report read as follows:

"Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

the equitable apportionment of benefits resulting from that activity. Moreover, certain members believed that the criterion of "appreciable harm" was too strict and that a formula such as "exceeding a State's equitable share" or "depriving another State of its equitable share" would be preferable. It was pointed out in that connection that the use of the term "harm" could give rise to a conflict between the concept of an "equitable share" under article 6 and that of not causing "appreciable harm" under article 9. It was suggested that those two articles could be reconciled by having article 9 prohibit the infliction of appreciable harm except to the extent allowable under an agreed determination of equitable allocation of the watercourse concerned. Finally, it was pointed out that the article as drafted did not clearly cover future harm in the sense of lost opportunity to construct a project or to put the water to a given use.

30. In his summing-up of the discussion on the topic at the thirty-sixth session, the Special Rapporteur recognized that, on certain basic issues concerning draft articles 1 to 9, opinions seemed to vary considerably. He therefore proposed that those articles be "provisionally referred" to the Drafting Committee so as to give him the opportunity to receive guidance from the Committee as to the drafting of formulations that might be more acceptable to the Commission for its future work. It was so agreed by the Commission.³⁰

E. Comments made in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-sixth session³¹

1. GENERAL OBSERVATIONS

31. The Commission was congratulated for having achieved appreciable progress in its consideration of the topic. It was stressed that, despite certain conceptual difficulties which had arisen both in the Commission and in the Sixth Committee, the revised draft articles provided a general basis on which further work on the topic could be pursued. Despite certain disagreements which seemed to remain within the Commission, it appeared that the draft articles had already reached an advanced stage and that work on the topic constituted a priority task for the Commission.

2. COMMENTS ON THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

32. Many representatives who addressed themselves to the issue commended the "framework agreement" approach to the topic, which followed the approach adopted by the Commission in 1980. It was said that, since political relationships and disposition to co-operate among riparian States varied greatly, the general rules included in a framework agreement should be precise and detailed enough to safeguard the rights of

³⁰ *Yearbook . . . 1984*, vol. II (Part Two), p. 98, para. 343.

³¹ This survey is based on section F of the "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), in which a more detailed account will be found.

interested parties in the absence of specific agreements. With regard to whether the framework agreement should consist strictly of legal rules, some representatives supported the Special Rapporteur's view that such an agreement should contain, in addition to such rules, guidelines and recommendations which might be adapted to specific watercourse agreements. But it was stated that the general concepts and language had to be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases.

33. Certain representatives expressed doubts concerning the framework agreement approach. One view was that it was difficult to envisage cases in which all States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea that the draft articles could serve as a set of model rules still had some appeal. Whatever their final form, however, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. The view was expressed that it was far from evident that the draft under consideration quite fitted the definition of a framework agreement that States could adapt to their particular needs. According to that view, such an agreement should be a more flexible and freer text.

34. Some representatives expressed concern that the Special Rapporteur had reworked some of the basic concepts underlying the draft articles, such as the "system" concept, the definition of an "international watercourse" and the concept of "shared natural resources". It was asked whether the new definitions really constituted progress. Finally, the Commission and the Special Rapporteur were urged to avoid an annual reconsideration of texts that had already been provisionally adopted by the Commission.

3. COMMENTS ON ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

35. Comments in the Sixth Committee on draft articles 1 to 9 largely paralleled the views expressed in the Commission. A brief summary will be provided here for ease of reference. Particular attention will be devoted to the articles that received most attention both in the Commission and in the Sixth Committee, namely articles 1, 6 and 9.

36. Views expressed in the Sixth Committee on draft article 1, and specifically on the deletion of the "system" concept, varied. Some representatives endorsed the Special Rapporteur's replacement of the term "international watercourse system" by the term "international watercourse". Specifically, it was said that the use of the "system" concept had been somewhat ambiguous because it might have connoted the idea of jurisdiction over land areas. Certain representatives welcomed the Special Rapporteur's assurances that the new wording in draft article 1 was a purely terminological and not a conceptual change. Other representatives, however, expressed regret at the abandonment of the "system" concept, which they considered to be a rich, modern notion. The abandonment of that concept, in their view, meant that one of the corner-stones of the draft had been removed. It was

thus urged that the Commission return to the "system" approach, since the natural connection between various elements—namely that they formed a system—could not be overlooked.

37. The few observations made in the Sixth Committee on draft articles 2 and 3 largely echoed those made in the Commission. Among other comments on draft article 4, some representatives criticized the new paragraph 1 as going too far towards giving the provisions of the framework agreement a status from which watercourse States would be unable to derogate by special agreement. With regard to paragraph 2 of article 4, several representatives criticized the vague import of the expression "to an appreciable extent" and suggested that criteria be set down to clarify the expression. Similar observations were made with respect to the same expression appearing in draft article 5. With regard to draft article 5 as a whole, certain representatives expressed their qualified approval of it, whereas others expressed doubts or reservations.

38. Several representatives welcomed the Special Rapporteur's replacement in draft article 6 of the concept of a "shared natural resource" by the notion of "sharing in the use of waters in a reasonable and equitable manner" and considered the revised text a major improvement which struck a better balance in the article as a whole. Some representatives welcomed the Special Rapporteur's assurances that the changes introduced were of a terminological nature and not intended to affect substance. They considered that, while the notion of sharing still formed the basis of the draft, it did so in a more general manner and avoided the doctrinal overtones implicit in the concept of a "shared natural resource".

39. Certain representatives believed that the revised text still did not strike the right balance, since it appeared to place more emphasis on the "sharing" notion than on the principle of permanent sovereignty over natural resources, on which greater emphasis was required. Thus, according to certain representatives, the notion of sharing in any form should be eliminated altogether from the article.

40. On the other hand, certain other representatives regretted or deplored the elimination of the concept of a "shared natural resource". In their view, the concept underlined the necessary interrelationship between the rights of adjacent riparian States and was the basis for certain essential obligations in that area. They believed that the abandonment of the concept, coupled with the deletion of the "system" concept in draft article 1, called into question the arguments underlying some of the draft articles. Doubts were also voiced with regard to the notion of "reasonable and equitable" sharing.

41. Draft article 7 was supported by some representatives as a necessary corollary to draft article 6. Doubts were, however, expressed regarding the terms "optimum utilization", "good-neighbourly", "protection and control" and "shared", because they could give rise to misinterpretation or abuse. Draft article 8 was the subject of mixed views. Certain representatives considered that the factors laid down therein could provide non-binding, non-exhaustive reference points for deter-

mining whether waters were used in a reasonable and equitable manner. Other representatives questioned the utility of including a long non-exhaustive list of factors and requested the Commission to re-examine the matter.

42. Draft article 9 was approved of by some representatives, who considered it to be one of the core provisions of the draft as a whole. They believed that the maxim *sic utere tuo ut alienum non laedas* should occupy a privileged place in the draft, since the obligation not to cause harm to other States was a basic obligation which was recognized as a generally accepted principle of international law. At the same time, the draft reflected modern trends by excluding from the scope of the prohibition those injurious effects which did not exceed the threshold of "appreciable harm", thus creating a link between the present topic and that of international liability for injurious consequences arising out of acts not prohibited by international law.

43. Certain representatives considered that the term "appreciable harm" required further clarification in order to become acceptable. Other representatives found the notion of "appreciable harm" to be too vague to be appropriately employed in article 9. Finally, certain representatives referred to a potential conflict between the determination of reasonable and equitable use of a watercourse under articles 6 to 8 and the prohibition of activities causing appreciable harm under article 9.

44. Chapters III, IV, V and VI of the Special Rapporteur's revised draft were also commented upon in the Sixth Committee, although less extensively than chapters I and II. Since attention was focused on the first two chapters both in the Commission and in the Sixth Committee, the comments on the other chapters are not summarized in the present report.

F. Preliminary report of the present Special Rapporteur

1. PROPOSALS FOR THE FUTURE PROGRAMME OF WORK ON THE TOPIC

45. In his preliminary report,³² submitted at the Commission's thirty-seventh session, in 1985, the present Special Rapporteur made two recommendations in relation to the Commission's future programme of work on the topic: first, that draft articles 1 to 9, which had been referred to the Drafting Committee in 1984, be taken up by the Committee at the thirty-eighth session, in 1986, to the extent possible and not be the subject of another general debate in plenary session; secondly, that, in elaborating further draft articles on the topic, he should follow the general organizational structure provided by the outline for a convention proposed by his predecessor.

46. With regard to his first recommendation, the Special Rapporteur indicated his intention to provide, in his second report, a concise statement of his views concerning the nine articles referred to the Drafting Com-

mittee in 1984. He suggested that the Commission's work might be expedited most effectively if discussion of those articles in plenary were confined, in principle, to any responses there might be to the views expressed on them in the Special Rapporteur's second report.

47. With regard to his second recommendation, the Special Rapporteur indicated that he intended to present, in his second report, a set of draft articles of manageable size and scope concerning a limited number of the issues covered in chapter III of the outline for a convention.

2. CONSIDERATION OF THE SPECIAL RAPPORTEUR'S PROPOSALS BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION, IN 1985³³

48. Members of the Commission who commented on the Special Rapporteur's preliminary report expressed general support for his intention to build as much as possible on the progress already achieved. Emphasis was placed on the importance of continuing with the work on the topic with minimum loss of momentum, especially in view of the urgency of the serious problems of fresh water currently confronting mankind.

49. At the same time, it was recognized that the subject was a difficult and sensitive one. Attention was drawn to the fact that no consensus had been reached in 1984 on some of the major issues raised by articles 1 to 9, referred to the Drafting Committee that year. The view was therefore expressed that further discussion of these issues was needed. It was noted that such a discussion could well take place during consideration of the Special Rapporteur's second report, which would contain a brief statement of his views on the major issues raised by those articles.

G. Comments made in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-seventh session³⁴

50. In commenting on the Commission's consideration of the present topic at its thirty-seventh session, in 1985, a number of representatives expressed agreement with the proposals of the present Special Rapporteur concerning the manner in which the Commission might proceed with its work. Satisfaction was expressed that the Commission intended to build on the progress already achieved and to aim at further progress in the form of the provisional adoption of draft articles.³⁵ Several representatives referred to the importance and urgency of the topic.³⁶

³² See *Yearbook . . . 1985*, vol. II (Part Two), p. 71, paras. 284-289.

³³ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. G.

³⁴ *Ibid.*, para. 448.

³⁵ *Ibid.*, paras. 445-446.

³² *Yearbook . . . 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

51. A few representatives, however, doubted whether the subject lent itself to codification or universal regulation because of the different types of, and views concerning, watercourses. Due to these considerations, it was said, obligations concerning international watercourses were more appropriately established in regional agreements than in an international convention. In the view of these representatives, the Commission should therefore confine itself to the formulation of guidelines and general recommendations.³⁷

52. Other representatives, however, maintained that it would in fact be possible, on the basis of the work already accomplished, to formulate general rules concerning international watercourses, as well as rules to facilitate co-operation among riparian States with a view to improving the management of such water-

³⁷ *Ibid.*, para. 452, and, for example, the observations by the representative of the USSR (*Official Records of the General Assembly, Fortieth Session, Sixth Committee, 25th meeting*, para. 56) and by the representative of Viet Nam (*Official Records . . .*, 27th meeting, para. 79).

courses.³⁸ Support was also expressed for the framework-agreement approach,³⁹ as well as for the use by States of the outline for a convention prepared by the previous Special Rapporteur as a model for the elaboration of agreements on the subject.⁴⁰

53. As indicated above (para. 50), a number of representatives expressed satisfaction at the Commission's intention to build on the progress already achieved. At the same time, some representatives noted that the possibility of discussing the substance of some of the draft articles already referred to the Drafting Committee should not be ruled out, in view of the importance and complexity of the subject-matter, and since, in their view, no consensus had been reached on some major questions.⁴¹

³⁸ See "Topical summary . . ." (A/CN.4/L.398), para. 454, and, for example, the observations by the representative of Spain (*Official Records . . .*, 32nd meeting, para. 78). The representative of Iraq expressed "puzzlement" at having heard statements of doubt concerning the viability of the topic and its vital importance to States, "given the absence of such views in the Commission" (*Official Records . . .*, 29th meeting, para. 10).

³⁹ "Topical summary . . ." (A/CN.4/L.398), para. 455.

⁴⁰ *Ibid.*, para. 456.

⁴¹ *Ibid.*, para. 458, and the observations by the representative of Bulgaria (*Official Records . . .*, 27th meeting, para. 30).

CHAPTER II

Articles 1 to 9 as submitted by the previous Special Rapporteur and referred to the Drafting Committee at the thirty-sixth session, in 1984

54. In his preliminary report, the present Special Rapporteur, while recommending that articles 1 to 9 as referred to the Drafting Committee in 1984 not be the subject of another general debate in 1986, stated that he considered it appropriate to provide, in his second report, a brief indication of his views on those articles. The articles cover many of the same issues dealt with in the articles provisionally adopted by the Commission in 1980: scope of the draft; definition of "system States" or "watercourse States"; definition of "system agreements" or "watercourse agreements" and identification of the States entitled to participate in the negotiation of, and to become parties to, such agreements; and the sharing of the uses of the waters of an international watercourse. The articles referred to the Drafting Committee in 1984 also set forth an "explanation" (definition) of the term "international watercourse" (art. 1); provided a non-exhaustive list of factors to be taken into account in determining what constitutes a reasonable and equitable use (art. 8); and contained a prohibition of activities which cause appreciable harm to other watercourse States (art. 9). The articles adopted in 1980 also included an article X entitled "Relationship between the present articles and other treaties in force", and were accompanied by a "provisional working hypothesis" as to the meaning of the term "international watercourse system" (see para. 5 above).

55. In referring to the Drafting Committee draft articles 1 to 9 submitted by the previous Special Rapporteur, the Commission indicated its understanding that "the Drafting Committee would also have available the text of the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980, the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session, and the texts of articles 1 to 9 as proposed by the Special Rapporteur in his first report".⁴² The present Special Rapporteur will proceed on the assumption that the Drafting Committee will continue to have these materials available to assist it in its deliberations.

56. It is evident that the articles referred to the Drafting Committee in 1984 deal with concepts and principles that form the foundation for the entire draft. In some respects, these articles parallel those adopted in 1980; in other respects, they depart significantly from, and even go beyond, the earlier articles. Both sets of articles, however, were based upon lessons learned from discussions in the Commission and the Sixth Committee which began in 1974. Some of the discrepancies between the two sets of articles mirror the differences of views within the Commission and the Sixth Committee con-

⁴² *Yearbook . . . 1984*, vol. II (Part Two), pp. 87-88, para. 280 and footnote 285.

cerning core principles and ideas. Other discrepancies may simply reflect preferences of the previous Special Rapporteur concerning drafting and style. In any event, the present Special Rapporteur is acutely aware that, in elaborating articles on this topic, neither he nor the Commission is writing on a *tabula rasa*. He will accordingly endeavour to offer guidance which, so far as possible, builds on the Commission's experience with the topic and avoids pitfalls that have manifested themselves in the past.

A. General observations

57. There are several general aspects of the Special Rapporteur's tentative approach to the topic that apply to the draft as a whole, but which have special force with regard to the initial articles due to their foundational nature. Since these points pertain to the entire set of nine articles at present under consideration, it will perhaps be most convenient to state them at the outset to avoid repetition.

58. First, the Special Rapporteur wishes to emphasize the importance of bearing constantly in mind the unique nature of the topic: the Commission's task is the progressive development and codification of legal rules which apply to physical phenomena;⁴³ it obviously cannot ignore those phenomena, any more than it could ignore State practice relating thereto, in formulating articles designed to serve as a framework for the regulation, in the absence of an agreement, of relations among States in respect of international watercourses. As the Commission observed in its report on its thirty-first session: "The international consequences of the physical characteristics of water could be said to be that water was not confined within political boundaries and that its nature was to transmit to one region changes, or effects of changes, occurring in another."⁴⁴

59. The second general theme of the Special Rapporteur's approach is that the Commission should strive for simplicity in drafting articles on the present topic. It must be borne in mind that the approach on which the Commission has embarked, and which the Sixth Committee has endorsed, is that of the preparation of a framework agreement containing general principles and

⁴³ The importance of this point led the second Special Rapporteur, Mr. Schwebel, to devote a substantial portion of his first report to a review of the salient characteristics of water relevant to the present topic. In introducing that review, he stated:

"In view of the ineluctable impact that the nature of water must exert on any codification of the law of international watercourses, it may be desirable, by way of introduction, to summarize the fundamental distinguishing physical characteristics of water. Water flowing in rivers has for present purposes three salient aspects: (a) the hydrologic cycle, (b) self-purification, and (c) variations in quantity and flow. . . ." (*Yearbook . . . 1979*, vol. II (Part One), p. 146, document A/CN.4/320, para. 8.)

⁴⁴ *Yearbook . . . 1979*, vol. II (Part Two), p. 163, para. 118. Herbert A. Smith, in his monumental work, *The Economic Uses of International Rivers* (London, King, 1931), wrote:

"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." (pp. 150-151.)

rules of a residual nature and providing guidelines for the negotiation of future agreements. The Special Rapporteur would suggest that an effort to provide a great deal of detail or guidance might, in view of the objective just mentioned, prove to be counter-productive and unnecessarily time-consuming. Furthermore, the very concept of a framework agreement implies that the instrument in question should be composed of the fundamental legal rules that govern the relations of States with respect to the non-navigational uses of international watercourses. Accordingly, the Special Rapporteur would venture to suggest that, at least initially, the Commission should concentrate on the elaboration of the basic legal principles operative in this area. Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles.

B. Observations concerning salient aspects of the articles referred to the Drafting Committee in 1984

1. DEFINITION OF AN "INTERNATIONAL WATERCOURSE [SYSTEM]"

60. The articles provisionally adopted by the Commission in 1980 did not include a definition of the term "international watercourse" or of the somewhat more specific term they utilized, namely "international watercourse system". Instead, the Commission that year decided to proceed on the basis of a provisional working hypothesis as to what was meant by the term "international watercourse system".⁴⁵ This decision was a reflection of the fact that the Commission, in 1980, "continued to be conscious of what in 1976 had been 'general agreement in the Commission that the question of determining the scope of the term 'international watercourses' need not be pursued at the outset of the work'".⁴⁶

61. The previous Special Rapporteur, in both his first and second reports, included as article 1 of the draft articles which he submitted an "explanation (definition) of the term 'international watercourse [system]' as applied in the present Convention". The "explanation (definition)" incorporated some elements of the hypothesis developed by the Commission in 1980 and added certain other elements. At the Commission's thirty-fifth session, in 1983, opinions were divided as to the advisability of drafting a definitional article at the

⁴⁵ In its report on its thirty-second session, the Commission explained that:

" . . . The purpose of the Commission at that juncture was not to prepare a definition of the international watercourse or the international watercourse system that would be definitive and to which the Commission or States would be asked to commit themselves. Rather, it was to prepare a working hypothesis, subject to refinement and indeed change, which would give those who were called upon to compose and criticize the draft articles an indication of their scope." (*Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 89.)

⁴⁶ *Ibid.*, para. 88.

outset of the work on the elaboration of draft articles.⁴⁷ Indeed, all the members of the Commission who addressed that issue at that session (when a definitional article was under consideration for the first time) favoured leaving aside, for the time being, the question of a definition. Several of those members expressly supported the idea of proceeding on the basis of a working hypothesis, such as the "note" formulated in 1980. Others simply expressed opposition to a definitional article, without indicating whether or not they favoured a working hypothesis.

62. Opinions in the Commission were also divided, in both 1983 and 1984, with regard to the "system" concept. Of those who addressed the issue, some members believed it to be an essential component of the draft, reflecting or describing hydrologic reality, others viewed it as being substantially equivalent to the "basin" concept which had earlier been found inappropriate, and still others simply considered the concept to be too wide. Thus, in 1983, of the members who did not express opposition to the idea of a definitional article, some did voice varying degrees of doubt concerning the utility of the "system" concept; and, in 1984, a number of other members questioned the then Special Rapporteur's abandonment of the "system" concept.

63. The foregoing considerations suggest that arriving at an acceptable definition of an "international watercourse" or an "international watercourse system" could well consume all the time that will be available for work on the present topic at the thirty-eighth session. The question is whether such an expenditure of time and effort would yield corresponding benefits in terms of progress on the remainder of the draft. It is the judgment of the Special Rapporteur that it would probably not. As the Commission concluded in 1980, at least as long as there is a tentative understanding of the meaning of the term, a definition of "international watercourse" would not seem to be a prerequisite to further work on the draft articles; in fact, leaving this question aside for the time being might well expedite work on the topic. The Special Rapporteur would therefore recommend that the Commission proceed on the basis of the provisional working hypothesis which it developed and accepted in 1980. Accordingly, unless the Commission would prefer that the Drafting Committee take up the text of draft article 1 referred to it in 1984, the Special Rapporteur would propose the withdrawal of this draft article for the time being.

⁴⁷ Members of the Commission expressing opposition to a definitional article were: Mr. Calero Rodrigues (*Yearbook . . . 1983*, vol. I, pp. 190-191, 1787th meeting, para. 12), Mr. Díaz González (*ibid.*, p. 199, 1788th meeting, para. 27) and Mr. Barboza (*ibid.*, pp. 200-201, 1789th meeting, para. 4), who agreed with the view of Sir Francis Vallat, expressed in 1976, that "to try to formulate a definition [before dealing with the uses of international watercourses] would only hamper the Commission's work unnecessarily" (*Yearbook . . . 1976*, vol. I, p. 275, 1407th meeting, para. 19); Mr. Jagota, who supported the idea of converting article 1 into a note (*Yearbook . . . 1983*, vol. I, p. 207, 1790th meeting, para. 14); Mr. Razafindralambo, who agreed with Mr. Jagota that the Commission "should for the time being leave aside the controversial question of a definition" (*ibid.*, p. 209, para. 29); and Mr. Mahiou, who expressed the view that "the Commission should follow the cautious approach which it had adopted in the past and that, at the present stage, a definition of the term 'international watercourse system' was not needed" (*ibid.*, p. 225, 1793rd meeting, para. 8).

2. AGREEMENTS CONCERNING INTERNATIONAL WATERCOURSES

64. Articles 3 and 4 provisionally adopted by the Commission in 1980 are entitled, respectively, "System agreements" and "Parties to the negotiation and conclusion of system agreements". They make specific provision for that which is implicit in the framework-agreement approach, namely the possibility of concluding agreements concerning particular international watercourses. The previous Special Rapporteur, in his first report, reproduced the texts of these articles verbatim as articles 4 and 5. In his second report, however, he proposed substantial changes to paragraph 1 of draft article 4, since a number of States had expressed concern that the text initially proposed could have seriously undermined existing agreements.⁴⁸ But these changes also gave rise to concern regarding the effect they would have on the continued validity of existing agreements.⁴⁹ The previous Special Rapporteur "agreed that paragraph 1 of the new version could be reformulated, taking into account the text of paragraph 1 of article 3 as provisionally adopted by the Commission in 1980".⁵⁰

⁴⁸ *Yearbook . . . 1984*, vol. II (Part Two), pp. 91-92, para. 304.

⁴⁹ *Ibid.*, p. 92, para. 305.

⁵⁰ *Ibid.*, para. 307. It must be noted that even article 3 as provisionally adopted in 1980 was not entirely free from controversy. The Commission indicated in the commentary to that article that "a few members did not accept it" (*Yearbook . . . 1980*, vol. II (Part Two), p. 117, para. (36)). The two reasons indicated for this position were: first, that it was not sufficiently clear that the right of "the riparians of an international watercourse . . . to make such agreements as they choose . . . could in no way depend upon the draft articles" (*ibid.*); and secondly, that "the draft articles could not obligate the riparians of an international watercourse to 'negotiate in good faith for the purpose of concluding one or more system agreements' " (*ibid.*). As to the first reason, there does not appear to be disagreement concerning the principle that the draft should neither discourage States from entering into agreements (indeed, if anything, it should encourage them to do so), nor affect existing agreements. If this is in fact the case, it only remains to find an acceptable form of words. As to the second reason, it does not appear to be the "duty to negotiate" *per se* that was the source of difficulty, but rather the question of which States were entitled to participate in the negotiations. (It might be noted that the Commission's reports on its thirty-fifth (1983) and thirty-sixth (1984) sessions contain almost no record of any comment on the duty to negotiate laid down in paragraph 3.) The reservations expressed in 1980 seem to have stemmed principally from uncertainty as to whether the "system" approach, in itself, would entitle States to participate in negotiations when the lack of an effect on such States would otherwise give them no legitimate claim to such participation. The Special Rapporteur is of the view that this difficulty can be dealt with independently of the "system" approach through the use of wording and a commentary that clearly define the States having a legitimate interest in participating in negotiations.

While discussing the effect of the draft articles on existing treaties and the duty to negotiate, it is perhaps appropriate to recall that article X as provisionally adopted in 1980, while preserving specific watercourse treaties in force, was made subject to the duty to negotiate laid down in paragraph 3 of article 3 as provisionally adopted the same year. The Commission explained in the commentary to article X that:

" . . . the existence of a treaty relating to a specific international watercourse may not of itself relieve system States of that watercourse of an obligation to negotiate in good faith for the purpose of concluding one or more system agreements. The applicability of the latter obligation . . . depends not on whether there is an existing international agreement relating to the watercourse in question, but on whether—having regard to the terms and effects of the existing agreement as well as other factors—the uses of an international watercourse system require such negotiations." (*Yearbook . . . 1980*, vol. II (Part Two), p. 136, para. (3).)

The present Special Rapporteur considers this a suitable basis on which to proceed with regard to this article.⁵¹

65. The other introductory provision relating to specific agreements concerning international watercourses is article 4 as provisionally adopted in 1980 and draft article 5 as submitted by the previous Special Rapporteur in 1984. Draft article 5 deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in paragraph 3 of draft article 4 as submitted in 1984. Paragraph 1 relates to agreements applying to the entire watercourse, while paragraph 2 deals with agreements applying only to a part of the watercourse or to a particular project, programme or use. Whereas in the former case all "system" or "watercourse" States would be entitled not only to participate in negotiations, but also to become a party to the agreement, in the latter case only States whose use of the waters might be "affected to an appreciable extent" by the agreement would be entitled to participate in the negotiation of the agreement, and even those States would not have the right to become a party to the agreement.

66. The previous Special Rapporteur explained that the revised text of draft article 5, submitted in 1984, "had been modelled closely on that of article 4 as provisionally adopted by the Commission in 1980, except for the deletion of the 'system' concept".⁵² Questions were raised in the Commission concerning the expression "to an appreciable extent" in paragraph 2 of the article, and the differences between the rights under paragraph 1 and those under paragraph 2. It was also suggested that the reference to article 4 be reinstated in paragraph 2. Finally, the view was expressed that, "with the abandonment of the 'system' concept, the article had lost its utility and meaning".⁵³

67. In the view of the present Special Rapporteur, article 5, or a similar article, should have a place in the draft. Where an agreement applies to an entire watercourse (system), there would appear to be little basis for excluding a State in whose territory parts of the watercourse exist from participating in its negotiation or from becoming a party thereto.⁵⁴ Furthermore, both sound watercourse management and actual State practice sup-

⁵¹ The Special Rapporteur is not unmindful of the other points covered by draft article 4 as submitted in 1984 but, as they were the subject of less comment that year than the issue of the effect of paragraph 1 on existing agreements, he will not further burden this section of the present report with independent discussion of them. Suffice it for present purposes to say that he considers both paragraphs 2 and 3 to be important, although the proviso in the second sentence of paragraph 2 may be covered by the prohibition against causing appreciable harm embodied in draft article 9 as submitted by the previous Special Rapporteur. As to the duty to negotiate in good faith laid down in paragraph 3, reference is made to the discussion in the previous footnote.

⁵² *Yearbook . . . 1984*, vol. II (Part Two), p. 92, para. 308.

⁵³ *Ibid.*, pp. 92-93, paras. 309, 310 and 312.

⁵⁴ As Mr. Schwebel noted in his second report:

" . . . It is true that there are likely to be system agreements that are of little interest to one or more of the system States. But since the provisions of such an agreement are intended to be applicable throughout the system, the purpose of the agreement would be stultified if every system State were not given the opportunity to participate." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 106.)

port such an approach. In the commentary to article 3 as provisionally adopted in 1980, the Commission noted that

. . . technical experts considered that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, and that this approach of including all the riparian States had been followed, *inter alia*, in the treaties relating to the Amazon, the Plate, the Niger and the Chad basins. . . .⁵⁵

68. Similar considerations apply to the situation dealt with in paragraph 2 of draft article 5, namely where the agreement applies only to a part of the watercourse or to a particular project, programme or use. Let us suppose, for example, that a river basin drains portions of States A, B and C, and that States A and B contemplate entering into an agreement relating to a part of that basin whose implementation would have a prejudicial effect (i.e. an appreciable adverse effect) upon State C. While the agreement would be directed only to a part of the basin, its implementation would produce effects in other parts and, in this example, in a State not party to the agreement.⁵⁶ In such conditions, the considerations

It might be added that it should be up to each State to determine for itself whether it would be affected by, and thus interested in, an agreement concerning a watercourse which runs through or is contiguous to its territory.

⁵⁵ *Yearbook . . . 1980*, vol. II (Part Two), p. 113, para. (7), referring to Mr. Schwebel's first report (document A/CN.4/320 (see footnote 10 above), paras. 98-100). See the Treaty for Amazonian Co-operation (1978) (*International Legal Materials* (Washington, D.C.), vol. XVII (1978), p. 1045); the Treaty of the River Plate Basin (1969) (United Nations, *Treaty Series*, vol. 875, p. 3); the Act regarding navigation and economic co-operation between the States of the Niger Basin (1963) (United Nations, *Treaty Series*, vol. 587, p. 9); and the Convention and Statute relating to the development of the Chad Basin (1964) (*Journal officiel de la République fédérale du Cameroun* (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003 (English and French texts); see also B. Rüster and B. Simma, eds., *International Protection of the Environment* (Dobbs Ferry (N.Y.), Oceana Publications, 1977), vol. XI, p. 5633).

The advantages of dealing with a watercourse as a whole are set out, for example, in United Nations, *Integrated River Basin Development*, report of a panel of experts (Sales No. E.70.II.A.4), p. 1:

"The need for integrated river basin development arises from the relationship between the availability of water and its possible uses in the various sectors of a drainage area. It is now widely recognized that individual water projects—whether single or multi-purpose—cannot as a rule be undertaken with optimum benefit for the people affected before there is at least the broad outline of a plan for the entire drainage area. . . ."

See also United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), para. 28:

"In spite of the fact that most States possess water resources in several basins, and all water resources available need to be considered as a whole for national programming purposes, the waters within the geographical area of a particular basin have been found to constitute a critical and, therefore, a most useful conceptual unit for establishing a legal régime and for organizing co-operation and collaboration with respect to water resources development, conservation and use. . . ."

For a more detailed discussion to the same effect, see United Nations, *Long-Term Planning of Water Management*, Proceedings of the Seminar on Long-Term Planning of Water Management, Zlatni Piasatzi (Bulgaria), 17-22 May 1976, vol. I (Sales No. E.76.II.E.27), part one, sect. B, paras. 59-61.

⁵⁶ A similar example was given by Mr. Schwebel in his second report and reproduced by the Commission in the commentary to article 4 as provisionally adopted in 1980:

" . . . States A and B, whose common border is the river Styx, agree that each may divert 40 per cent of the river flow for domestic con-

supporting the participation of all "system" or "watercourse" States in agreements dealing with the entire watercourse apply with equal or greater force.⁵⁷ As the Commission observed in relation to a similar hypothesis, in the commentary to article 4 as provisionally adopted in 1980:

The question is not whether States A and B are legally entitled to enter into such an agreement.⁵⁸ It is whether a treaty that is to provide general principles for the guidance of States in concluding agreements on the use of fresh water should contain a principle that will ensure that State C has the opportunity to join in negotiations, as a prospective party, with regard to proposed action by States A and B that will substantially reduce the amount of water that flows through State C's territory.⁵⁹

69. In provisionally adopting article 4 in 1980, the Commission answered this question in the affirmative. The Special Rapporteur submits that this answer is sound, for two reasons: first, it is in conformity with generally accepted principles of watercourse management by including all potentially affected States in the planning process; and secondly, it tends to forestall disputes that might arise from injury to State C by allowing that State to make its concerns known at the planning stage.⁶⁰ The policy underlying the latter reason

sumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 109; and *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (4).)

Another example involving a clear effect upon State C would be an agreement between States A and B to erect a facility or co-operate in an activity whose wastes would either be discharged into the watercourse or find their way into it through natural drainage, where those wastes made the water unsuitable for one or more of State C's pre-existing uses.

⁵⁷ Such considerations may apply with greater force since, as already noted (footnote 54 above), there may be agreements intended to be applicable throughout the entire river basin or system which are none the less of little interest to one or more of the States in which part of the basin or system is located. In the present hypothesis, however, the agreement in question, although applicable only to a part of the basin, would doubtless affect State C's interests, and therefore be of interest to it.

⁵⁸ The present Special Rapporteur would recall, in this connection, that the proviso in paragraph 2 of article 3 as provisionally adopted in 1980, and in paragraph 2 of draft article 4 as submitted by the previous Special Rapporteur, would not allow States A and B to enter into an agreement with respect to a part of an "international watercourse system" if the agreement would appreciably affect the use by another "system State" of the waters of the international watercourse. Furthermore, implementation of such an agreement to the detriment of State C would appear to be barred by draft article 9 as submitted by the previous Special Rapporteur, which prohibits the causing of appreciable harm. As the Commission noted in the commentary to article 3, such implementation

"... would run counter to fundamental principles which . . . govern the non-navigational uses of international watercourses, such as the right of all system States to share equitably in the use of the waters and the obligation of all system States not to use what is their own so as to inflict injury upon others" (*Yearbook . . . 1980*, vol. II (Part Two), p. 114, para. (14)).

⁵⁹ *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (5) (reproduced from the second report of Mr. Schwebel, document A/CN.4/332 and Add.1 (see footnote 11 above), para. 110).

⁶⁰ The Commission will, of course, have occasion to revert to planning considerations when it takes up the part of the topic which deals with notification of projects or programmes that may cause appreciable harm. This subject is covered in draft articles 11 to 14 sub-

also finds expression in chapter III of the draft submitted by the previous Special Rapporteur,⁶¹ certain aspects of which will be addressed in subsequent parts of the present report.

70. Moreover, these considerations would seem to support entitling State C not only to participate in the negotiation of the agreement, but also to become a party thereto. Article 4 as provisionally adopted in 1980 did not provide for such entitlement.⁶² The commentary to that article, however, includes language which would support granting State C such a right:

... if the use of water by a State can be affected appreciably by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of the State whose use is affected.⁶³

The fact that the scope of the agreement would thus extend to the territory of State C would, in effect, bring the situation within the principle laid down in paragraph 1 of draft article 5. As noted above, State C, by virtue of the adverse effect upon its use of the water, could well have a greater interest in the agreement in that hypothetical example than one or more "watercourse" or "system" States would have in an agreement applying to the watercourse as a whole. The reasons for entitling those States to participate in the negotiation of, and to become parties to, such an agreement would therefore seem to apply with even greater force to State C in the case of the kind of agreement involved in that hypothesis.

3. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES (CHAPTER II OF THE DRAFT)

(a) *The "shared natural resource" concept*

71. The articles provisionally adopted by the Commission in 1980 do not specifically and directly address the subject of rights and duties of watercourse States. The article which perhaps comes closest to doing so is article 5, entitled "Use of waters which constitute a shared natural resource". It provides in effect that, for

mitted by the previous Special Rapporteur. See also paragraphs 3 to 9 of draft article 8 submitted in Mr. Schwebel's third report (document A/CN.4/348 (see footnote 14 above), para. 156). The thrust of these provisions would seem to be to require States A and B, in the above hypothesis, to notify State C of any action by way of implementation of their agreement that might cause appreciable harm to the interests of State C. State C would then have an opportunity to determine whether the proposed action would appreciably harm its interests and, if so, States A and B would have a duty to consult with State C with a view to making such modifications as were necessary to avoid causing State C appreciable harm (unless they provided compensation acceptable to State C). It would seem likely that, in many instances, allowing State C to participate in the negotiation of the agreement in the first instance would forestall the need for recourse to these procedures and thus save all the States concerned time and expense.

⁶¹ See the references and discussion in the previous footnote.

⁶² This right had, however, been stipulated in the original text of the article (art. 5) submitted by Mr. Schwebel in his second report. Paragraph 2 of that article read:

"2. Each system State whose use or enjoyment of the water of an international watercourse system may be affected to an appreciable extent by the provisions of a system agreement that applies only to a part of the system is entitled to participate in the negotiation and conclusion of that agreement." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 105.)

⁶³ *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (3), *in fine*.

the purposes of the articles, the waters of an international watercourse will be considered a "shared natural resource" to the extent that their use in one State affects their use in another State. The article goes on to provide that waters which constitute a shared natural resource are to be used in accordance with the provisions of the articles.

72. Article 5 does not specify the legal consequences of identifying the waters of an international watercourse as a "shared natural resource". However, the Commission indicated in the commentary to that article that the concept of shared natural resources might, in fact, entail certain legal obligations:

While the concept of shared natural resources may in some respects be as old as that of international co-operation, its articulation is relatively new and incomplete. It has not been accepted as such, and in terms, as a principle of international law, although the fact of shared natural resources has long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources. . . .⁶⁴

It went on to point out that article 5

. . . simply requires States to use the waters of an international watercourse system as a shared natural resource, with what that implies pursuant to principles such as the equitable use of those waters and the axiom *sic utere tuo ut alienum non laedas*.⁶⁵

73. The previous Special Rapporteur initially retained the shared natural resource concept in draft article 6 as submitted in his first report, in 1983. That draft article consisted largely of a verbatim reproduction of article 5 as provisionally adopted in 1980, but also provided that "each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource".⁶⁶ In his second report, however, submitted in 1984, the previous Special Rapporteur presented a completely revised text of article 6,⁶⁷ which omitted any reference to the shared natural resource concept.⁶⁸ He explained the change as follows:

. . . In view of the opposition to the concept of an international watercourse as a "shared natural resource" expressed by a number of representatives during the discussions on the first report, it seems doubtful whether it will prove conducive to the attainment of a generally acceptable convention to retain that concept in the form in which it was expressed in article 6. . . .

He went on, however, to state that he had

deemed it useful to lay down expressly the obvious starting-point that a State within its territory has the right to a fair and equitable share of the uses of the waters of an international watercourse.⁶⁹

74. By thus, in effect, replacing the "shared natural resource" concept with an entitlement to "a reasonable and equitable share of the uses of the waters of an international watercourse", the previous Special Rapporteur gave a more definite legal content to the article. As in-

dedicated above, the Commission had recognized in 1980 that the articulation of the "shared natural resource" concept was "relatively new and incomplete". While the use of the concept had received a certain measure of support,⁷⁰ its elimination from the draft may have been a source of some comfort to those who were disquieted by the relative uncertainty as to its precise legal effect.⁷¹ At the same time, one of the chief principles the Commission had identified as being implicit in the concept—that of equitable use of the waters of an international watercourse⁷²—had been not only retained in article 6, but made explicit. Another attribute of the shared natural resource concept which had been identified by the Commission was the duty to co-operate.⁷³ While this duty is not mentioned in the revised text of draft article 6, the subject of co-operation is dealt with in draft article 10 submitted by the previous Special

⁷⁰ Of course, the Commission itself had indicated its support for the "shared natural resource" concept by incorporating it in article 5 as provisionally adopted in 1980. In addition, in their comments in the Sixth Committee of the General Assembly in 1980, a number of representatives had welcomed the Commission's adoption of article 5; see, for example, the statements by the representatives of the Netherlands (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, para. 38); Algeria (*ibid.*, 55th meeting, para. 36); the United States of America (*ibid.*, 56th meeting, para. 21); Thailand (*ibid.*, para. 51); Egypt (*ibid.*, para. 72); and Argentina (*ibid.*, 57th meeting, paras. 18-20). Some members of the Commission again endorsed the retention of the concept during the consideration of the original text of draft article 6 submitted by the previous Special Rapporteur in 1983; see, for example, the statements by Mr. Stavropoulos (*Yearbook . . . 1983*, vol. I, pp. 181-182, 1785th meeting, para. 38); Mr. Pirzada (*ibid.*, p. 188, 1786th meeting, para. 30); Mr. Sucharitkul (*ibid.*, p. 189, 1787th meeting, para. 3); Mr. Díaz González (*ibid.*, p. 199, 1788th meeting, para. 28); Mr. Barboza (*ibid.*, pp. 201-202, 1789th meeting, paras. 9-11); Mr. Balanda (*ibid.*, pp. 203-204, paras. 20 and 24); and Mr. Mahiou (*ibid.*, p. 225, 1793rd meeting, para. 9).

⁷¹ In the commentary to article 5, the Commission had indicated that:

"One member of the Commission was unable to take a position on draft article 5, essentially on the ground of the undetermined meaning of the concept of a shared natural resource. . . . Another member stressed the relevance for the topic of the principles of permanent sovereignty over natural resources." (*Yearbook . . . 1980*, vol. II (Part Two), p. 136, para. (80).)

See also the record of the Commission's discussion on draft article 5 as proposed by the Drafting Committee (*Yearbook . . . 1980*, vol. I, pp. 280-281, 1636th meeting, paras. 63-69). Statements of concern had also been made in the Sixth Committee of the General Assembly; see, for example, the comments by the representatives of France (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 49); Brazil (*ibid.*, 51st meeting, para. 34); Ethiopia (*ibid.*, para. 51); Jamaica (*ibid.*, 54th meeting, para. 4); India (*ibid.*, para. 46); and Turkey (*ibid.*, para. 58). During the Commission's consideration of the original text of draft article 6 submitted by the previous Special Rapporteur, some members expressed sentiments ranging from doubt about, to opposition to, the concept; see, for example, the statements by Mr. Calero Rodrigues (*Yearbook . . . 1983*, vol. I, p. 191, 1787th meeting, para. 16); Mr. Njenga (*ibid.*, p. 196, 1788th meeting, paras. 6-7); Mr. Ushakov (*ibid.*, p. 198, para. 19); Mr. Jagota (*ibid.*, pp. 207-208, 1790th meeting, paras. 16-17); Mr. Razafindralambo (*ibid.*, p. 209, para. 32); Mr. Flitan (*ibid.*, p. 213, 1791st meeting, para. 9); and Mr. Yankov (*ibid.*, p. 231, 1794th meeting, paras. 13 and 15).

⁷² See the passage cited in paragraph 72 above from the commentary to article 5 as provisionally adopted in 1980.

⁷³ See also the discussion of the duty to co-operate in the context of the treatment of the waters of an international watercourse as a shared natural resource in Mr. Schwebel's second report (document A/CN.4/332 and Add.1 (see footnote 11 above), chap. III).

⁶⁴ *Ibid.*, p. 120, para. (2).

⁶⁵ *Ibid.*, pp. 135-136, para. (79), *in fine*.

⁶⁶ Document A/CN.4/367 (see footnote 15 above), para. 80.

⁶⁷ See footnote 26 above.

⁶⁸ The term "share" does appear twice in the revised text of article 6, once (in paragraph 1) as a noun, where it replaces the term "participation", and once (in paragraph 2) as a verb, in the phrase "the watercourse States concerned shall share in the use of the waters . . . in a reasonable and equitable manner". In neither case, however, is the term used in the same sense as "shared" in the expression "shared natural resource".

⁶⁹ Document A/CN.4/381 (see footnote 16 above), para. 48.

Rapporteur.⁷⁴ It therefore appears that, while the reformulation of article 6 has resulted in the loss of a new and developing concept, it has produced greater legal certainty and, when viewed in connection with other draft articles, has not resulted in the elimination of any fundamental principles from the draft as a whole.

(b) Equitable utilization and participation

75. The core of the revised text of article 6 is the *right* to "a reasonable and equitable share of the uses of the waters of an international watercourse". Article 7, entitled "Equitable sharing in the uses of the waters of an international watercourse", deals with what may be termed the other side of the coin, namely the *duty* to develop, use and share the waters of an international watercourse "in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations". Thus the common theme of the two articles is the principle of equitable utilization, apportionment and participation. As the legal authorities supporting these articles and the principle of equitable utilization have already been presented to and discussed by the Commission,⁷⁵ it is hoped that it will suffice for present purposes to recall that there is extensive support for the principle,⁷⁶ and to review some representative illustrations of that support.

(i) Treaties

76. The basic principles underlying the doctrine of equitable utilization have been recognized, explicitly or

⁷⁴ Revised draft article 7, entitled "Equitable sharing in the uses of the waters of an international watercourse", submitted in 1984 by the previous Special Rapporteur, does not refer to co-operation. However, in his first report, the previous Special Rapporteur, commenting on the original text of this article, had stressed the importance of co-operation among "system" or "watercourse" States in order to attain the goals of "optimum utilization and the necessary control and protection of the watercourse system and its components" (document A/CN.4/367 (see footnote 15 above), para. 88). In his second report, he stated that "by and large, the commentary to the article contained in the first report is applicable to the amended text" (document A/CN.4/381 (see footnote 16 above), para. 53).

⁷⁵ See Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 41-91; the previous Special Rapporteur's first report, document A/CN.4/367 (see footnote 15 above), paras. 80-93; and his second report, document A/CN.4/381 (see footnote 16 above), paras. 45-53.

⁷⁶ See the exhaustive survey by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), paras. 41-84. See generally, for example, J. Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", *Revue égyptienne de droit international* (Cairo), vol. 16 (1960), pp. 23 *et seq.*; J. Barberis, *Los recursos naturales compartidos entre Estados y el derecho internacional* (Madrid, Tecnos, 1979), pp. 35-45, and the authorities cited therein; J. Briery, *The Law of Nations*, 6th ed., Sir Humphrey Waldock, ed. (Oxford, Clarendon Press, 1963), p. 231; W. L. Griffin, "The use of waters of international drainage basins under customary international law", *The American Journal of International Law* (Washington, D.C.), vol. 53 (1959), pp. 50 *et seq.*; E. Hartig, *Internationale Wasserwirtschaft und internationale Recht* (Vienna, Springer, 1955); J. Lipper, "Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), especially pp. 41 *et seq.*; F. Villagrán Kramer, "El aprovechamiento de las aguas del lago de Güija", *Revista de la Asociación Guatemalteca de Derecho Internacional* (Guatemala), No. 3 (January 1959), pp. 95 *et seq.*; and Smith, *op. cit.* (footnote 44 above), *passim* and especially p. 150. See also the work of non-governmental international organizations cited in footnote 79 below.

implicitly, in numerous international agreements⁷⁷ between States located in all parts of the world. While the language and approaches of these agreements vary considerably,⁷⁸ their unifying theme is the recognition of

⁷⁷ See, for example, the agreements surveyed by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), paras. 49-72; and the agreements listed in annexes I and II to the present chapter. See also Lipper, *loc. cit.* (footnote 76 above), pp. 33-35; United States of America, Memorandum of the State Department of 21 April 1958, *Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909*, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), pp. 62-72 (referring to "well over 100 treaties which have governed or today govern systems of international waters [and which] have been entered into all over the world"). See also the collections of agreements which, in effect, place limitations upon the parties' freedom of action in respect of portions of international rivers within their borders, cited in: Smith, *op. cit.* (footnote 44 above), pp. 159-216 (abstracting 51 treaties concluded between 1785 and 1930); the Economic Commission for Europe (ECE) study by Pierre Sevette of January 1952, "Legal aspects of the hydro-electric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), annex 1 (citing some 40 additional agreements); A. M. Hirsch, "Utilization of international rivers in the Middle East: A study of conventional international law", *The American Journal of International Law* (Washington, D.C.), vol. 50 (1956), pp. 81 *et seq.*; F. J. Berber, *Die Rechtsquellen des internationalen Wassernutzungsrechts* (Munich, Oldenbourg, 1955) (English trans.: *Rivers in International Law* (London, Stevens, 1959)). See also the table of international agreements containing substantive provisions concerning pollution of international watercourses, in J. G. Lammers, *Pollution of International Watercourses* (The Hague, Nijhoff, 1984), pp. 124 *et seq.*

An observation by Jerome Lipper concerning the significance of a number of similar treaty provisions is pertinent here:

"... treaties must be evaluated with caution; their significance rests not in the specific provisions of a particular treaty, but in underlying factors found in common among such treaties. It is of great importance that all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river. Nor are these treaties limited to any particular area of the world, for the Americas, Europe, Asia and Africa are represented." (*Loc. cit.* (footnote 76 above), p. 33.)

In his study, Lipper provides a representative selection of 16 treaties dealing with successive rivers (*ibid.*, pp. 74-75, footnote 79). To the same effect, see the State Department Memorandum of 21 April 1958, *op. cit.* (above), p. 63.

⁷⁸ A few examples will illustrate the point:

(a) 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 referred to as "1909 Boundary Waters Treaty") (*British and Foreign State Papers, 1908-1909* (London), vol. 102 (1913), p. 137; United States of America, *Treaty Series*, No. 548 (Washington (D.C.), 1924); reproduced in the United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4) (hereinafter referred to as "Legislative Texts..."), p. 260, No. 79) provides in article VI:

"... the waters [of the St. Mary and Milk Rivers and their tributaries] shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other, by either country, so as to afford a more beneficial use to each. . . ."

notwithstanding the fact that, as observed by the Legal Adviser of the United States Department of State, G. H. Hackworth, in a memorandum of 26 May 1942,

"most of the supply comes from sources within the United States and the combined flow of the two rivers is insufficient to meet all of the irrigation needs of the regions through which they pass" (cited in M. M. Whiteman, ed., *Digest of International Law* (Washington, D.C.), vol. 3 (1964), p. 950).

(b) The Convention of 15 July 1930 between Romania and Czechoslovakia concerning the settlement of questions arising out of

the equal and correlative rights⁷⁹ of the parties to the use⁸⁰ and benefits⁸¹ of the international watercourse or

the delimitation of the frontier between the two countries (Frontier Statute) (League of Nations, *Treaty Series*, vol. CLXIV, p. 157) provides, in article 24, only that "the Contracting Parties shall have regard as far as possible to the fair claims of the inhabitants of the other State".

(c) The Convention of 11 May 1929 between Norway and Sweden on certain questions relating to the law on watercourses (*ibid.*, vol. CXX, p. 263) relates (article 1) "to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country". Article 12, paragraph 1, of the Convention provides:

"1. One country may not authorize an undertaking unless the other country has given its approval, if the undertaking is likely to involve any considerable inconvenience in the latter country in the use of a watercourse . . ."

(d) The Agreement of 8 November 1959 between the United Arab Republic and Sudan for the full utilization of the Nile waters (hereinafter referred to as "1959 Nile Waters Agreement") (United Nations, *Treaty Series*, vol. 453, p. 51) confirms in article 1 certain "present acquired rights", and contains in article 2 highly detailed provisions on "Nile control projects and the division of their benefits between the two Republics". Article 3, entitled "Projects for the utilization of lost waters in the Nile Basin", provides in paragraph 1, second subparagraph, that the water benefits of such projects and the total costs of construction shall be shared equally by the two Republics. Article 5, paragraph 2, provides that, if a joint consideration by the two parties of claims of other riparian States to a share of Nile waters

"results in the acceptance of allotting an amount of the Nile water to one or the other of the said States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan".

Commenting on the régime established by this Agreement, Sayed Hosni observes that it "confirms the idea that the parties drifted further towards the concept of equitable shares" ("The Nile régime", *Revue égyptienne de droit international* (Cairo), vol. 17 (1961), p. 97). On the 1959 Nile Waters Agreement generally, see, for example, G. M. Badr, "The Nile waters question. Background and recent development", *ibid.*, vol. 15 (1959), pp. 94 *et seq.*; Abd El-Fattah Ibrahim El-Sayed Baddour, *Sudanese-Egyptian Relations. A Chronological and Analytical Study* (The Hague, Nijhoff, 1960), pp. 201-241; and J. Andrassy, "Rapport définitif sur l'utilisation des eaux internationales non maritimes (en dehors de la navigation)", *Annuaire de l'Institut de droit international*, 1959 (Basel), vol. 48, tome I, pp. 319 *et seq.*

⁷⁹ However, as stated in the commentary to article IV of the Helsinki Rules on the Uses of the Waters of International Rivers, "equal and correlative rights of use among the co-basin States does not mean that each such State will receive an identical share in the uses of the waters" (for the texts of the Rules and the commentaries thereto adopted by the International Law Association at its Fifty-second Conference, held at Helsinki in 1966, see ILA, *Report of the Fifty-second Conference, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405).

The correlative nature of the rights in question is also reflected in article 2 of the resolution adopted by the Institute of International Law at its Salzburg session in September 1961:

"Article 2. Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

"This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin."

See *Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, tome II, pp. 381-384; and *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

⁸⁰ As in the report by the Secretary-General on legal problems relating to the utilization and use of international rivers (*Yearbook . . . 1974*, vol. II (Part Two), p. 33, document A/5409), the term "use" is employed here in its broad sense, comprehending such terms as "utilization", and

watercourses in question.⁸² This is true of treaty provisions relating to both contiguous⁸³ and successive⁸⁴ rivers. Indeed, leading studies of the law of international watercourses have concluded that the rights and obligations of States in respect of the use of international watercourses are the same whether the watercourse is contiguous or successive.⁸⁵ Herbert A. Smith,

"should be understood as denoting every possible utilization or use of an international river [lake, etc.], excluding navigation, but including fishing, the floating of timber, flood control and the prevention of water pollution" (*ibid.*, p. 50, para. 8).

In his study on the principle of equitable utilization, Lipper states that these terms

"are used in the general sense of the employment of the waters of an international river and include, but are not limited to, consumptive uses. . . . The quantity of water in the river is not diminished by a non-consumptive use, but its quality may be depreciated to such an extent that the water is no longer suitable for another use." (*Loc. cit.* (footnote 76 above), p. 17.)

⁸¹ The term "benefits" covers many of the uses referred to in the previous footnote and, additionally, under appropriate circumstances, such watercourse "products" as hydroelectric energy.

⁸² As Mr. Schwebel stated in his third report, with reference to article IV of the Helsinki Rules:

"There may be, aside from the rule that no State may cause appreciable harm to another State, no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State 'is entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters.'" (Document A/CN.4/348 (see footnote 14 above), para. 42.)

Cecil Olmstead, referring to the 1959 Nile Waters Agreement between the United Arab Republic and Sudan (see footnote 78 (d) above), the Indus Waters Treaty of 19 September 1960 between India, Pakistan and IBRD (United Nations, *Treaty Series*, vol. 419, p. 125) and the Treaty of 17 January 1961 between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin (*ibid.*, vol. 542, p. 244), reached a similar conclusion:

"... The common theme running through these three recent treaties is that the great benefits derived from co-operative development of the river basins are to be shared. . . ." ("Introduction", *The Law of International Drainage Basins*, *op. cit.* (footnote 76 above), p. 3.)

⁸³ The term "contiguous watercourse" is used here to mean a river, lake or other watercourse that flows between or is located upon, and is thus "contiguous" to, the territories of two or more States. Such watercourses are sometimes referred to as "frontier" or "boundary" waters. Annex I to the present chapter contains an illustrative list of treaty provisions relating to contiguous watercourses, arranged by region, which recognize the equality of the rights of the riparian States in the use of the waters in question.

⁸⁴ The term "successive watercourse" is used here to mean a watercourse that flows ("successively") from one State into another State or States. Lipper states that "all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river" (*loc. cit.* (footnote 76 above), p. 33). Annex II to the present chapter contains an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned.

⁸⁵ According to Lipper:

"... international law does not draw legal distinctions between contiguous rivers and successive rivers. Such authority as has been found supports the view that the same rules of international law apply to both types of rivers.

"It could be argued that this common treatment ignores the physical differences between the two categories of rivers, i.e. in the case of a successive river one State is in complete physical control of the river as it passes through its territory, while in the case of a contiguous river, there is dual physical control of the waters. Although superficially persuasive, the pertinence of this argument apparently

writing in 1931, summarized the position at that time as follows:

The treaty provisions, now somewhat numerous, are all directed towards the practical object of securing the most beneficial use of the rivers with which they are concerned . . .⁶⁶

77. The subject of treaty arrangements providing for the equitable utilization of international watercourses should not be left without recalling the very important modern development referred to in Mr. Schwebel's third report, namely that of agreements providing for integrated management of entire river basins. Mr. Schwebel stated:

There also exists a series of quite recent agreements among developing countries in which the system States have felt it not only unnecessary to iterate their respective rights or shares, but have instead taken practical steps to bring about integrated management of their international watercourse systems. The Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin, entered into in 1977 by Burundi, Rwanda and the United Republic of Tanzania,⁶⁷ is the most recent and far-reaching example. Similarly comprehensive approaches, designed to achieve not just "equitable" but optimum utilization by fully international, system-wide organizations have been taken by some of or all the system States of several other international watercourses. These include the Senegal Basin, the Niger Basin, the Gambia Basin and the Lake Chad Basin. In such arrangements for the integrated development, use and protection of shared water resources, the residual duty to utilize waters equitably has been taken for granted and surpassed by

rests solely upon the fact of physical control. While physical control is not wholly irrelevant, sheer power does not serve as the foundation upon which international law has been developed. And, in the field of international river law, its application would in many cases prevent optimum utilization of the waters.

" . . . Even the geographic distinction between the two kinds of rivers can, in some cases, be more apparent than real, for a river may be both successive and contiguous. For example, it may flow through the territories of two States and also, at any point, between their territories." (*Loc. cit.* (footnote 76 above), p. 17.)

See also Smith, *op. cit.* (footnote 44 above), pp. 155-156; and C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston (Mass.), Little, Brown and Co, 1945), vol. I, p. 567. Cf. F. L. Kirgis, Jr., *Prior Consultation in International Law. A Study of State Practice* (Charlottesville (Va.), University Press of Virginia, 1983), p. 86. It may also be recalled that, in its judgment of 10 September 1929 concerning *Territorial Jurisdiction of the International Commission of the River Oder*, on the question of the applicability of the Treaty of Versailles to certain navigable tributaries of the River Oder, the PCIJ drew no distinction between successive and contiguous rivers in stating "principles governing international fluvial law in general", referring only to the manner in which "States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief . . ." (*P.C.I.J., Series A, No. 23*, pp. 26-27.)

Lipper notes, however, that:

" . . . the application of the law to boundary waterways appears to have preceded in time and exceeded in frequency its application to successive streams, probably in recognition of the necessity of establishing boundaries between States and in part, perhaps, due to an awareness of the geographic facts of life which deprive either State of a natural advantage over the other as regards these waters" (*loc. cit.* (footnote 76 above), p. 23).

⁶⁶ *Op. cit.* (footnote 44 above), p. 148. Smith goes on to state that the treaties concluded up to that time "lend no support to the theory of an absolute right of veto", but that they

"protect each State from the danger of material injury by the unilateral action of its neighbours. This is highly important, in so far as it goes to show that the conventional law of nations is steadily cutting away any foundations that there may ever have been for the doctrine of the absolute rights of the territorial sovereign." (*Ibid.*)

⁶⁷ Agreement concluded on 24 August 1977 and subsequently acceded to by Uganda (United Nations, *Treaty Series*, vol. 1089, p. 165).

recognition of the need to achieve the optimum use of waters rationally, by installing machinery for system-wide planning and implementation of the system States' projects and programmes as co-ordinated or joint ventures.⁶⁸

(ii) Positions taken by States in diplomatic exchanges⁶⁹

78. Government statements concerning the law of international watercourses generally confirm the above conclusions as to the effect of treaty practice. Statements of Governments must be evaluated with some caution, of course, in the light of the fact that they are often made in the context of negotiations and may thus represent advocacy more than a Government's view of the law. None the less, such statements cannot be ignored, and indeed can provide enlightening evidence of what States believe to be their rights and obligations under international law. This is particularly true when statements can be viewed in the light of actual government conduct. A representative selection of positions taken by Governments in international watercourse disputes will therefore now be reviewed for the purposes of illustration.

a. The "Harmon Doctrine" or absolute sovereignty

i. Treaty practice of the United States of America

79. It is perhaps appropriate to begin this survey by taking a brief look at the dispute between Mexico and the United States which produced the "Harmon Doctrine" of absolute sovereignty and which was ultimately resolved by the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes.⁹⁰

80. The Rio Grande rises in the State of Colorado in the United States, flows through the State of New Mexico, then forms the border between the State of Texas and Mexico before flowing into the Gulf of Mexico. A controversy arose in the latter part of the nineteenth century over diversions of water from the Rio Grande by farmers and ranchers in Colorado and New Mexico. These diversions were said to have reduced the water supply available to Mexican communities in the vicinity of Ciudad Juarez.⁹¹ In October 1895, the Mexican Minister to the United States sent a letter of protest to the United States Secretary of State claiming that the American diversions violated two treaties and that "the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande", whose "claim to the use of

⁶⁸ A/CN.4/348 (see footnote 14 above), para. 70.

⁶⁹ For a general survey of the question, see Lipper, *loc. cit.* (footnote 76 above), pp. 25-28.

⁹⁰ Signed at Washington on 21 May 1906 (hereinafter referred to as "1906 Convention"). For the text, see C. Parry, ed., *The Consolidated Treaty Series*, vol. 201 (1906) (Dobbs Ferry (N.Y.), Oceana Publications, 1980), p. 225; reproduced in United Nations, *Legislative Texts . . .*, p. 232, No. 75.

⁹¹ Concerning the disputes that arose during this period between the United States and Mexico relating to international rivers, see J. Simarian, "The diversion of waters affecting the United States and Mexico", *Texas Law Review* (Austin), vol. 17 (1938-1939), p. 27. See also J. Austin, "Canadian-United States practice and theory respecting the international law of international rivers: A study of the history and influence of the Harmon Doctrine", *Canadian Bar Review* (Toronto), vol. XXXVII, No. 3 (1959), pp. 405 *et seq.*

the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years".⁹² The Secretary of State thereupon requested that Attorney-General Judson Harmon prepare a legal opinion on the question whether, under principles of international law, Mexico was entitled to indemnity for harm suffered from the diversions. The Attorney-General's opinion, which has since become known as the "Harmon Doctrine", was based not upon the law of international watercourses, but upon principles of sovereignty under general international law. In fact, it relied principally upon the landmark sovereign immunity decision of the United States Supreme Court in *The Schooner "Exchange" v. McFaddon and others* (1812).⁹³ The following passages of the opinion are of present interest:

... it is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.

... The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange v. McFaddon* . . .):

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."⁹⁴

Attorney-General Harmon went on to emphasize, however, that his opinion did not take foreign policy considerations into account:

The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of *comity** is a question which does not pertain to this Department [of Justice]; but that question should be decided as one of *policy** only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States."⁹⁵

81. With respect to the legal value of the Harmon opinion, Anthony D'Amato has written that "it is an extremely dubious proposition to rely upon the *arguments* of Governments, expressed either through their attorneys or foreign offices, rather than their *acts*".⁹⁶ It

⁹² Letter of 21 October 1895 from the Mexican Minister, Matías Romero, to the United States Secretary of State, Richard Olney (*American and British Claims Arbitration. The Rio Grande Claim—Answer of the United States* (Washington (D.C.), 1923), pp. 200-203; cited by Simsarian, *loc. cit.* (footnote 91 above), p. 32).

⁹³ W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*, vol. VII, 3rd ed. (New York, 1911), p. 116.

⁹⁴ United States of America, *Official Opinions of the Attorneys-General of the United States* (Washington, D.C.), vol. XXI (1898), pp. 281-282. As will be seen below, the passages cited technically do not deny that a State has a duty to avoid causing injury to other States by means of actions wholly within its territory.

⁹⁵ *Ibid.*, p. 283.

⁹⁶ D'Amato adds: "So far as diversion of rivers is concerned, many bilateral treaties have appeared since 1895 that regulate water uses in international drainage basins, and over a hundred such treaties are

might be added that statements of Governments should be viewed in the context in which they were made. For example, in a later dispute with Canada over diversion in Canada of the waters of the Columbia River, the United States, this time a lower riparian, took a position similar to that espoused by Mexico in 1895. It argued, *inter alia*, that:

... the United States, as an injured sovereign, would not be limited to the redress provided for individuals in article II [of the 1909 Boundary Waters Treaty]; ... [that] under the doctrine of "prior appropriation", since the United States has been first in use of the waters, it has a right to their permanent use; [and that] the application of the doctrine of "equitable apportionment" requires an equitable sharing of waters in the Columbia Basin between the two countries; ..."

82. Returning to the Rio Grande dispute between Mexico and the United States, the Secretary of State informed the Government of Mexico, on the basis of Attorney-General Harmon's opinion, that the United States was under no duty to halt the diversions in Colorado and New Mexico.⁹⁸ At the same time, however, the two Governments instructed the United States and Mexican Commissioners on the International Boundary Commission⁹⁹ to investigate and report on the Rio

operative today." (*The Concept of Custom in International Law* (Ithaca (N.Y.), Cornell University Press, 1970), p. 134.) G. Schwarzenberger states that "cases of special pleading are to be found in the practice of most States [and], according to convenience, *ad hoc* legal principles have been invented" (*International Law*, vol. 1, 3rd ed. (London, Stevens, 1957), p. 34). To similar effect, see the passage from the State Department Memorandum of 21 April 1958 cited in paragraph 82 below.

⁹⁷ United States position as summarized by 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), p. 46. The authors point out that the United States additionally made the rather remarkable arguments that "the reservation of sovereign rights in article II is based on the Harmon Doctrine, which is not part of international law" and that "the Treaty could be abrogated under the principle of *rebus sic stantibus*, since there has been an essential change in the circumstances under which it was concluded" (*ibid.*). To these arguments, Canada is reported to have replied that "it is not the Harmon Doctrine of absolute sovereignty, but a solemn treaty which has been adhered to for nearly fifty years, that determines the rule applicable in the Columbia case; ... [that] the diversion contemplated is neither unreasonable nor inequitable; [and that] any increased use of Columbia waters by the United States through storage of water in Canada would involve a fair allocation of the so-called 'downstream benefits' between the two countries" (*ibid.*, p. 47).

Compare, in this context, the United States request of Great Britain in April 1895, some eight months before Attorney-General Harmon's opinion was issued, that "suitable measures . . . be taken to avert the threatened injury" from a dam, or "dyke", which a corporation of the Canadian Province of British Columbia planned to construct on Boundary Creek "where it crosses the boundary line, the result of which would be the overflow and washing away of the lands and improvement of settlers in the [United States] State of Idaho" (J. B. Moore, *A Digest of International Law* (Washington (D.C.), 1906), vol. II, pp. 451-452). In the event, work on the dam proceeded, resulting in the apprehended injuries, whereupon the United States requested prompt "removal of the obstruction in the creek, and the payment of proper indemnity to those who had been injured" (*ibid.*, p. 451).

⁹⁸ Moore, *op. cit.* (footnote 97 above), vol. 1, p. 654.

⁹⁹ This Commission had been established by the Boundary Convention between the United States and Mexico of 1 March 1889 (Parry, *The Consolidated Treaty Series, op. cit.* (footnote 90 above), vol. 172 (1889-1890) (1978), p. 21; reproduced in United Nations, *Legislative Texts . . .*, p. 229, No. 74). The name of the Commission was later changed to International Boundary and Water Commission, United

Grande situation. The Commissioners submitted a joint report in 1896 in which they declared that

the only feasible method of regulating the use of the waters so as to secure to each country and its inhabitants their legal and equitable rights was to build a dam across the Rio Grande at El Paso. The Commissioners' report stated that Mexico had been wrongfully deprived for many years of its equitable rights and they recommended the matter be settled by a treaty dividing the use of the waters equally, Mexico to waive all claims for indemnity for the past unlawful use of water.¹⁰⁰

The dispute¹⁰¹ was finally settled by the 1906 Convention,¹⁰² the first paragraph of the preamble to which reads as follows:

The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a Convention for these purposes . . .

83. The Convention provides that, after completion of a storage dam in New Mexico, the United States is to deliver a specified volume of water to Mexico annually, "in the bed of the Rio Grande", without cost to Mexico. It also provides that Mexico waives all claims arising out of past diversions in the United States and states in article V:

The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. . . .

The State Department Memorandum of 21 April 1958 contains the following comments on the legal position taken by the United States in this dispute:

. . . it is necessary to distinguish between what States say and what they do. It should be noted that the Harmon opinion contains two elements: (1) Territorial sovereignty, and (2) therefore no obligation. . . . in the case of Mexico the United States uttered both elements (1) and (2) but entered into a treaty which in fact apportioned the water.¹⁰³

Elsewhere in the memorandum, in a discussion of the negotiating history of the future treaty concerning the boundary waters between the United States and Canada,¹⁰⁴ it is noted that the United States negotiator, Chandler P. Anderson, made the following statements concerning boundary waters in a communication to the then Secretary of State, Elihu Root:

States and Mexico, and new powers and duties were vested in it, under the Treaty of 3 February 1944 between the United States and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (United Nations, *Treaty Series*, vol. 3, p. 313).

¹⁰⁰ See the State Department Memorandum of 21 April 1958, *op. cit.* (footnote 77 above), p. 64.

¹⁰¹ For an account of events between the publication of the International Boundary Commission's report and the conclusion of the 1906 Convention, including the various United States attempts to satisfy Mexico, see Simsarian, *loc. cit.* (footnote 91 above) and the State Department Memorandum of 21 April 1958, *op. cit.* (footnote 77 above), pp. 64-65.

¹⁰² See para. 79 and footnote 90 above.

¹⁰³ *Op. cit.* (footnote 77 above), pp. 9-10.

¹⁰⁴ 1909 Boundary Waters Treaty (see footnote 78 (a) above).

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

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

As Mr. Anderson pointed out in the foregoing paragraphs, the truism that a State is sovereign in its territory does not lead to the conclusion that a State may legally make unlimited use of waters within its territory.¹⁰⁵

84. The circumstances leading up to a subsequent treaty between the United States and Mexico shed further light on the United States position. In a memorandum of 26 May 1942 relating to the negotiations between the United States and Mexico concerning the Colorado River, the Legal Adviser of the United States Department of State, G. H. Hackworth, reviewed existing treaties regarding international rivers and lakes. He stated that the review

is by no means comprehensive but is believed to be sufficient to indicate the trend of thought concerning the adjustment of questions relating to the equitable distribution of the beneficial uses of such waters. No one of these agreements adopts the early theory advanced by Attorney-General Harmon . . . On the contrary, the rights of the subjacent State are specifically recognized and protected by these agreements.¹⁰⁶

In a second memorandum, written in November of the same year, the Legal Adviser addressed the rights of Mexico to water impounded by Boulder Dam in the United States:

The question with which we are confronted is what is Mexico entitled to, under all the circumstances, as her fair and equitable portion of the impounded waters of a stream which if left in the state of nature would afford a certain amount of water to both countries—insufficient for the needs of either at the lowest stage and more than can be utilized by either or both at flood stage.

. . .

The rights of the United States and Mexico in this situation cannot be determined by fixed rules of law, nor can they be determined by the simple criterion that the water has its source in the United States and may be utilized in this country. Such a rule, if sound or if applied, would deprive all subjacent States of the normal and natural benefits of streams the world over. Our purpose should be to find a reasonable equation by which rights to the water may be equitably distributed.¹⁰⁷

85. In 1944, the United States and Mexico signed a treaty concerning the lower Rio Grande and Colorado Rivers.¹⁰⁸ The process leading to the conclusion of this treaty had been initiated on the United States side by the appointment of three Commissioners, pursuant to Congressional authorization, "to co-operate with representatives of the Government of Mexico in a study regarding the equitable use of the waters of the lower Rio

¹⁰⁵ *Op. cit.* (footnote 77 above), pp. 60-61. This point was also recognized in the ECE study (see footnote 77 above), which states:

" . . . Each riparian State has a right of ownership over the section of the waterway which traverses it, and this right restricts the freedom of action of the others. Nevertheless, the fact that each State is obliged to respect the right of ownership of the other States in no way impairs its sovereign power. . . ." (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 189.)

¹⁰⁶ Cited in Whiteman, *op. cit.* (footnote 78 (a) above), p. 950.

¹⁰⁷ *Ibid.*, pp. 953-954.

¹⁰⁸ Treaty of 3 February 1944 between the United States and Mexico (see footnote 99 above).

Grande and of the lower Colorado Rivers".¹⁰⁹ The Treaty provides for the allocation of the waters of the two rivers and the construction of works. When the Treaty was being considered by the United States Senate Committee on Foreign Relations as part of the United States ratification process, an opponent testified that Attorney-General Harmon's opinion was a correct statement of the law as practised by the United States. Three executive branch officials challenged this assertion. First, an Assistant Legal Adviser of the Department of State, Ben M. English, after pointing out that the Harmon opinion was based primarily on language from the *Schooner "Exchange"* case, which did not involve the question of the allocation of waters of international rivers, stated:

. . . the contention that . . . the United States can properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

(a) The practice of States as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.¹¹⁰

Secondly, Assistant Secretary of State Dean Acheson made the following statement on the point under consideration:

. . . The logical conclusion of the legal argument of the opponents of the treaty appears to be that an upstream nation by unilateral act in its own territory can impinge upon the rights of a downstream nation; this is hardly the kind of legal doctrine that can be seriously urged in these times.¹¹¹

Finally, Frank Clayton, counsel for the United States section of the International Boundary Commission, stated that "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware".¹¹²

86. A fitting postscript to the conclusion of the 1944 Treaty was provided by Secretary of State Edward R. Stettinius, Jr., who observed, upon the Treaty's approval by the United States Senate, that it would allow Mexico and the United States to "co-operate as good

neighbors in developing the vital water resources of the rivers in which each has an equitable interest".¹¹³

87. The conclusion can be drawn from the foregoing survey of positions taken by officials of the United States Government, viewed in the context of United States diplomatic and treaty practice, that the "Harmon Doctrine" is not, and probably never has been, actually followed by the State that formulated it.¹¹⁴ Indeed, as

¹¹³ United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XII, No. 304 (22 April 1945), p. 742. The President of the United States made the following statement concerning the Senate's approval of the 1944 Treaty:

"In voting its approval of the water treaty with Mexico, the Senate today gave unmistakable evidence that it stands firmly in support of the established policy of our Government to deal with our good neighbors on the basis of simple justice, equity, friendly understanding, and practical co-operation. By this action of the Senate, the United States and Mexico join hands in a constructive, businesslike program to apportion between them and develop to their mutual advantage the waters of the rivers that are in part common to them." (*Ibid.*)

¹¹⁴ It has been said that article II of the 1909 Treaty concerning the boundary waters between Canada and the United States (see footnote 78 (a) above) embodies the Harmon Doctrine (see, for example, the United States argument referred to in footnote 97 above, which, however, also denied that this doctrine was part of international law). Article II provides in this regard:

"Each of the High Contracting Parties reserves to itself . . . , subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters . . ."

The article must, however, be read in the context of the Treaty as a whole, which not only established the International Joint Commission and vested it with jurisdiction to investigate and report on "questions or matters of difference arising between [the parties] involving the rights, obligations, or interests of either in relation to the other" (art. IX), but also actually resolved the existing dispute over the waters of the St. Mary and Milk Rivers by apportioning the waters of those rivers and their tributaries equally (art. VI) (see footnote 78 (a) above). Furthermore, it has been seen that a State's assertion of "exclusive jurisdiction and control" or "absolute territorial sovereignty" is not incompatible with a recognition by that State of a duty not to use its waters in such a manner as to affect another State injuriously (see para. 83, *in fine* above). Finally, the State Department Memorandum of 21 April 1958, after an exhaustive study of the negotiating history of the 1909 Treaty, concludes that there is no evidence in the record that article II was intended to incorporate the Harmon Doctrine (*op. cit.* (footnote 77 above), pp. 59-61). The Memorandum (pp. 5-62) gives particular attention to article II in its review of the negotiating history of the 1909 Treaty.

See generally R. D. Scott, "The Canadian-American Boundary Waters Treaty: Why article II?", *Canadian Bar Review* (Toronto), vol. XXXVI, No. 4 (1958), p. 511; and Austin, *loc. cit.* (footnote 91 above), p. 393.

A somewhat different view was expressed by C. B. Bourne in his article "The right to utilize the waters of international rivers", *The Canadian Yearbook of International Law, 1965* (Vancouver), vol. III:

" . . . even today it is doubtful whether the doctrine has been abandoned by the United States; the statements of its governmental officers in the Senate hearings on the 1944 United States-Mexico Treaty are equivocal, and in proceedings before the International Joint Commission as late as 1950 and 1951 counsel for the United States was still invoking it by relying on article II of the Boundary Waters Treaty of 1909" (p. 204).

The only statements to which Bourne refers are those of Assistant Secretary of State Acheson and Secretary of State Stettinius, referred to above (paras. 85-86). While neither statement expressly repudiates the Harmon Doctrine, as, for example, Mr. Clayton did (see footnote 112 above), both recognize in forceful terms that it has no place in the relations of the United States with its neighbours in respect of international rivers. As to the fact that United States counsel relied on article II of the 1909 Treaty in 1950 and 1951, it has been seen above that

¹⁰⁹ Public Resolution No. 62 of 3 March 1927, sixty-ninth Congress, 2nd session (*The Statutes at Large of the United States of America*, vol. XLIV, part. 2, p. 1403, chap. 381).

¹¹⁰ In addition to State practice, Mr. English referred, in support of this conclusion concerning the Harmon Doctrine, to:

"(b) The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.

"(c) The writing of authorities on international law in opposition to the Harmon doctrine.

"(d) The Trail smelter arbitration . . ."

(United States of America, Senate, *Hearings before the Committee on Foreign Relations on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers*, seventy-ninth Congress, 1st session (Washington (D.C.), 1945), part 5, p. 1751.)

¹¹¹ *Ibid.*, p. 1762.

¹¹² Mr. Clayton continued:

" . . . I have made an attempt to digest the international treaties on this subject . . . [In] all those I have been able to find, the starting-point seemed to be the protection of the existing uses in both the upper riparian country and the lower riparian country, without regard to asserting the doctrine of exclusive territorial sovereignty. Most of them endeavour to go further than that and to make provision for expansion in both countries, both upper and lower, within the limits of the available supply." (*Ibid.*, part 1, pp. 97-98.)

has been seen, the 1906 Rio Grande Convention, which resolved the very dispute that gave rise to Attorney-General Harmon's opinion, provides, in its preamble, for the "equitable distribution of the waters of the Rio Grande" (see para. 82, *in fine* above).¹¹⁵

ii. Practice of other States

88. A few States, in diplomatic exchanges, have occasionally asserted absolute sovereignty over portions of international watercourses situated entirely within their territories.¹¹⁶ As was true of the United States in respect of the situations discussed above, however, these States have generally resolved the controversies in the context of which absolute sovereignty was asserted by entering into treaties that actually apportioned the water or recognized rights in the other State or States. For example, the Indus Waters Treaty of 1960 between India and Pakistan,¹¹⁷ concluded with the participation of the World Bank,¹¹⁸ represented the culmination of a long period of negotiations in which India, at one point,

reserved its full freedom to extend or alter the system of irrigation within India—in other words, to draw off such quantities of water as it needed, subject to such agreement as could be reached with Pakistan. But it continued to supply water as in the past.¹¹⁹

Pakistan characterized India's position as striking at "the very root of Pakistan's right to [a] historic, legal and equitable share in the common rivers" and "accordingly proposed a conference for the purpose of making 'an equitable apportionment' of the flow of all the waters shared by the two countries and, failing a settlement arrived at through negotiation, submission of the dispute to the International Court of Justice".¹²⁰

the reservation by each party in article II of "exclusive jurisdiction and control" over successive rivers within its territory is far from being tantamount to an assertion of a right to use waters within its territory with no regard whatsoever for resulting damage to the other country.

¹¹⁵ The ECE study (see footnote 77 above) in fact concludes that the United States abandoned the Harmon Doctrine *de facto* by ratifying the 1906 Convention (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 99).

¹¹⁶ Research has revealed no assertions of the doctrine of absolute sovereignty in respect of purely contiguous watercourses. By this is meant that the contiguous States, while asserting "equal rights" or claiming "half the water" (see, for example, the provisions of treaties cited in annex I to the present chapter), have not claimed the right to dispose of all of the waters of contiguous watercourses. Of course, this statement would not apply to situations in which the boundary between the contiguous States followed one of the banks of the watercourse and not the median line or thalweg. See also Lipper, *loc. cit.* (footnote 76 above), p. 23.

¹¹⁷ United Nations, *Treaty Series*, vol. 419, p. 125.

¹¹⁸ The late Richard Baxter wrote that the World Bank "was not a disinterested third force but one of the parties to what were actually tripartite negotiations, for it was known that it would have to be a participant in any program of works and of financing which might be drawn up" ("The Indus Basin", in Garretson, Hayton and Olmstead, *op. cit.* (footnote 76 above), p. 477).

¹¹⁹ Baxter, *loc. cit.*, p. 453.

¹²⁰ Note verbale of 16 June 1949 from the Ministry of Foreign Affairs and Commonwealth Relations of Pakistan to the High Commissioner for India in Pakistan (Government of Pakistan, *Canal Waters Dispute: Correspondence between the Government of Pakistan and the Government of India and Partition Documents* (May 1958), p. 163), cited by Baxter, *loc. cit.*, p. 454.

While the parties reserved their legal positions,¹²¹ the 1960 Treaty actually effected what observers have characterized as an equitable apportionment of the waters of the Indus System.¹²²

89. Utilization of waters flowing from India into East Pakistan (Bangladesh since 1971) has been the subject of a series of negotiations between those two countries over a period of years. In one instance, in 1950, the Government of India, in response to reports of plans to construct a dam on the Karnafuli River in East Pakistan which would result in the flooding of areas in the Indian State of Assam, stated that "the Government of India cannot obviously permit this and trusts that the Government of Pakistan will not embark on any works likely to submerge land situated in India". Pakistan replied that construction of a dam which would flood land in India was not contemplated.¹²³ The principal source of controversy between the two countries, however, has been the dam constructed by India (between 1961 and 1975) on the Ganges River at Farakka, some 11 miles upstream from the Bangladesh border.¹²⁴ When the matter

¹²¹ Article XI, paragraph (1) (b), of the Indus Waters Treaty provides:

"(b) nothing contained in this Treaty . . . shall be construed as constituting a recognition or waiver . . . of any rights or claims whatsoever of either of the Parties other than those rights or claims which are expressly recognized or waived in this Treaty."

Paragraph (2) of the same article provides:

"(2) Nothing in this Treaty shall be construed by the Parties as in any way establishing any general principle of law or any precedent."

However, as Baxter wrote in reference to this article, "a provision of this nature cannot keep others from looking to the settlement as a precedent or from deriving what general principles they choose from the terms agreed upon" (*loc. cit.*, p. 476).

¹²² That the Indus Waters Treaty actually effected an equitable apportionment, or, to put it another way, provided for equitable utilization, of the waters of the Indus System is a conclusion that has been reached by a number of commentators. See, for example, Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), para. 65; and Baxter, *loc. cit.*, p. 476.

¹²³ Exchange of Notes of 13 February and 15 April 1950, referred to by M. Qadir, "Note on the uses of the waters of international rivers", *Principles of Law Governing the Uses of International Rivers* (London, I.L.A., 1956), reports and commentaries submitted to the International Law Association at its Forty-seventh Conference (Dubrovnik (Yugoslavia), 26 August-1 September 1956), p. 12; cited by Lammers, *op. cit.* (footnote 77 above), p. 311.

¹²⁴ This project and the resulting controversy is described by Lammers as follows:

" . . . The purpose of this project was to divert part of the Ganges waters through a feeder canal into the Bhagirathi-Hooghly River—in fact a branch of the Ganges in India—in order to put an end to the silting of that river and of the port of Calcutta which had been the result of inadequate headwater supply. According to India, this diversion of Ganges waters and flushing of the Bhagirathi-Hooghly River was the only feasible means to save the port of Calcutta and to safeguard the well-being of millions of people in the city and the hinterland. The flushing of the Bhagirathi-Hooghly River would according to India also diminish the intensity and frequency of the so-called 'bores', which are walls of water that surge upstream at great speed and seriously impede navigation.

"Pakistan, and since 1971, Bangladesh, has vigorously opposed the construction of the dam at Farakka. While the Ganges has an abundant flow in the monsoon period (June-October) causing floods in East Pakistan/Bangladesh, it has a very small flow in the remaining dry season (November-May) when there is no melting snow from the Himalayas and the rainfall in the basin is extremely scarce. It was the further reduction of the flow of the Ganges in the dry season brought about by the Farakka dam which constituted the

was brought before the General Assembly in 1968, India originally took the position that, by virtue of the fact that 90 per cent of its main channel, 99 per cent of its catchment area and 91.5 per cent of its entire irrigation potential lay within India, the Ganges was not an international river, but "overwhelmingly" an Indian river.¹²⁵ India nevertheless declared that it was "willing to discuss this matter with Pakistan to satisfy them that construction of the Farakka Barrage will not do any damage to Pakistan".¹²⁶ In subsequent debates in the Special Political Committee of the General Assembly, India not only ceased to deny the internationality of the Ganges, but stated its general position as follows:

India's views regarding the utilization of waters of an international river were similar to those held by the majority of States. When a river crossed more than one country, each country was entitled to an equitable share of the waters of that river. . . .

Those views did not conform to the Harmon Doctrine of absolute sovereignty of a riparian State over the waters within its territory, as had been implied in the statement by the representative of Bangladesh. India, for its part, had always subscribed to the view that each riparian State was entitled to a reasonable and equitable share of the waters of an international river.¹²⁷

Pursuant to a joint statement adopted by consensus in 1976 by both the Special Political Committee and the General Assembly,¹²⁸ the parties met to work out a settlement and in fact reached agreement on an interim arrangement in the form of the 1977 Agreement on Sharing of the Ganges Waters.¹²⁹ According to Lammers:

[it has] become apparent from the Ganges waters controversy . . . that India has eventually fully abandoned the Harmon doctrine, a doctrine which it still appeared to favour in its dealings with Pakistan in the Indus waters controversy and the early phase of the Ganges waters question.¹³⁰

90. The Government of Austria took what might be described as an absolute sovereignty position when, in negotiations with Bavaria over the development of certain international watercourses, it stated that, "in accordance with the law of territorial sovereignty", a successive watercourse is wholly at the disposal of the State

through which it flows.¹³¹ As noted above, however, this position is not necessarily inconsistent with a recognition of one State's obligation not to use waters within its borders in such a manner as to cause harm to other States. Moreover, Austria did agree to give notice of and to consider objections concerning future development, and, 10 years later, was reportedly espousing the position that an international river is an indivisible unit.¹³²

91. Lipper states his conclusions with regard to the "Harmon Doctrine" or notion of absolute sovereignty as follows:

. . . the Harmon Doctrine was not an expression of international river law. Rather, it was an assertion that, there being no rules of international law which governed, States were free to do as they wished. No subsequent development of the principle supports its inclusion as a part of the law of international rivers.¹³³

b. *Equitable utilization or "limited sovereignty"*¹³⁴

92. In numerous instances, upper riparian States have recognized rights in lower riparian States from the outset of negotiations. For example, in the negotiations between the United Kingdom and Egypt leading to the 1929 agreement concerning the Nile,¹³⁵ the United Kingdom Foreign Minister instructed his representative as follows:

The principle is accepted that the waters of the Nile, that is to say, the combined flow of the White and Blue Niles and their tributaries, must be considered as a single unit, designed for the use of the peoples inhabiting their banks according to their needs and their capacity to benefit therefrom; and, in conformity with this principle, it is recognized that Egypt has a prior right to the maintenance of her present supplies of water for the areas now under cultivation, and to an equitable proportion of any additional supplies which engineering works may render available in the future.¹³⁶

Herbert A. Smith has made the following observation in relation to these negotiations:

The position taken by Great Britain in her discussions with Egypt over the apportionment of the Nile water is a significant example of the refusal of a powerful State to rely upon the doctrine of the ab-

¹³¹ Austrian statement of principles regarding successive rivers. Austria further recognized that:

" . . . neither State enjoys exclusive rights over the total volume of the waters of contiguous waterways, but that, by virtue of general principles of law, each of them . . . may claim the right to exploit half the volume of the waters of the waterways in question." (Cited in the ECE study (see footnote 77 above), E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 38.)

¹³² "Austria, an upper riparian . . . has gone even further than the United States in forsaking absolute sovereignty. The present Austrian position treats an international river as an indivisible unit, and the riparian States as tenants in common, with each owning an indivisible share of the whole. This position thus moves beyond the principle of limited territorial sovereignty and approaches adoption of the community in the waters theory." (Lipper, *loc. cit.* (footnote 76 above), p. 27, citing I. Seidl-Hohenveldern, "Austrian views on international rivers", *Annales Universitatis Saraviensis*, vol. IX (1962), p. 191.)

¹³³ *Loc. cit.*, pp. 22-23.

¹³⁴ According to Lipper's definition, the principle of "limited territorial sovereignty" "restricts the principle of absolute sovereignty to the extent necessary to insure each riparian a reasonable use of the waters" (*loc. cit.*, p. 18; see also pp. 23-28).

¹³⁵ Exchange of Notes of 7 May 1929 in regard to the use of the waters of the River Nile for irrigation purposes (League of Nations, *Treaty Series*, vol. XCIII, p. 43).

¹³⁶ United Kingdom, *Papers regarding Negotiations for a Treaty of Alliance with Egypt—Egypt No. 1 (1928)*, Cmd. 3050 (London, 1928), p. 31.

core of the problem. Pakistan/Bangladesh feared that in that season the flow of the Ganges would become so small that, due to lack of water, hundreds of thousands of acres of cultivated land would turn into waste land. Other expected negative effects were that the channel of the Ganges in East Pakistan/Bangladesh would become silted, which would greatly increase the problem of flooding in the wet season, and that coastal areas of East Pakistan/Bangladesh would become uncultivable in consequence of the greater penetration of sea water into the delta owing to the lack of drainage of fresh water into the sea." (*Op. cit.* (footnote 77 above), pp. 312-313.)

¹²⁵ *Official Records of the General Assembly, Twenty-third Session, Plenary Meetings*, 1682nd meeting, para. 177; and *ibid.*, *Thirty-first Session, Special Political Committee*, 21st meeting, para. 15. For further details on the negotiations between India and Pakistan, and later Bangladesh, see Lammers, *op. cit.*, pp. 313-319.

¹²⁶ *Official Records of the General Assembly, Twenty-fourth Session, Plenary Meetings*, 1776th meeting, para. 285.

¹²⁷ *Ibid.*, *Thirty-first Session, Special Political Committee*, 21st meeting, paras. 8-9.

¹²⁸ *Ibid.*, 27th meeting, para. 3; and *ibid.*, *Plenary Meetings*, 80th meeting, paras. 134-142.

¹²⁹ The Agreement entered into force for a period of five years on 5 November 1977. For the text, see *International Legal Materials* (Washington, D.C.), vol. XVII (1978), p. 103.

¹³⁰ *Op. cit.* (footnote 77 above), p. 319.

solute rights of the territorial sovereign. The application of this principle would have permitted Great Britain to take as much water as she pleased for the irrigation of the Sudan, but the published correspondence shows that Lord Lloyd admitted freely and without argument the principle of Egypt's "ancient and historic rights" in the waters of the Nile with the consequence that the apportionment of the water must rest upon the agreement of the two Governments concerned.¹³⁷

In more recent discussions between the United Arab Republic and Sudan in relation to the proposed Aswan high dam, the Sudanese Government stated:

It is not disputed that Egypt has established a right to the volumes of water which she actually uses for irrigation. The Sudan has a similar right.¹³⁸

The Government of Sudan agreed with that of the United Arab Republic that any supplies of water additional to those in which there were established rights must be apportioned equitably, although agreement upon a specific equitable allocation was not reached at that time. The 1959 Nile Waters Agreement, however, did confirm the rights of each party to certain quantities of water.¹³⁹

93. The dispute between Argentina and Brazil over the use of the waters of the Paraná River,¹⁴⁰ while primarily

involving questions of consultation, provision of information and co-operation, is instructive for the present study. The problem revolved around plans by Argentina and Brazil, respectively, to construct two separate dams across different points of the Paraná River. The Argentine dam would be located at Corpus, where the Paraná forms the frontier between Argentina and Paraguay; The Brazilian dam would be situated upstream at Itaipu, where the Paraná forms the frontier between Brazil and Paraguay. Because of apprehension that the Itaipu project, in conjunction with others in Brazil, would adversely affect the Corpus dam, Argentina claimed that Brazil was under an international legal duty to provide Argentina with information and to consult with it concerning its plans. Although Brazil refused to recognize such an obligation,¹⁴¹ it later concluded a bilateral agreement with Argentina which provided that, in the field of the environment, States would co-operate by providing technical data regarding works to be undertaken within their jurisdiction in order to prevent any appreciable harm which might be caused in the human environment of the neighbouring area.¹⁴² The agreement also provided that, "in the exploration, exploitation and development of their natural resources, States must not provoke [appreciable] harmful effects on zones located outside their national jurisdictions".¹⁴³ The text of this agreement was later adopted as General Assembly resolution 2995 (XXVII) of 15 December 1972.¹⁴⁴ Furthermore, in June 1971, Argentina and Brazil both signed the Act of Asunción, which contains the Declaration of Asunción on the Use of International Rivers.¹⁴⁵ Paragraph 2 of that Declaration provides:

In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the [La Plata] Basin.¹⁴⁶

Finally, Argentina, Brazil and Paraguay concluded an agreement in 1979 providing for co-ordination of the two dam projects.¹⁴⁷

¹³⁷ *Op. cit.* (footnote 44 above), p. 147.

¹³⁸ Sudan, Ministry of Irrigation and Hydro-Electric Power, *Nile Waters Question* (Khartoum, 1955), p. 13.

¹³⁹ See the illustrative provisions of this Agreement in footnote 78 (d) above and annex II to the present chapter. In addition, article 3, paragraph 2, of the Agreement provides:

"... when the Republic of Sudan is ready to utilize its share according to the agreed programme, it shall pay to the United Arab Republic a share of all the expenses in the same ratio as the Sudan's share in benefit is to the total benefit of the project; provided that the share of either Republic shall not exceed one half of the total benefit of the project."

See also article 5, paragraph 2.

In his study of the régime of the Nile Basin, Albert H. Garretson notes:

"... as soon as the Sudan was given a degree of control over her foreign affairs she indicated that she did not consider herself as bound by the 1929 [Nile Waters] Agreement. Moreover, the Sudan immediately upon independence in January 1956, formally stated that she did not consider herself bound by a treaty entered into on her behalf by the British.

"The legal question as to the succeeding effect of the 1929 Agreement may be considered to be overtaken by the recital in the preamble of the 1959 Agreement that 'whereas the Nile Waters Agreement concluded in 1929 has only regulated a partial use of the natural river and did not cover the future conditions of the fully controlled river supply, the two riparians have agreed to the following ...'

"It would seem quite clear that the Sudan thereby renounces any claim to the invalidity of the 1929 Agreement. Moreover, the full scheme of the 1959 Agreement is clearly an adaptation and extension of the 1929 Agreement." ("The Nile Basin", *The Law of International Drainage Basins*, *op. cit.* (footnote 76 above), p. 287.)

For further detailed examination of the legal situation with respect to the Nile, see, for example, the studies mentioned in footnote 78 (d) above, and Whiteman, *op. cit.* (footnote 78 (a) above), pp. 1002-1013.

¹⁴⁰ Concerning this dispute, see generally G. J. Cano, "Argentina, Brazil and the De la Plata River Basin: A summary review of their legal relationship", *Natural Resources Journal* (Albuquerque, N.M.), vol. 16 (1976), p. 863; P. M. Dupuy, "La gestion concertée des ressources naturelles: à propos du différend entre le Brésil et l'Argentine relatif au barrage d'Itaipu", *Annuaire français de droit international*, 1978 (Paris), vol. XXIV, p. 866; and Lammers, *op. cit.* (footnote 77 above), pp. 294-296.

¹⁴¹ Lammers writes:

"... the dispute between Argentina and Brazil on this question even made it impossible during the 1972 United Nations Conference on the Human Environment to reach consensus on Principle 20 of the Draft Declaration on the Human Environment, which referred to the obligation of States to supply information on activities within their territory which could have significant adverse effects on the environment of other States" (*op. cit.*, p. 295).

¹⁴² The agreement between Argentina and Brazil was concluded in New York on 29 September 1972 (*ibid.*).

¹⁴³ Cited by Cano, *loc. cit.* (footnote 140 above), p. 873, who also points out that Argentina denounced this agreement on 10 June 1973 because of disagreements with Brazil over methods of notification and which country would be the judge of whether planned works might cause appreciable extraterritorial harm.

¹⁴⁴ See also General Assembly resolution 3129 (XXVIII), adopted on 13 December 1973 on the initiative of Argentina and 52 other countries after the breakdown of the 1972 agreement between Argentina and Brazil mentioned in the previous footnote.

¹⁴⁵ *Yearbook* ... 1974, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

¹⁴⁶ *Ibid.*, p. 324. The Paraná is situated within the La Plata River Basin.

¹⁴⁷ Agreement signed on 19 October 1979, reproduced in *International Legal Materials* (Washington, D.C.), vol. XIX, No. 3 (1980), p. 615.

94. In a dispute between Chile and Bolivia over the use of the Lauca River,¹⁴⁸ Chile, the upstream State, recognized that Bolivia had "rights" in the waters and went on to state that the Montevideo Declaration of 1933 "may be considered as a codification of the generally accepted legal principles on this matter".¹⁴⁹ That Declaration provides, *inter alia*, that States have the "exclusive right" to exploit the portion of a contiguous or successive river that is within their jurisdiction, but makes the exercise of this right conditional on "the necessity of not injuring the equal right due to the neighbouring State" in the portion under its jurisdiction.¹⁵⁰

95. Similarly, the Government of France, in the *Lake Lanoux* arbitration in 1957, pointed to "the sovereignty in its own territory of a State desirous of carrying out hydroelectric developments", but at the same time recognized "the correlative duty not to injure the interests of a neighbouring State".¹⁵¹ France did not assert a "Harmon Doctrine" position, but argued that Spain's consent to the project in question was not required because restitution of the diverted water would result in there being no alteration of the water régime in Spain.

96. At one stage of the long-standing dispute between Israel and neighbouring Arab countries over the use of the Jordan River and its tributaries,¹⁵² the United States

¹⁴⁸ Lipper points out that "the situation arose after Chile announced its intention to divert for agricultural purposes the waters of the Lauca which flow from Chile into Bolivia. In the ensuing disagreement, rioting and a severance of diplomatic relations by Bolivia resulted." He further notes that, "despite the heat of the quarrel and the interests at stake, Chile did not assert the Harmon Doctrine" (*loc. cit.* (footnote 76 above), p. 27). See also the discussion of this controversy in Lammers, *op. cit.* (footnote 77 above), pp. 289-290, and the sources cited on p. 290, footnote 1.

¹⁴⁹ Statement by Chile's Minister of Foreign Affairs, Martínez Sotomayor, to the OAS Council, 19 April 1962 (OEA/Ser.G/VI, p. 1), cited by Lipper, *loc. cit.*, pp. 27-28. Lammers observes that Bolivia also invoked the Montevideo Declaration, but that it interpreted it differently. Bolivia claimed that the Declaration

"embodied international law and obliged Chile not to carry out the project before it had obtained the consent of Bolivia. Chile, however, contended, *inter alia*, that the Declaration required such consent only if the project would cause damage to Bolivia and stated that Bolivia had not furnished any proof that it would suffer damage as a result of the diversion." (*Op. cit.*, p. 289.)

Lammers also notes (pp. 289-290) that Chile eventually went ahead with the project, which was put into operation in 1962.

¹⁵⁰ See paras. 2 and 4 of the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, resolution LXXII adopted by the Seventh International Conference of American States at its fifth plenary session, 24 December 1933 (*The International Conferences of American States, First Supplement, 1933-1940* (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A).

¹⁵¹ United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 296-297; *International Law Reports, 1957* (London), vol. 24 (1961), pp. 111-112; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

¹⁵² For discussion of this situation, see, for example, S. N. Saliba, *The Jordan River Dispute* (The Hague, Nijhoff, 1968); K. B. Doherty, "Jordan waters conflict", *International Conciliation* (New York), No. 553 (May 1965); O. Z. Ghobashy, *The Development of the Jordan River* (New York, Arab Information Center, 1961), Information Paper No. 18; J.-V. Louis, "Les eaux du Jourdain", *Annuaire français de droit international, 1965* (Paris), vol. XI, pp. 823

Department of State declared in 1954 that, according to the United States mediator, Eric Johnston:¹⁵³

Syria, Lebanon, Jordan and Israel have accepted the principle of international sharing of the contested waters of the Jordan River and are prepared to co-operate with the United States Government in working out details of a mutually acceptable program for developing the irrigation and power potentials of the river system.

. . . Mr. Johnston stated that the plan involved acceptance by the Arab countries and Israel of the following principles:

1. The limited waters of the Jordan River system should be shared equitably by the four States in which they rise and flow. This principle was implicit in the valley plans put forward respectively by the Arab States and Israel, both of which clearly recognized the right of the other States to a share of the available waters. It was affirmed by both sides during the recent conversations with Mr. Johnston.¹⁵⁴

Technical experts of the States involved agreed upon a unified Jordan Valley plan proposed by Johnston, which was based upon the above principles. Israel's Prime Minister Lévi Eshkol later stated that "Mr. Johnston produced a unified regional plan which was based upon accepted rules and principles of international law and procedure".¹⁵⁵ The Johnston plan was, however, "rejected for political reasons by the Arab League Council in October 1955".¹⁵⁶ Israel then decided to proceed with its own project for the diversion of Jordan River waters,¹⁵⁷ but "undertook not to exceed the quantities allotted to it" under the Johnston plan.¹⁵⁸ The Arab States responded with plans to divert headwaters of the Jordan located in Arab territory, but this project was not implemented, reportedly for technical reasons.¹⁵⁹

97. The 1958 State Department Memorandum indicated that, in the view of the United States, which is both an upper and a lower riparian in relation to Canada, and an upper riparian in relation to Mexico:

. . . an international tribunal would deduce the applicable principles of international law to be along the following lines:

et seq.; G. G. Stevens, *Jordan River Partition* (Stanford University (Cal.), 1965), Hoover Institution Studies No. 6; Whiteman, *op. cit.* (footnote 78 (a) above), pp. 1013 *et seq.*; Lammers, *op. cit.* (footnote 77 above), pp. 304-307; and M. Wolfrom, *L'utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux* (Paris, Pedone, 1964), pp. 211-227.

¹⁵³ The mission of the United States mediator has been described as follows:

"In October 1953 President Eisenhower appointed Eric Johnston his personal representative . . . stating:

"One of the major purposes of Mr. Johnston's mission will be to undertake discussions with certain of the Arab States and Israel, looking to the mutual development of the water resources of the Jordan River Valley on a regional basis for the benefit of all the people of the area." (Whiteman, *op. cit.* (footnote 78 (a) above), p. 1017, citing *The Department of State Bulletin* (Washington, D.C.), vol. XXIX, No. 748 (26 October 1953), p. 553.)

¹⁵⁴ "Eric Johnston reports agreement on sharing of Jordan waters", press release No. 369, 6 July 1954, *The Department of State Bulletin*, vol. XXXI, No. 787 (26 July 1954), p. 132; cited in Whiteman, *op. cit.*, pp. 1017-1018.

¹⁵⁵ Speech to the Knesset, 20 January 1964, *Jerusalem Post*, 21 January 1964, p. 2; cited by Lammers, *op. cit.* (footnote 77 above), p. 306.

¹⁵⁶ Lammers, *op. cit.*, p. 306.

¹⁵⁷ *Ibid.*, p. 304.

¹⁵⁸ *Ibid.*, p. 306.

¹⁵⁹ Stevens, *op. cit.* (footnote 152 above), pp. 68, 75-76 and 80; and Lammers, *op. cit.*, p. 307.

1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right to each co-riparian.

Comment.—The doctrine of sovereignty is a fundamental tenet of the world community of States as it presently exists. Sovereignty exists and it is absolute in the sense that each State has exclusive jurisdiction and control over its territory. Each State possesses equal rights on either side of a boundary line. Thus riparians each possess the right of exclusive jurisdiction and control over the part of a system of international waters in their territory, and these rights reciprocally restrict the freedom of action of the others.

2. (a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

...¹⁶⁰

98. In the negotiations leading to the 1909 Boundary Waters Treaty between Great Britain and the United States,¹⁶¹ the position of the Canadian negotiators was that all existing and future disputes should be resolved by an international tribunal in accordance with principles to be incorporated into the treaty.

. . . These principles, apparently believed in general to be existing law, were:

1. Navigation was not to be impaired by other uses.
2. Neither country could make diversions or obstructions which might cause injury in the other without the latter's consent.
3. Each country would be entitled to the use of half the waters along the boundary for the generation of power.
4. Each country would be entitled to an "equitable" share of water for irrigation.¹⁶²

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

The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation.¹⁶³

(iii) *Decisions of international courts and tribunals*

100. It is well known that Article 38, para. 1 (d), of the Statute of the ICJ directs the Court to apply "judicial decisions . . . as [a] subsidiary means for the determination of rules of law" in deciding in accordance with international law disputes brought before it.¹⁶⁴ While such decisions have no binding force *per se* "except between the parties [to the case in question] and in respect of that particular case",¹⁶⁵ they are often cited and relied upon to a certain extent in subsequent cases, both by the parties to a given dispute and

by the body called upon to settle it, if any. This phenomenon is probably due largely to the fact that, in deciding concrete cases, courts must usually have recourse to generally applicable rules of law, which are then applied to the specific case at hand. The very identification of such general rules is often found to be of great assistance in later cases, in view of the fact that the international legal system is still not fully developed. It should be added, however, that, in the words of the ICJ itself, the Court's "duty is to apply the law as it finds it, not to make it".¹⁶⁶

101. While a thorough discussion of all decisions bearing upon the doctrine of equitable utilization and participation is beyond the scope of the present review of authorities, a brief summary of the principal decisions of courts and arbitral tribunals relating to the subject at hand is offered below in the hope that it will be of some assistance in ascertaining the present state of the law. The organization of the cases—i.e. according to whether a judicial decision or arbitral award was involved—follows that of the 1963 report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers".¹⁶⁷

a. *Judicial decisions*

i. The River Oder case¹⁶⁸

102. In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ was asked to determine whether, under the Treaty of Versailles of 1919, the jurisdiction of the International Commission of the Oder extended to certain tributaries of that river. The Oder rises in Czechoslovakia, flows into Poland, forms the border between Poland and eastern Germany, and empties into the Baltic. Article 331 of the Treaty of Versailles provided that all navigable parts of these river systems [including the Oder] which naturally provided more than one State with access to the sea possessed international status. Article 341 of the Treaty placed the Oder under the administration of an International Commission,¹⁶⁹ whose task it was to define the sections of the river or its tributaries to which the international régime would be applied.

103. The question before the PCIJ was whether the jurisdiction of the Commission should extend to two tributaries of the Oder situated in Poland, the Netze (Notéc) and the Warthe (Warta): Poland maintained that the Commission's jurisdiction should end where the Oder crossed the Polish border, whereas the six other

¹⁶⁰ *Op. cit.* (footnote 77 above), pp. 89-90.

¹⁶¹ See footnote 78 (a) above.

¹⁶² 1958 State Department Memorandum, *op. cit.* (footnote 77 above), p. 58.

¹⁶³ Cited and translated in Smith, *op. cit.* (footnote 44 above), p. 217, where the main parts of the letter are reproduced (pp. 217-221) in the original Dutch (original text in the State Archives at The Hague).

¹⁶⁴ This directive is, of course, expressly made subject to the qualification contained in Article 59 of the Statute that decisions of the Court have "no binding force except between the parties and in respect of [the] particular case [in question]".

¹⁶⁵ See the previous footnote. See also Article 94 of the Charter of the United Nations.

¹⁶⁶ *South West Africa cases, Second Phase*, Judgment of 18 July 1966, *I.C.J. Reports 1966*, p. 48, para. 89. See also *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Merits*, Judgment of 25 July 1974, *I.C.J. Reports 1974*, pp. 23-24, para. 53.

¹⁶⁷ Document A/5409, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 33 *et seq.* Part III of the report contains a "Summary of decisions by international tribunals, including arbitral awards" (pp. 187 *et seq.*).

¹⁶⁸ Judgment of 10 September 1929, *P.C.I.J., Series A, No. 23*. For discussion of this case, see, for example, Lipper, *loc. cit.* (footnote 76 above), pp. 28-29, and Lammers, *op. cit.* (footnote 77 above), pp. 505-507.

¹⁶⁹ The members of the Commission were Czechoslovakia, Denmark, France, Germany, Great Britain, Poland and Sweden; the dispute was between Poland and the other members.

members of the Commission contended that it should extend to the point at which each of the tributaries ceased to be navigable, even if that point were situated within Polish territory. The navigability of the Warthe and the Netze was not disputed, but Poland claimed that the sections of those rivers situated in Polish territory provided only Poland with "access to the sea" under article 331.

104. The issue in the case thus concerned the competence of the Oder Commission in particular and navigation rights in general. However, because the PCIJ found that it was unable to answer the question before it solely on the basis of the provisions of the Treaty of Versailles, it resorted to "the principles underlying the matter to which the text refers", namely those "governing international fluvial law in general".¹⁷⁰ The Court acknowledged that providing upstream States with access to the sea played an important role "in the formation of the principle of freedom of navigation on so-called international rivers". But, it continued:

... when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. 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.¹⁷¹

The Court went on to hold that, under the Treaty of Versailles, the jurisdiction of the Commission extended to the sections of the Oder tributaries that were situated in Polish territory.

105. While the dispute before the PCIJ concerned questions of navigation, the Court's pronouncements regarding "international fluvial law in general"¹⁷² may be applicable to a certain extent to non-navigational uses as well. Commentators have so concluded. Lipper, for example, in his study on equitable utilization, states that "both [the Court's] language and its reasoning make [the above-quoted passage] equally applicable to non-navigational uses" and that

the "requirements of justice and the considerations of utility" referred to by the Court apply with equal force to both navigational and non-navigational uses. . . . Finally, if navigation on an international river—which involves the physical entry of foreign vessels into the territory of another State—does not violate State sovereignty, it would seem that, *a fortiori*, States would have the right to use the waters of such river within their own territory subject to "the perfect equality of all riparian States" so to do.¹⁷³

A somewhat different line of analysis is followed by Lammers, who points out that the PCIJ based its finding of "a community of interest of riparian States" upon considerations which do not relate solely to navigation. Thus he notes:

... The Court derived [the existence of the community of interest of riparian States] from 1. "the manner in which States have regarded

the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State" and 2. "the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief". Both these elements were mentioned by the Court without further qualification.

He observes:

Accordingly it is not improbable that in the Court's view the legal concept of "a community of interest of riparian States" should not merely lie at the basis of legal solutions for problems of navigation to which the international character of an international watercourse would give rise but also for problems connected with other forms of use of the waters of an international watercourse.

He acknowledges that:

... For forms of use other than navigation, the legal notion of the community of interest could not, of course, find exactly the same application. As appears from the practice of States, each riparian State may make such other use of the water only within the limits of its own territory.

But he points out that:

... the other elements mentioned such as "the perfect equality of all riparian States" and "the exclusion of any preferential privilege of any one riparian State in relation to the others" would, in the line of the Court's thinking, probably apply similarly to water uses other than navigation.¹⁷⁴

ii. The *Diversion of Water from the Meuse* case¹⁷⁵

106. In the words of the PCIJ:

The Meuse is an international river. It rises in France . . . leaves French territory near Givert, crosses Belgium, forms the frontier between the Netherlands and Belgium . . . and enters Netherlands territory a few kilometres above Maastricht. Between Borgharen (a few kilometres below Maastricht) and Wessem-Maasbracht, the Meuse again forms the frontier between Belgium and the Netherlands, then below Wessem-Maasbracht both banks of the river are in Netherlands territory.¹⁷⁶

Belgium and the Netherlands had concluded a treaty in 1863 in order "to settle permanently and definitively the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels".¹⁷⁷ Article 1 of the Treaty provided for construction in Netherlands territory below Maastricht of an intake from the Meuse which would feed all the canals then situated below Maastricht. Belgium had in 1930 begun the construction of a canal (the Albert Canal) which was to be fed by water drawn from the Meuse in Belgian territory above Maastricht. In 1936, the Netherlands instituted a case against Belgium before the PCIJ, claiming that certain works constructed or planned by Belgium in connection with the 1930 canal project violated or would violate the 1863 Treaty. For its part, the Belgian Government contended in its counter-memorial that the Netherlands had violated the Treaty by constructing a barrage, and also claimed that the flow of water to the Juliana Canal constructed by the Netherlands would be subject to the Treaty.

¹⁷⁴ Lammers, *op. cit.* (footnote 77 above), p. 507.

¹⁷⁵ Judgment of 28 June 1937, *P.C.I.J., Series A/B, No. 70*, p. 4; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 187-188, document A/5409, paras. 1022 *et seq.*

¹⁷⁶ *P.C.I.J., Series A/B, No. 70*, pp. 9-10.

¹⁷⁷ The text of the 1863 Treaty is reproduced (in French) in *P.C.I.J., Series A/B, No. 70*, p. 81, annex I; and in United Nations, *Legislative Texts . . .*, p. 550, No. 157. See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 146-147, document A/5409, paras. 736-740.

¹⁷⁰ *P.C.I.J., Series A, No. 23*, p. 26.

¹⁷¹ *Ibid.*, pp. 26-27.

¹⁷² *Ibid.*, p. 26.

¹⁷³ Lipper, *loc. cit.* (footnote 76 above), p. 29.

107. The value of the PCIJ's opinion for the present study is limited significantly by the fact that the Court, while noting that the parties had made reference in their written and oral pleadings to "the application of the general rules of international law as regards rivers", declared that "the points at issue must all be determined solely by the interpretation and application of [the 1863] Treaty".¹⁷⁸ The Court nevertheless made several noteworthy statements in addressing the Netherlands' claims that (a) Belgium's plans to divert water from the Meuse above Maastricht violated the Netherlands' right of supervision over diversions of water from the Meuse by means of the Maastricht intake,¹⁷⁹ and (b) the feeding of canals located below Maastricht with water taken from the Meuse in excess of the quantities allotted to Belgium by the 1863 Treaty violated Treaty regulations governing allocation of Meuse water. With regard to the first point, the Court stated:

... There can be no doubt that, so far as the right of supervision is derived from the position of the intake on Netherlands territory, the Netherlands, as territorial sovereign, enjoys a right of supervision which Belgium cannot possess.¹⁸⁰

With regard to the second point, the Court stated:

... If, therefore, it is claimed on behalf of the Netherlands Government that, over and above the rights which necessarily result from the fact that the new intake is situated on Netherlands territory, the Netherlands possess certain privileges in the sense that the Treaty imposes on Belgium, and not on [the Netherlands], an obligation to abstain from certain acts connected with the supply to canals below Maastricht of water taken from the Meuse elsewhere than at the Treaty feeder, the argument goes beyond what the text of the Treaty will support.¹⁸¹

The Court went on to make the following observation in relation to diversion of Meuse waters from points other than the Treaty feeder into canals not expressly covered by the Treaty and situated wholly in the territory of Belgium or the Netherlands:

... As regards such canals, each of the two States is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water at the Treaty feeder and the volume of water to be discharged therefrom to maintain the nor-

mal level and flow in the Zuid-Willemsvaart [a canal situated partly in the Netherlands] is not affected.¹⁸²

Thus the Court would seem to have recognized that the Treaty régime for the supply of water to canals below Maastricht could not legally be impaired by upstream diversions of Meuse waters at points and for purposes not covered by the 1863 Treaty.

iii. The *Corfu Channel* case¹⁸³

108. This case was brought before the ICJ by special agreement between Albania and the United Kingdom in order to determine whether the United Kingdom had rights of innocent passage through the Corfu Channel, and whether Albania was internationally responsible for loss of life and damage to two United Kingdom destroyers sustained when the ships struck mines in the Channel.¹⁸⁴ The case thus does not deal at all with international watercourses, nor, strictly speaking, with environment-related injuries such as those suffered through air pollution. None the less, certain aspects of the Court's opinion have been cited repeatedly in connection with legal analyses of international environmental problems.¹⁸⁵ Those aspects are reviewed briefly below.

109. While the ICJ did not find sufficient evidence to support a finding that the mines had been laid by or at the instance of Albania, it did conclude that they could not have been laid without Albania's knowledge. It went on to hold that this knowledge gave rise to an obligation to notify ships operating in the area of the ex-

¹⁸² *Ibid.*, p. 26.

¹⁸³ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4. See generally Q. Wright, "The Corfu Channel case", *The American Journal of International Law* (Washington, D. C.), vol. 43 (1949), p. 491; A. C. Kiss, "Problèmes juridiques de la pollution de l'air", in Hague Academy of International Law, *Colloquium 1973—The Protection of the Environment and International Law*, A. C. Kiss, ed. (Leyden, Sijthoff, 1975), p. 168; Lammers, *op. cit.* (footnote 77 above), pp. 525-527; A. P. Lester, "River pollution in international law", *The American Journal of International Law*, vol. 57 (1963), pp. 839-840; and S. A. Bleicher, "An overview of international environmental regulation", *Ecology Law Quarterly* (Berkeley, Cal.), vol. II (1972), pp. 16-19.

¹⁸⁴ These ships were part of a squadron of British naval vessels which were proceeding through the Corfu Channel on 22 October 1946 without the permission of the Albanian Government. Briefly, the background of this incident is that British warships had been fired on by an Albanian battery on 5 May 1946 while passing through the Channel. The United Kingdom Government protested, claiming rights of innocent passage through the strait. Albania replied that no foreign vessels, naval or merchant, had rights of innocent passage through Albanian territorial waters without giving prior notification to, and receiving permission from, Albanian authorities. Thus when, on 22 October 1946, the British squadron sailed into the Channel without notification or permission, Albania claimed that the United Kingdom had violated Albanian sovereignty. (The United Kingdom subsequently, on 12 and 13 November 1946, swept a number of mines from the Channel, and Albania also contended in the case that this action violated her sovereignty.)

¹⁸⁵ See Bleicher and Lammers, cited in footnote 183 above; I. Brownlie, "A survey of international customary rules of environmental protection", *Natural Resources Journal* (Albuquerque, N.M.), vol. 13 (1973), p. 180; M. H. Arsanjani, *International Regulation of Internal Resources* (Charlottesville, University Press of Virginia, 1981), pp. 397-399; Lester, *loc. cit.* (footnote 178 above), pp. 101-102; and Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association, commentary (a) to article X, *ILA, op. cit.* (footnote 79 above), p. 497.

¹⁷⁸ *P.C.I.J., Series A/B, No. 70*, p. 16. Commentators are in general agreement that "except as an example of the potentiality of the judicial process in this area, the decision does not yield any important general principles of international law" (A. P. Lester, "Pollution", in Garretson, Hayton and Olmstead, *op. cit.* (footnote 76 above), p. 100). See also Lammers, *op. cit.* (footnote 77 above), p. 504. Often cited, however, is the portion of the concurring opinion of Judge Hudson concerning the derivation of the Court's equitable powers from "general principles of law recognized by civilized nations" (*P.C.I.J., Series A/B, No. 70*, p. 76).

¹⁷⁹ The gravamen of the Netherlands' complaint in this regard related to the fact that a portion of the new canal being constructed by Belgium (the Albert Canal) utilized the bed of the old Hasselt Canal, which was situated in Belgian territory below Maastricht and thus, under the Treaty, was to be fed by water drawn from the Maastricht intake. The Netherlands claimed, in essence, that Belgium could not, consistently with the Treaty, feed that portion of the Albert Canal which would be comprised of the old Hasselt Canal with water drawn from points other than the Maastricht intake. The reason for the Netherlands' concern seems to have been that it would not be able to supervise diversions in Belgian territory in the manner that would be possible at the Maastricht feeder. This element of having some degree of control over diversions through a supervisory power was presumably an aspect of the overall agreement that was important to the Netherlands.

¹⁸⁰ *P.C.I.J., Series A/B, No. 70*, p. 18.

¹⁸¹ *Ibid.*, p. 20.

istence of the mines and to warn the British naval vessels of the imminent danger they posed.¹⁸⁶ The Court declared:

... Such obligations are based ... on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.¹⁸⁷

110. The obligation last referred to by the Court may be considered to be an expression of the maxim *sic utere tuo ut alienum non laedas*,¹⁸⁸ and to this extent it is helpful in the context of the present inquiry. On the other hand, the facts of the case are obviously far removed from the types of situation under consideration,¹⁸⁹ and furthermore, the Court's formulation provides no indication of what the "rights of other States" might be in the context of the non-navigational utilization of international watercourses. None the less, the Court did characterize the obligation in question as one which was "general and well-recognized", and gave no indication that the applicability of either that obligation or the other two principles it identified was limited to factual situations closely akin to those involved in the case. It may therefore be concluded that the general obligation identified by the Court would make it internationally wrongful for one State "to allow knowingly its territory", including portions of international watercourses situated thereon, "to be used for acts contrary to the rights of other States".¹⁹⁰ What remain to be identified and established, of course, are "the rights of other States" along or through whose territory the watercourse in question flows. Such rights could include the right to an equitable share of the uses and benefits of the waters, and the right to be free from adverse effects, or "appreciable harm", occasioned through the medium of the watercourse. Once these rights have been established, the obligation recognized in the Corfu

Channel case would offer protection against their infringement.¹⁹¹

b. *Arbitral awards*

i. The Lake Lanoux arbitration¹⁹²

111. This case involved a hydroelectric project, proposed in 1950 by Electricité de France and adopted by the French Government, which would entail the diversion of waters of Lake Lanoux, situated in the eastern Pyrenees entirely within France, down a steep incline and into the Ariège River. The natural drop in elevation between the lake and the Ariège would make possible the generation of electricity. The difficulty was that, while Lake Lanoux naturally drained into Spain via the Font-Vive and Carol Rivers, and thence into the Mediterranean, the Ariège is a tributary of the Garonne, which flows through France and empties into the Atlantic. "The initial project involved no return of water to the Carol River despite important irrigation interests in Spain that were served by it. Instead, France offered monetary compensation which was refused by Spain."¹⁹³ The project was then modified so that the "withdrawal of part of the water which feeds the Carol" would be offset by "an underground return tunnel [which] would carry a part of the water of the Ariège to the Carol", and thence into Spain.¹⁹⁴ While France offered to return to the Carol an amount of water equivalent to that which had been diverted, Spain opposed any diversion of Lake Lanoux waters, since the French project

would alter the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters to the Ariège and by thus making restitution of the waters to the Carol physically dependent upon human will, which would result in the *de facto* preponderance of one party only, rather than in the preservation of the equality of the two parties as provided for by the Treaty of Bayonne of 26 May 1866 and by the Additional Act of the same date; . . .¹⁹⁵

¹⁸⁶ With regard to innocent passage, the Court "arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.

" . . .

"For these reasons the Court is unable to accept the Albanian contention that the Government of the United Kingdom has violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government." (*I.C.J. Reports 1949*, pp. 29-30.)

¹⁸⁷ *Ibid.*, p. 22.

¹⁸⁸ In this connection, see, for example, Helsinki Rules, commentary (a) to article X (see footnote 79 above); and Lester, *loc. cit.* (footnote 178 above), p. 101. Cf. the 1949 Memorandum by the Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 1948.V.1(1)):

" . . . There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law. . . ." (P. 34, para. 57.)

¹⁸⁹ Moreover, as Bleicher points out:

" . . . The court was primarily concerned with other matters, such as the problems of proof and presumptions, the scope of the right of innocent passage of warships, and the jurisdiction of the court to fix the amount of compensation under the language of the *compromis*." (*Loc. cit.* (footnote 183 above), p. 17.)

¹⁹⁰ *I.C.J. Reports 1949*, p. 22.

¹⁹¹ Cf. Lammers's statement that, once the "rights of other States" have been established, the obligation recognized by the Court "may be resorted to to establish that States are not only obliged to prevent violations of those rights committed by their organs but are also obliged to prevent inroads on the interests protected by those rights through the conduct of individuals or private entities from within their territory" (*op. cit.* (footnote 77 above), p. 527).

¹⁹² Original French text of the arbitral award in: *Revue générale de droit international public* (Paris), vol. 62 (1958), pp. 79 *et seq.*; and United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*; partial translations in *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068; *The American Journal of International Law* (Washington, D.C.), vol. 53 (1959), pp. 156 *et seq.*; and *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.* For commentary, see, for example, J. G. Laylin and R. L. Bianchi, "The role of adjudication in international river disputes. The Lake Lanoux case", *The American Journal of International Law*, vol. 53 (1959), pp. 30 *et seq.*; F. Duléry, "L'affaire du lac Lanoux", *Revue générale de droit international public*, vol. 62 (1958), pp. 469 *et seq.*; A. Gervais, "L'affaire du lac Lanoux—étude critique de la sentence du tribunal arbitral", *Annuaire français de droit international, 1960* (Paris), vol. 6, pp. 372 *et seq.*; Lammers, *op. cit.* (footnote 77 above), pp. 508-517; Whiteman, *op. cit.* (footnote 78 (a) above), pp. 1066-1073; and Bleicher, *loc. cit.* (footnote 183 above), pp. 25-28.

¹⁹³ Whiteman, *op. cit.*, p. 1066.

¹⁹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 294.

¹⁹⁵ *Ibid.*, p. 285, third preambular paragraph of the arbitration *compromis*.

The Additional Act accompanying the 1866 Treaty of Bayonne, which fixed the border between France and Spain from Andorra to the Mediterranean, recognized existing rights on watercourses flowing from one country into the other or forming a boundary and required agreement between the two States before new construction that might change the régime or the volume of the watercourse.¹⁹⁶

112. Negotiations between France and Spain yielded no solution, and the parties entered into a *compromis* providing for the submission of the dispute to arbitration and referring the following question to the arbitral tribunal:¹⁹⁷

Is the French Government justified in its contention that, in carrying out, without a preliminary agreement between the two Governments, works for the use of the waters of Lake Lanoux on the terms laid down in the project and in the French proposals mentioned in the preamble to this *compromis*, it would not commit a violation of the provisions of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date?¹⁹⁸

While this formulation of the question suggests that the *compromis* limited the competence of the tribunal to the application and interpretation of the 1866 Treaty, the tribunal found that:

... when there is a matter for interpretation, this should be done according to international law; international law does not establish any absolute and rigid system of interpretation; it is, therefore, permissible to take into consideration the spirit which governed the Pyrenees treaties and the generally accepted rules of international law; ...¹⁹⁹

113. The tribunal concluded that the French project violated neither the 1866 Treaty nor the Additional Act. In the course of its opinion, the tribunal made a number of important statements concerning the rights and duties of States riparian to an international watercourse under general international law. Those that are most relevant to the present inquiry will be mentioned at this juncture; the others will be referred to subsequently in connection with other aspects of the topic.

114. Article 8 of the Additional Act provided that:

All still and running water, whether in the public or the private domain, shall be subject to the sovereignty of the country in which it is situated and, consequently, to that country's laws, except for such amendments as are agreed to by both Governments. . . .

In addressing the contention that "these amendments should be interpreted restrictively, because they derogated from sovereignty", the tribunal declared that it

could not accept so absolute a statement. Territorial sovereignty acts as a presumption. It must yield to all international obligations, whatever their origin, but only to them.

The question is, therefore, to determine what the obligations of the French Government are in this matter. . . .²⁰⁰

¹⁹⁶ Whiteman, *op. cit.*, p. 1066.

¹⁹⁷ "In accordance with the provisions of article 2 of the *compromis*, the arbitral tribunal comprised four members: Mr. Plinio Bolla and Mr. Paul Reuter (appointed by the French Government), Mr. Fernand de Visser and Mr. Antonio de Luna (appointed by the Spanish Government), and a President, Mr. Sture Petré (designated by the King of Sweden). It sat at Geneva and gave its award on 16 November 1957." (*Yearbook* . . . 1974, vol. II (Part Two), p. 195, document A/5409, para. 1061.)

¹⁹⁸ Art. 1 of the *compromis* (*ibid.*, para. 1060).

¹⁹⁹ Para. 2 (penultimate subparagraph) of the arbitral award (*ibid.*, para. 1063).

²⁰⁰ Para. 1 (second and third subparagraphs) of the award (*ibid.*).

115. The tribunal considered that the issue posed in the *compromis* could be reduced to two basic questions: first, whether the French project would in itself constitute a violation of Spain's rights under the 1866 Treaty and Additional Act; and secondly, if the answer to the first question were in the negative, whether the execution of the project without a prior agreement between the two countries would constitute a violation of the Treaty and Additional Act.

116. With respect to the first question, Spain had argued, as noted above (para. 111), that the project was unlawful because by altering natural conditions it would make "restitution of the waters to the Carol physically dependent upon human will". Spain based this argument on article 12 of the Additional Act. The tribunal observed:

According to the Spanish Government, this provision confirms the notion that neither of the Parties may, without the consent of the other, alter the natural order of the water's flow. . . . [But] the Spanish Government does not attribute an absolute meaning to respect for natural order; according to the counter-case . . . : "A State has the right to use unilaterally the part of a river which traverses it to the extent that this use is likely to cause on the territory of another State a limited harm only, a minimal inconvenience, which comes within the bounds of those that derive from good-neighbourliness."²⁰¹

117. The tribunal then characterized Spain's argument concerning the first question as consisting of two parts: first, the transfers of water by one riparian State to another basin without the consent of the other riparian State were prohibited, even if an equivalent amount were returned to the basin of origin; and secondly, that "all actions that may create along with a *de facto* inequality, the physical possibility of a violation of law" were prohibited without the consent of the other party.²⁰²

118. With regard to the first part of Spain's argument, the tribunal concluded that "withdrawal with return, as provided in the French project and proposals, is not in conflict with the Treaty and the Additional Act of 1866".²⁰³ In reaching this conclusion, it reasoned as follows:

... The Tribunal, from the viewpoint of physical geography, cannot disregard the reality of each river basin, which constitutes, as the Spanish case . . . contends, "a whole". But this fact does not justify the absolute consequences which the Spanish thesis seeks to draw from it. The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life. Water, which is by nature a fungible thing, may be restored without alteration of its qualities from the viewpoint of human needs. A withdrawal with return, as contemplated in the French project, does not alter a state of affairs established in response to the demands of life in society.²⁰⁴

²⁰¹ Para. 7 (third subparagraph) of the award (*ibid.*, p. 196, para. 1064).

²⁰² Para. 7 (fourth subparagraph) of the award (*ibid.*).

²⁰³ Para. 8 (third subparagraph) of the award (*ibid.*).

²⁰⁴ Para. 8 (first subparagraph) of the award (*ibid.*). The tribunal went on to note that, "in federations", court decisions had recognized the validity of the practice of inter-basin diversions for the purpose of generating electric power, referring to the decision by the Supreme Court of the United States of America in *Wyoming v. Colorado* (1922) (*United States Reports*, vol. 259 (1923), p. 419), and to the cases cited by Berber, *Die Rechtsquellen* . . . , *op. cit.* (footnote 77 above), p. 180, and by G. Sausser-Hall, "L'utilisation industrielle des fleuves internationaux", *Recueil des cours de l'Académie de droit international de La Haye, 1953-II* (Leyden, Sijthoff, 1955), vol. 83, p. 544.

119. The tribunal disposed of the second part of Spain's argument with the observation that, since France had given assurances that it would not interfere with the régime established under its proposals,

It could not be alleged that despite this commitment Spain would not have a sufficient guarantee, for it is a well-established general principle of law that bad faith is not presumed. . . .²⁰⁵

The tribunal concluded that:

. . . there is not, in the Treaty and Additional Act of 26 May 1866 or in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State.²⁰⁶

120. The tribunal then turned to the second basic question involved in the case, namely Spain's contention that the execution of the French project required "the preliminary agreement of the two Governments, and that in the absence of such agreement the country which proposed the project could not have freedom of action to undertake the works". Since Spain based its position not only on the Treaty and the Additional Act, but also on generally accepted rules of international law, the tribunal found that it was possible "to demonstrate the existence of an unwritten general rule of international law" established by, *inter alia*, "precedents . . . in the international practice of States concerning the industrial use of international waterways".²⁰⁷

121. The tribunal first made some general observations:

. . . To admit that in a given matter competence may no longer be exercised except on the condition of or by means of an agreement between two States is to place an essential restriction on the sovereignty of a State, and it may be allowed only if there is conclusive proof. Undoubtedly international practice discloses some specific cases in which this assumption is proved; . . . But these cases are exceptional and international case-law does not readily recognize their existence, especially when they infringe upon the territorial sovereignty of a State, which would be true in the present case.

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another State. This is to admit a "right of consent", a "right of veto", which at the discretion of one State paralyzes another State's exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. . . .²⁰⁸

The tribunal thus concluded that international practice did not permit it to decide anything more than the following:

. . . the rule that States may use the hydraulic power of international waterways only if a *preliminary* agreement between the States con-

cerned has been concluded cannot be established as a customary rule or, still less, as a general principle of law. . . .²⁰⁹

With regard to the foregoing point, the tribunal had stated:

. . . while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal . . . that the French project did not alter the waters of the Carol. . . .²¹⁰

122. Finally, the tribunal addressed the question whether France had complied with the obligations laid down in article 11 of the Additional Act, which required a State initiating works to give prior notice, and to develop a system of complaints and safeguards for "all the interests involved on one side and the other". The tribunal decided that France had complied with those obligations, but in so deciding it made further statements of a general nature which do not appear to be derived solely from the agreement of the parties (in this case, article 11). First of all, the tribunal noted that France's compliance with the obligation to give notice had not been contested. The tribunal next proceeded to consider the question "how 'all the interests involved on one side and the other' should be safeguarded".²¹¹ It was of the view that more was involved than the "interests corresponding to a right of the riparian population", and declared:

. . . Consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right. Only this solution is in accord with the terms of article 16 [of the Additional Act], the spirit of the Pyrenees Treaties, and *the trends apparent in current international practice as regards hydro-electric development*.²¹²

The tribunal went on to explain how, according to principles which are apparently of general applicability, these interests could be safeguarded. It stated that the procedure "cannot be reduced to purely formal requirements, such as taking note of complaints". Rather, according to the tribunal:

. . . the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.²¹³

123. But the tribunal did not stop there. In addressing the question whether France had taken Spanish interests sufficiently into consideration, the tribunal observed that "note must be taken of the intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted".²¹⁴ It found that France had given sufficient

²⁰⁵ Para. 9 (second subparagraph) of the award (*Yearbook* . . . 1974, vol. II (Part Two), p. 196, document A/5409, para. 1064).

²⁰⁶ *Ibid.*

²⁰⁷ Para. 10 (third subparagraph) of the award (*ibid.*, pp. 196-197, para. 1065).

²⁰⁸ Para. 11 (first, second and third subparagraphs) of the award (*ibid.*, p. 197, para. 1065).

²⁰⁹ Para. 13 (second subparagraph) of the award (*ibid.*, para. 1066). In reaching this conclusion, the tribunal relied upon the Geneva Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State (League of Nations, *Treaty Series*, vol. XXXVI, p. 77; see also *Yearbook* . . . 1974, vol. II (Part Two), pp. 57 *et seq.*, document A/5409, paras. 68-78).

²¹⁰ Para. 13 (first subparagraph) of the award (*Yearbook* . . . 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066).

²¹¹ Para. 22 (first subparagraph) of the award (*ibid.*, p. 198, para. 1068).

²¹² Para. 22 (second subparagraph) of the award (*ibid.*).

²¹³ Para. 22 (third subparagraph) of the award (*ibid.*).

²¹⁴ Para. 24 (penultimate subparagraph) of the award (*ibid.*).

consideration to Spanish interests and therefore that "the French project satisfies the obligations of article 11 of the Additional Act".

124. It has been seen that, in deciding the Lake Lanoux case, the arbitral tribunal had recourse to a number of principles of general international law, including some that pertain specifically to international watercourses. Among these principles are the following:

(1) territorial sovereignty "must yield to all international obligations, whatever their origin";

(2) "the unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life", and therefore a transfer of water out of a basin, accompanied by the return of water into it, with no significant alteration of quality or quantity, "does not alter a state of affairs established in response to the demands of life in society";

(3) "it is a well-established general principle of law that bad faith is not presumed";

(4) there is not to be found "in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State";

(5) in the factual context of the case, at least, international practice does not require prior agreement between the riparians, but "prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement";

(6) while it has no application to the facts of the case, "there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State";

(7) under "the trends apparent in current international practice as regards hydro-electric development", "consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right";

(8) "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own"; and

(9) there is an "intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted".

ii. The Trail Smelter arbitration²¹⁵

125. In this case, sulphur dioxide fumes emitted by a privately-owned zinc and lead smelter located at Trail

²¹⁵ For the texts of the awards of 16 April 1938 and 11 March 1941 in this case, see United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.* The awards

(British Columbia) in Canada, seven miles from the border with the United States of America, were carried by the prevailing winds across the border into the State of Washington in the United States, where they caused damage to crops and timber, also privately owned. The case thus does not involve international watercourses, but because the damage was inflicted through the medium of an airshed²¹⁶ common to the areas of Canada and the United States involved—much like a boundary lake—it is believed to be analogous to the kinds of situation under consideration.

126. As John E. Read has observed:

... The subject-matter of the dispute did not directly concern the two Governments; nor did it involve claims by United States citizens against the Canadian Government. It did not seem to come within any of the ordinary categories of arbitrable international disputes. It consisted rather of claims based on nuisance, alleged to have been committed by a Canadian corporation and to have caused damage to United States citizens and property in the State of Washington.²¹⁷

Private remedies at the level of municipal law being unavailable,²¹⁸ however, the two Governments ultimately²¹⁹ entered into an agreement for the "final settlement" of the dispute.²²⁰ The Convention provided, *inter alia*: (a) that Canada would pay the United States \$US 350,000 for "all damage which occurred in the United States, prior to the first day of January, 1932, as

are summarized and excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 192 *et seq.*, document A/5409, paras. 1049-1054. The 1941 award, which will be focused upon here, is reproduced in *The American Journal of International Law* (Washington, D.C.), vol. 35 (1941), p. 684. See the commentary by John E. Read, Legal Adviser to Canada's Secretary of State for External Affairs during the dispute, "The Trail Smelter dispute", *The Canadian Yearbook of International Law*, 1963 (Vancouver), vol. I, p. 213. See also J. Androssy, "Les relations internationales de voisinage", *Recueil des cours . . .*, 1951-II (Paris, Sirey, 1952), vol. 79, pp. 92 *et seq.*

²¹⁶ *Webster's New Twentieth Century Dictionary of the English Language, Unabridged*, 2nd ed. (New York, Simon and Schuster, 1983), p. 41, defines "airshed" as "an area of varying size that is dependent on a single air mass and that is uniformly affected by the same sources of air pollution".

²¹⁷ *Loc. cit.* (footnote 215 above), pp. 213-214.

²¹⁸ The Constitution of the State of Washington did not permit the acquisition of a smoke easement by an alien and, under the precedent established by the House of Lords in *British South Africa Company, v. Companhia de Moçambique* (1893) (United Kingdom, *The Law Reports*, 1893, p. 602), the courts of British Columbia would have lacked jurisdiction over an action to recover for damage to foreign land. Read states:

"It was the general opinion of the lawyers concerned at the time that the British Columbia courts would be compelled to refuse to accept jurisdiction in suits based on damage to land situated outside of the province." (*Loc. cit.* (footnote 215 above), p. 222.)

See also S. C. McCaffrey, "Transboundary pollution injuries: Jurisdictional considerations in private litigation between Canada and the United States", *California Western International Law Journal* (San Diego, Cal.), vol. 3 (1973), pp. 224-229.

²¹⁹ The negotiations and steps taken by the two States leading up to the submission of the dispute to arbitration began in 1927 and included referral of the problem to the International Joint Commission established by the 1909 Boundary Waters Treaty (see footnote 78 (a) above). See, in this connection, Read, *loc. cit.*, pp. 213-214.

²²⁰ Convention of 15 April 1935 for the final settlement of the difficulties arising through complaints of damage done in the State of Washington by fumes discharged from the smelter of the Consolidated Mining and Smelting Company, Trail, British Columbia (League of Nations, *Treaty Series*, vol. CLII, p. 73; and United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1907).

a result of the operation of the Trail Smelter" (art. I);²²¹ (b) that the two Governments would constitute a tribunal (art. II),²²² which would decide the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions? (Art. III.)

and (c) that, in deciding those questions, the tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned. (Art. IV.)

The tribunal delivered its decision on the first of the above questions in its interim award of 16 April 1938,²²³ and on the other questions in its final award of 11 March 1941.²²⁴ In its first award, the tribunal answered question No. 1 by finding that damage had indeed occurred since 1 January 1932, and determining that \$78,000 should be paid as indemnity therefor.²²⁵ It also found that it was "unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention",²²⁶ because its terms of reference included only the questions of the existence of damage and the amount of indemnity due therefor, which Canada had promised to pay. In its second award, the tribunal addressed the remaining three questions.²²⁷ It first observed that a balance had to be struck between the interests of industry and those of the agricultural community. In this regard, it took note of the parties' desire to reach a "just solution", which it interpreted to mean one

which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained if, in spite of such restrictions and limitations, damage should occur in the future in the United States.²²⁸

The tribunal found that it was not necessary to decide whether to apply United States or international law, "as

²²¹ This had been the sum recommended by the International Joint Commission, to which the Trail Smelter problem had been referred by the two Governments in 1928 pursuant to article IX of the 1909 Boundary Waters Treaty.

²²² The tribunal constituted pursuant to article II was composed of: Charles Warren (appointed by the United States); Robert A. E. Greenshields (appointed by Canada); and Jan Frans Hostie, Chairman (appointed by the two Governments jointly).

²²³ United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1911.

²²⁴ *Ibid.*, p. 1938.

²²⁵ *Ibid.*, p. 1931.

²²⁶ *Ibid.*, p. 1932.

²²⁷ It also completed the answer to question No. 1 by finding, contrary to the claim of the United States, that no damage had occurred since 1 October 1937 (the end of the period covered by the sum of \$78,000 under the first award) (*ibid.*, p. 1962).

²²⁸ *Ibid.*, p. 1939.

the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law".²²⁹

127. The tribunal referred to Eagleton's statement that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction",²³⁰ and observed that "a great number of such general pronouncements by leading authorities" had been presented to it.²³¹ It stated:

. . . International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, [which] has not been questioned by Canada.²³²

Noting the lack of international cases involving air pollution, the tribunal stated that "the nearest analogy is that of water pollution", but found no international decisions in that area either. The tribunal therefore turned to decisions of the United States Supreme Court dealing with air and water pollution, finding that they

may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the constitution of the United States.²³³

After discussing a number of decisions of the United States Supreme Court in cases involving inter-State air and water pollution, as well as a case decided by the Federal Court of Switzerland involving complaints by one canton concerning dangers posed by a shooting-range in a neighbouring canton,²³⁴ the tribunal stated the principle for which the arbitration is most often cited:

The Tribunal . . . finds that the above [United States Supreme Court] decisions, taken as a whole, constitute an adequate basis for its conclusions, namely that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²³⁵

The tribunal accordingly went on to hold that:

. . . the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.²³⁶

The tribunal therefore answered question No. 2 in the affirmative, finding specifically that the smelter should

²²⁹ *Ibid.*, p. 1963.

²³⁰ C. Eagleton, *The Responsibility of States in International Law* (New York, University Press, 1928), p. 80.

²³¹ United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1963.

²³² *Ibid.*

²³³ *Ibid.*, p. 1964.

²³⁴ *Solothurn v. Aargau*, judgment of 1 November 1900, *Recueil officiel des arrêts du Tribunal fédéral suisse, 1900*, vol. XXVI, part I, p. 444.

²³⁵ United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1965.

²³⁶ *Ibid.*, pp. 1965-1966.

refrain from causing such damage in the State of Washington as would be "recoverable" in suits between private individuals in United States courts.²³⁷ With regard to question No. 3, the tribunal prescribed a régime which regulated the operation of the smelter and which the tribunal believed would "probably result in preventing any damage of a material nature".²³⁸ But the tribunal went on to rule, in its answer to question No. 4, that:

... if any damage ... shall occur in the future, whether through failure on the part of the smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage ...²³⁹

128. The implications of the awards in the *Trail Smelter* case have been thoroughly analysed elsewhere, most notably in a lucid report by the late Robert Q. Quentin-Baxter.²⁴⁰ Suffice it for present purposes to say that the tribunal endeavoured to achieve a "just solution" to the controversy by striking the following balance between the industrial and agricultural interests involved: it allowed the smelter to continue to operate under a strict regulatory régime and required the Washington landowners to tolerate any minor damage that might none the less ensue; if the landowners suffered material damage, however, they were to be compensated, even if such damage resulted from the smelter's operation in compliance with the tribunal's régime. The agricultural and industrial interests were thus accommodated by allowing the smelter to continue to operate on the condition that the landowners would be compensated for any material damage it caused. The solution arrived at by the tribunal is thus an apt illustration of a general observation of R. Q. Quentin-Baxter:

It is ... a feature of the modern world—of which there is ample evidence in the jurisprudence of the [ICJ]—that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules. ...²⁴¹

iii. Other arbitral awards

129. There are several other arbitral awards which are perhaps not so prominent or apposite to the question of equitable utilization as the two just discussed, but which should be touched upon for the sake of completeness.

130. The first two awards are those rendered in the *Helmand River Delta* case between Afghanistan and Persia (Iran) on 19 August 1872 and 10 April 1905.²⁴²

²³⁷ *Ibid.*, p. 1966.

²³⁸ *Ibid.*, p. 1980.

²³⁹ *Ibid.*

²⁴⁰ "Second report on international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook ... 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, paras. 22-40.

²⁴¹ *Ibid.*, p. 115, para. 54, citing the decisions of the ICJ in the *Fisheries* case (United Kingdom v. Norway), Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 116, and in the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

²⁴² Concerning this dispute, see C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Calcutta, Government of India Central Publication Branch, 1933), vol. XIII, pp. 34-35 and 209 *et seq.* See also *Yearbook ... 1974*, vol. II (Part Two), pp. 188 *et seq.*, document A/5409,

The Helmand (or Hirmand) rises in, and flows for most of its course through Afghanistan, but forms the boundary between that country and Iran for about 12 miles before dividing and flowing into lakes in Afghanistan and Iran. A dispute between Afghanistan and Persia concerning the delimitation of their boundary and the use of the waters of the Helmand River was submitted in 1872 to arbitration by a British Commissioner, Sir Frederick Goldsmid. In his award of 19 August 1872, the arbitrator stated, *inter alia*:

... It is moreover to be well understood that no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand.²⁴³

131. A change in the channel of the Helmand led in 1902 to a second arbitration concerning the boundary and the allocation of the waters of that river. The arbitrator, Sir Henry McMahon, rendered an award on 10 April 1905 which effected a slight change in the boundary and a new allocation of the waters.²⁴⁴ While the portion of the award concerning the boundary was accepted by both States, the other part, which allocated to Persia one third of the Helmand waters measured at a point approximately 35 miles inside Afghanistan,²⁴⁵ was accepted only in part by Afghanistan and rejected entirely by Persia, on the ground that it had been treated more favourably under the previous Goldsmid award.²⁴⁶

132. The Goldsmid award, which continued to govern the distribution of the waters of the Helmand, did attempt to achieve an equitable allocation by requiring that no works on either side of the river were to interfere with "the requisite supply of water for irrigation" on the other. The McMahon award recognized substantial rights in the downstream State. While that State, Persia, did not find the award acceptable, the upstream State did accept it in part.

133. Other arbitral awards concerning international rivers principally concern delimitation of boundaries and navigation.²⁴⁷ A final award that is of some interest

paras. 1034-1037; Whiteman, *op. cit.* (footnote 78 (a) above), pp. 1031-1032; and Lammers, *op. cit.* (footnote 77 above), pp. 302-304 and 505.

²⁴³ See *Yearbook ... 1974*, vol. II (Part Two), p. 189, document A/5409, para. 1035 and footnote 840.

²⁴⁴ The text of the McMahon award appears in Aitchison, *op. cit.* (footnote 242 above), pp. 285-286; and in *Yearbook ... 1974*, vol. II (Part Two), pp. 189-190, document A/5409, para. 1036.

²⁴⁵ Clause III of the McMahon award.

²⁴⁶ See Aitchison, *op. cit.*, p. 35. See also Whiteman, *op. cit.*, p. 1031.

²⁴⁷ See, for example, the award of 22 March 1888 by Grover Cleveland, President of the United States of America, as arbitrator in the case between Costa Rica and Nicaragua concerning San Juan River (text in J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (Washington (D.C.), 1898), vol. II, pp. 1964 *et seq.*; excerpted in *Yearbook ... 1974*, vol. II (Part Two), pp. 190-191, document A/5409, paras. 1038-1041); and the award in the Faber case between Germany and Venezuela by the German-Venezuelan Mixed Claims Commission constituted under the Protocol of 13 February 1903 (text in United Nations, *Reports of International Arbitral Awards*, vol. X (Sales No. 60.V.4), pp. 438 *et seq.*, and J. H. Ralston, *Venezuelan Arbitrations of 1903* (Washington (D.C.), 1904), p. 600; excerpted in *Yearbook ... 1974*, vol. II (Part Two), p. 192, document A/5409, paras. 1047-1048).

An award which did involve non-navigational uses is the one of 22 August (3 September) 1893 delivered in the Kushk River case by an

for present purposes is that rendered on 4 April 1928 in the *Island of Palmas* case between the United States of America and the Netherlands.²⁴⁸ Those States submitted to arbitration by Max Huber, acting for the Permanent Court of Arbitration, the question "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory". The case thus does not involve international watercourses or even use of natural resources, but resolution of conflicting territorial claims to an island. In the award, however, Huber stated the following general principle, which is of relevance for the present study:

Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.²⁴⁹

While, as in the *Corfu Channel* case, this statement does not define the rights of other States that are to be protected by the territorial State, it does reinforce the principle underlying the other decisions that the sovereign rights of States are correlative.

(iv) *Other international instruments*

134. A number of intergovernmental and non-governmental bodies have adopted statements of principles concerning the non-navigational uses of international watercourses. These instruments overwhelmingly support the principle of equitable utilization by States of international watercourses. Many of them are conveniently collected in the report by the Secretary-General on legal problems relating to the utilization and use of international rivers²⁵⁰ and the supplement thereto.²⁵¹ In order to avoid unduly prolonging the present survey, not all of them will be mentioned here. It is hoped that a few representative examples will suffice to illustrate the positions typically taken. The instruments are organized according to their nature and the type of body that produced them.

Anglo-Russian commission with a view to elucidating and completing clause III of Protocol No. 4 of 10 (22) July 1887 between Great Britain and Russia (text in Aitchison, *op. cit.* (footnote 242 above), p. 253; excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 191-192, document A/5409, paras. 1042-1046). That award, rendered by a commission composed of one national of each of the States involved, concerned the application of an earlier (1885) agreement between them. The award, set forth in a protocol, essentially allocated the waters on the basis of the point on the river from which the water was taken (or flowed, in the case of a canal).

²⁴⁸ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), pp. 829 *et seq.*

²⁴⁹ *Ibid.*, p. 839.

²⁵⁰ Document A/5409, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 33.

²⁵¹ Document A/CN.4/274, *ibid.*, p. 265.

a. *Declarations and resolutions adopted by intergovernmental organizations, conferences and meetings*

135. The Declaration of Montevideo concerning the industrial and agricultural use of international rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24 December 1933,²⁵² includes the following provisions:

. . .

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

. . .

4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers.²⁵³

136. The Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay and Uruguay) at their Fourth Meeting, from 1 to 3 June 1971,²⁵⁴ contains the Declaration of Asunción on the Use of International Rivers,²⁵⁵ paragraphs 1 and 2 of which provide:

1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.

2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.

137. Argentina signed three other instruments in 1971 dealing with international watercourses: the Act of Santiago of 26 June 1971 concerning hydrologic basins (with Chile),²⁵⁶ the Declaration of 9 July 1971 on water resources (with Uruguay)²⁵⁷ and the Act of Buenos Aires of 12 July 1971 on hydrologic basins (with Bolivia).²⁵⁸ The following provisions of the Act of Santiago are typical:

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

. . .

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

. . .

138. The United Nations Conference on the Human Environment of 1972 adopted the Declaration on the

²⁵² See footnote 150 above.

²⁵³ See the reservations by Venezuela and Mexico and the declaration by the United States of America, in *The International Conferences of American States . . .*, *op. cit.* (footnote 150 above), pp. 105-106; and *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A.

²⁵⁴ Text reproduced in OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in *Yearbook . . . 1974*, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

²⁵⁵ Resolution No. 25 annexed to the Act of Asunción.

²⁵⁶ See *Yearbook . . . 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.

²⁵⁷ *Ibid.*, pp. 324-325, para. 328.

²⁵⁸ *Ibid.*, p. 325, para. 329.

Human Environment (Stockholm Declaration),²⁵⁹ Principle 21 of which provides:

Principle 21

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

The Conference also adopted an "Action Plan for the Human Environment",²⁶⁰ Recommendation 51 of which provides:

Recommendation 51

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.

...

(b) The following principles should be considered by the States concerned when appropriate:

...

- (ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;
- (iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;

...

139. The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held at Mar del Plata (Argentina) in 1977,²⁶¹ contains a number of recommendations and resolutions concerning the management and utilization of water resources. Recommendation 7 calls upon States to frame "effective legislation . . . to promote the efficient and equitable use and protection of water and water-related ecosystems".²⁶² With regard to international co-operation, the Action Plan provides, in Recommendations 90 and 91:

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.²⁶³

²⁵⁹ 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. I.

²⁶⁰ *Ibid.*, chap. II, sect. B.

²⁶¹ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), part one.

²⁶² *Ibid.*, p. 11.

²⁶³ *Ibid.*, p. 53.

b. Reports and studies prepared by intergovernmental organizations or by conferences of government experts

140. The report of the Permanent Committee on Public International Law on the general principles which may facilitate regional agreements between adjacent States on the industrial and agricultural use of the waters of international rivers, adopted at Rio de Janeiro on 23 July 1932 and submitted to the Seventh International Conference of American States (Montevideo, 1933), defined "the right of a riparian State with respect to the use of fluvial waters for industrial purposes in general, and agricultural purposes in particular" as being "an exclusive right, but limited in its exercise by the necessity of not prejudicing the equal right of a neighbouring State".²⁶⁴

141. The report entitled *Integrated River Basin Development*, submitted in November 1957 by a panel of experts constituted by the Secretary-General of the United Nations pursuant to Economic and Social Council resolution 599 (XXI) of 3 May 1956,²⁶⁵ states that, "pending establishment of an accepted international code, it is suggested that the Dubrovnik draft statement of principles affords a sound basic philosophy for planning and executing a project for integrated river development in an international river basin".²⁶⁶ The principles adopted by the International Law Association at its Forty-seventh Conference, held at Dubrovnik in 1956,²⁶⁷ included the following:

III. While each State has sovereign control over the international rivers within its own boundaries, the State must exercise this control with due consideration for its effects upon other riparian States.

IV. A State is responsible, under international law, for public or private acts producing change in the existing régime of a river to the injury of another State, which it could have prevented by reasonable diligence.

V. In accordance with the general principle stated in No. III above, the States upon an international river should in reaching agreements, and States or tribunals in settling disputes, weigh the benefit to one State against the injury done to another through a particular use of the water. . . .²⁶⁸

142. In a report submitted in 1971 to the Committee on Natural Resources of the Economic and Social Council, the Secretary-General recognized that: "Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers."²⁶⁹ The report went on to note that international water resources, which were defined as water in a natural hydrological system shared by two or

²⁶⁴ Para. 2 of the report, reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 213, document A/5409, annex II.A.

²⁶⁵ The revised edition of the report appeared in 1970 (United Nations publication, Sales No. E.70.II.A.4); extracts of the text published in 1958 are reproduced *ibidem*, pp. 215 *et seq.*, annex II.B.

²⁶⁶ Chap. IV of the report, under the heading "Inadequacy of relevant international law".

²⁶⁷ ILA, *Report of the Forty-seventh Conference, Dubrovnik, 1956*, (London, 1957), pp. x-xii, resolution 3; text reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 203, document A/5409, para. 1080.

²⁶⁸ The last-quoted principle goes on to list a number of factors that should be taken into consideration in the weighing process referred to therein.

²⁶⁹ E/C.7/2/Add.6, para. 1.

more countries, offer "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action."²⁷⁰

143. The Asian-African Legal Consultative Committee in 1969 created an inter-sessional Sub-Committee to prepare draft articles on the law of international rivers. In 1971, this body was succeeded by a new Sub-Committee, and in 1972 the Committee established a Standing Sub-Committee. In 1973, the Sub-Committee recommended to the plenum that it consider the Sub-Committee's report at an opportune time at a future session. The revised draft propositions submitted by the Sub-Committee's Rapporteur follow closely the Helsinki Rules adopted in 1966 by the International Law Association (see para. 154 below). Proposition III provides in part as follows:

1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case.²⁷¹

144. The secretariat of the Economic Commission for Europe prepared a study on the legal aspects of the hydroelectric development of rivers and lakes of common interest, which was published in 1950.²⁷² The study contains the following statements:

A State has the right to develop unilaterally that section of the waterway which traverses or borders its territory, in so far as such development is liable to cause in the territory of another State only slight injury or minor inconvenience compatible with good-neighbourly relations.

On the other hand, when the injury liable to be caused is serious and lasting, development works may only be undertaken under a prior agreement.²⁷³

The study goes on to inquire whether it is possible to establish a criterion for distinguishing between slight and serious injury, and concludes that the determination must be made on a case-by-case basis in the light of the prevailing circumstances.

145. In Recommendation No. 4 adopted at its eleventh session in 1954, the Committee on Electric Power:

Recommends that a State proposing to embark within its own territory on projects likely to have serious repercussions on the territory of other States, whether upstream or downstream, should first communicate to the States concerned such information as would enlighten them as to the nature of those repercussions;

Recommends that, in the event of objections being raised by the States concerned following such prior notification, the State proposing to embark on the projects should endeavour, by negotiations with

²⁷⁰ *Ibid.*, para. 3.

²⁷¹ The next paragraph of proposition III contains a non-exhaustive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. See Asian-African Legal Consultative Committee, *Report of the Fourteenth Session held at New Delhi* (10-18 January 1973) (New Delhi), pp. 7-14; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

²⁷² The revised text of the study appeared in 1952 as document E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1 (see footnote 77 above).

²⁷³ *Ibid.*, para. 191. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 330, document A/CN.4/274, para. 340.

those States, to reach an agreement such as will ensure the most economic development of the river system.²⁷⁴

146. In 1968, the Secretary-General of the United Nations constituted a Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, whose report, entitled *Management of International Water Resources: Institutional and Legal Aspects*,²⁷⁵ was published in 1975. In the section of the report dealing with "The need for international co-operation or collaboration", it is stated:

Each basin State should recognize the legitimacy of the interest that its co-basin States have in the use of the waters of their international drainage basin or water resources system and should be disposed to co-operate to optimize the uses of the resource and to seek management of the system on a system-wide, long-term basis. This includes minimizing, if not eliminating, deleterious consequences to other States of one State's uses, or water-related activities. Furthermore, non-co-operation and failure to provide affirmatively for the rational management of the system will in the long run prove to be detrimental to the national interest of each basin or system State, to the extent that water in the system bears a relationship to the human welfare and economic development of the States concerned, and also by having a disruptive influence on bilateral relations generally.²⁷⁶

147. The study entitled *The Control of Marine Pollution and the Protection of Living Resources of the Sea: A Comparative Study of International Controls and National Legislation and Administration*, presented in 1970 to the FAO Technical Conference on Marine Pollution and its Effects on Living Resources and Fishing,²⁷⁷ contains the following passage dealing with the current state of customary international law:

. . . Briefly, the theory of absolute territorial sovereignty prevailing at the beginning of the century, which holds that each State has sovereign power to do what it likes in its own territory, regardless of the results outside that territory, is now treated with disfavour. So also is the contrary view that a State may do nothing within its territory which may produce harmful effects, however slight, within the territory of another State. So far as inland water pollution is concerned, most legal writers now adopt a compromise position between these two extremes, which requires that a State should act in such a way as to avoid causing appreciable and unreasonable harm on the territory of a neighbouring State.²⁷⁸

148. In 1972, the Legal Office (Legislative Branch) of FAO prepared a draft agreement on water utilization and conservation in the Lake Chad Basin as part of its technical assistance to the Lake Chad Basin Commission. Article V of that draft provides:

(1) Each Member State shall be entitled, within its territory, to a reasonable and equitable share in the beneficial utilization of the water resources of the Basin.

(2) At the request of any Member State, the Commission may determine what constitutes a reasonable and equitable share, taking into account all relevant hydrological, ecological, economic and social circumstances.²⁷⁹

²⁷⁴ E/ECE/EP/147. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 331, document A/CN.4/274, para. 343.

²⁷⁵ Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2).

²⁷⁶ *Ibid.*, p. 18, para. 53.

²⁷⁷ FAO, document FIR: MP/70/R-15.

²⁷⁸ *Ibid.*, p. 6; cited in *Yearbook . . . 1974*, vol. II (Part Two), p. 335, document A/CN.4/274, para. 357.

²⁷⁹ FAO/UNDP, *Survey of the Water Resources of the Chad Basin for Development Purposes—Surface Water Resources in the Lake Chad Basin*, Technical Report 1 (AGL: DP/RAF/66/579), appendix I, pp. 125 *et seq.*; the text of the draft is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 335-337, document A/CN.4/274, para. 358.

149. On 12 May 1969, the Consultative Assembly of the Council of Europe adopted Recommendation 555 (1969),²⁸⁰ in which it recommended "that the Committee of Ministers instruct a committee of governmental experts to prepare as rapidly as possible a European convention based on the following draft". The preamble of the draft convention provides that the member States of the Council of Europe consider that "it is a general principle of international law that no country is entitled to exploit its natural resources in a way that may cause substantial damage in a neighbouring country", and that these States are "desirous of implementing the principle of the equitable utilization of the waters of international drainage basins". Article 2, paragraph 1, of the draft provides in part:

1. Contracting States shall take measures to abate any existing pollution and to prevent any new form of water pollution or any increase in the degree of existing water pollution causing or likely to cause substantial injury or damage in the territory of any other contracting State. . . .²⁸¹

150. In 1963, the Inter-American Juridical Committee of OAS²⁸² adopted a draft convention on the industrial and agricultural use of international rivers and lakes. After member States had commented on the draft, the Committee prepared a revised draft convention in 1965,²⁸³ relevant provisions of which are as follows:

Article 4

The right of a State to industrial or agricultural utilization of the waters of an international river or lake that are under its sovereignty does not imply non-recognition of the eventual right of the other riparian States.

Article 5

The utilization of the waters of an international river or lake for industrial or agricultural purposes must not . . . cause substantial injury, according to international law, to the riparian States . . .

Article 6

In cases in which the utilization of an international river or lake results or may result in damage or injury to another interested State, the consent of that interested State shall be required, as well as the payment or indemnification for any damage or harm done, when such is claimed.²⁸⁴

²⁸⁰ Council of Europe, Consultative Assembly, Committee on Regional Planning and Local Authorities, "Report on a Draft European Convention on the Protection of Fresh Water against Pollution" (document 2561). The draft convention is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 343 *et seq.*, document A/CN.4/274, para. 374.

²⁸¹ The Committee of Ministers, after considering the draft convention, decided that it did not, "in its present form, provide a suitable basis for [concentrated] action", principally because of the provisions of chapter III (arts. 7 *et seq.*) concerning State liability (Council of Europe, Committee of Ministers, document CM (70) 134; text reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 345-346, document A/CN.4/274, para. 375). It does not appear that the provisions quoted above, in particular those concerning equitable utilization, presented significant obstacles.

²⁸² Although OAS is an intergovernmental organization, and the Committee is an organ of OAS, it is recognized that the members of the Committee serve in their individual expert capacities and not as representatives of States.

²⁸³ *Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting* (OEA/Ser.I/VI.1, CIJ-83) (Washington (D.C.), 1966), pp. 7-10; the text of the draft convention is reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 349-351, document A/CN.4/274, para. 379.

²⁸⁴ Article 8 provides in part: "A State that plans to build works for utilization of an international river or lake must first notify the other interested States."

c. Studies by international non-governmental organizations

151. A number of studies of the law of the non-navigational uses of international watercourses have been conducted by groups of experts on international law, the most prominent of which are those of the Institute of International Law and the International Law Association. These studies all embody the principle of equitable utilization.

152. At its Madrid session, in 1911, the Institute of International Law adopted a resolution on "International regulations regarding the use of international watercourses",²⁸⁵ which provided in part:

I. When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc. thereof.

The foregoing provisions are likewise applicable to a lake lying between the territories of more than two States.

II. When a stream traverses successively the territories of two or more States:

. . .

(2) All alterations injurious to the water, the emptying therein of injurious matter (from factories, etc.) is forbidden;

(3) No establishment (especially factories using hydraulic power) may take so much water that the constitution, otherwise called the utilizable or essential character, of the stream shall, when it reaches the territory downstream, be seriously modified;

. . .

(5) A State situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation;

. . .²⁸⁶

153. At its Salzburg session, in 1961, the Institute adopted another resolution concerning the non-navigational uses of international watercourses.²⁸⁷ This text, entitled "Utilization of non-maritime international waters (except for navigation)", provides in part:

Article 1

The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

²⁸⁵ *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24 (1911), pp. 365-367. The resolution was based on the second report of the Rapporteur, L. von Bar, *ibid.*, pp. 168-183.

²⁸⁶ In the "Statement of reasons" accompanying the regulations, the Institute stated that it seemed expedient to remedy the fact that "the use of water for the purposes of industry, agriculture, etc." had not theretofore been "foreseen by international law", by "noting the rules of law resulting from the interdependence which undoubtedly exists between riparian States with a common stream and between States whose territories are crossed by a common stream" (*ibid.*, p. 365).

²⁸⁷ The resolution, which was based on the final report of the Rapporteur, J. Andrassy, submitted at the Institute's Neuchâtel session in 1959 (*Annuaire de l'Institut de droit international, 1959* (Basel), vol. 48, tome I, pp. 319 *et seq.*), was adopted by 50 votes to none, with one abstention; for the text, see *Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, tome II, pp. 381-384; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

Article 2

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

Article 3

If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

Article 4

No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

Article 5

Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

154. The International Law Association (ILA) has studied the topic of the non-navigational uses of international watercourses since consideration of the subject was first proposed to the Association by Clyde Eagleton at its Forty-sixth Conference, held at Edinburgh in 1954.²⁸⁸ The Association has produced a number of drafts relating to the topic,²⁸⁹ the most notable of which is that entitled "Helsinki Rules on the Uses of the Waters of International Rivers", adopted at its Fifty-second Conference, held at Helsinki in 1966.²⁹⁰ Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains the following relevant provisions:

²⁸⁸ See ILA, *Report of the Forty-sixth Conference, Edinburgh, 1954* (London, 1955), pp. 324 *et seq.*

²⁸⁹ The drafts adopted by the International Law Association concerning the uses of the waters of international rivers are the following:

The resolution adopted at the Forty-seventh Conference, held at Dubrovnik in 1956, containing a statement of principles on which to base rules of law concerning the use of international rivers, extracts from which are quoted in paragraph 141 (see footnote 267 above).

The statement of "Agreed principles of international law", principle 2 of which provides in part:

"... each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case."

(See the third report of the Committee on the Uses of the Waters of International Rivers, submitted to the Forty-eighth Conference, held in New York in 1958 (ILA, *Report of the Forty-eighth Conference, New York, 1958* (London, 1959), pp. 99 *et seq.*; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 204-205, document A/5409, para. 1082).)

The "Hamburg Recommendations on Procedure concerning Non-Navigational Uses", recommending that, in the event of a difference between co-riparian States as to their legal rights or interests, the States concerned should enter into consultations, and that, if the consultations do not resolve the dispute, the States should agree to form an *ad hoc* commission, the composition and procedures of which are set out in the recommendations (ILA, *Report of the Forty-ninth Conference, Hamburg, 1960* (London, 1961), pp. xvi-xviii). See also the "Hamburg Recommendation on Pollution Control" (*ibid.*, p. xviii). Both texts are reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 205-206, document A/5409, para. 1084.

²⁹⁰ See footnote 79 above.

Article IV

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

Article V

1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

Paragraph 2 of article V contains a non-exhaustive list of 11 factors to be considered in determining what is a reasonable and equitable share of the beneficial uses of the waters of an international drainage basin. The provisions of the Helsinki Rules concerning water pollution, contained in chapter 3, were elaborated in the Rules on Water Pollution in an International Drainage Basin, approved by the Association at its Sixtieth Conference, held at Montreal in 1982.²⁹¹ Article 1 of the Montreal Rules provides that States shall, in particular:

(a) prevent new or increased water pollution that would cause substantial injury in the territory of another State;

(b) take all reasonable measures to abate existing water pollution to such an extent that no substantial injury is caused in the territory of another State; and

(c) attempt to further reduce any such water pollution to the lowest level that is practicable and reasonable under the circumstances.

The Montreal Rules go on to provide, *inter alia*, that "States shall co-operate with the other States concerned" in order to give effect to the articles (art. 4); that basin States shall regularly inform other concerned States about pollution of waters in the basin, notify them "in due time of any activities envisaged in their own territories that may involve a significant threat of, or increase in, water pollution in the territories of those other States", and "promptly inform States that might be affected of any sudden change of circumstances that may cause or increase water pollution in the territories of those other States" (art. 5); that basin States "shall consult one another on actual or potential problems of water pollution in the drainage basin" in a way that will not "unreasonably delay the implementation of plans that are the subject of the consultation" (art. 6); and that:

When it is contended that the conduct of a State is not in accordance with its obligations under these articles, that State shall promptly enter into negotiations with the complaining State with a view of reaching a solution that is equitable under the circumstances. (Art. 10.)

155. A final study by an international non-governmental organization that is worthy of note in the present context is that conducted under the auspices of the Inter-American Bar Association, the results of which are embodied in a resolution adopted unanimously at the Association's Tenth Conference, held at Buenos Aires in 1957.²⁹² The resolution, which concerns the principles of law governing the use of international rivers, provides in part:

1. That the following general principles, which form part of existing international law, are applicable to every watercourse or system

²⁹¹ ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 535 *et seq.*

²⁹² Inter-American Bar Association, *Proceedings of the Tenth Conference, Buenos Aires, 1957* (Buenos Aires, 1958), pp. 82-83; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.

of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States (such a system being referred to hereinafter as a "system of international waters"):

1. Every State having under its jurisdiction a part of a system of international waters has the right to make use of the waters thereof in so far as such use does not affect adversely the equal right of the States having under their jurisdiction other parts of the system;

2. States having under their jurisdiction a part of a system of international waters are under a duty, in the application of the principle of equality of rights, to recognize the right of the other States having jurisdiction over a part of the system to share the benefits of the system, taking as the basis the right of each State to the maintenance of the status of its existing beneficial uses and to enjoy, according to the relative needs of the respective States, the benefits of future developments. In cases where agreement cannot be reached, the States should submit their differences to an international court or an arbitral commission;

3. States having under their jurisdiction a part of a system of international waters are under a duty to refrain from making changes in the existing régime that might affect adversely the advantageous use by one or more other States having a part of the system under their jurisdiction, except in accordance with (i) an agreement with the State or States affected or (ii) a decision of an international court or arbitral commission;

At its Fifteenth Conference, held at San José (Costa Rica) in 1967, the Association adopted another resolution, which provides in part:

3. International waters have for America unique importance to the extent that it is difficult to imagine a social and economic development and integration of the continent without an equitable and adequate usage of such waters, in achieving which the law has a substantial function;²⁹³

(v) *The views of publicists*

156. Writings relating to the law of the non-navigational uses of international watercourses in general, and to equitable utilization in particular, are too numerous even to summarize in this review of authorities. Several works of particular note will be mentioned, however, in an effort to provide a representative sample of the views of publicists on the subject of the rights of States under international law in respect of the utilization of international watercourses.

157. Commentators who have studied the subject overwhelmingly support the doctrine of equitable utilization as a rule of general international law.²⁹⁴ In

²⁹³ Inter-American Bar Association, *Resolutions, Recommendations and Declarations approved by the XVth Conference, San José (Costa Rica), 1967*, pp. 1-2; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 356, document A/CN.4/274, para. 401.

²⁹⁴ Writers of treaties on the law of international watercourses support the proposition that the doctrine of equitable utilization is part of the corpus of general international law. See, for example, E. Caratheodory, *Du droit international concernant les grands cours d'eau* (Leipzig, Brockhaus, 1861), p. 32; H. P. Farnham, *The Law of Waters and Water Rights; International, National, State, Municipal and Individual, including Irrigation, Drainage and Municipal Water Supply* (Rochester (N.Y.), The Lawyers Co-operative Publishing Co., 1904); A. Lederle, *Das Recht der internationalen Gewässer unter besonderer Berücksichtigung Europas* (Mannheim, Bensheimer, 1920), pp. 51 *et seq.* and 60 *et seq.*; G. R. Bjorksten, *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht* (Helsinki, Tilgmann, 1925), pp. 8 and 166 *et seq.*; Smith, *op. cit.* (footnote 44 above), especially p. 150; E. Hartig, *op. cit.* (footnote 76 above); J. Dräger, *Die Wasserentnahme aus internationalen Binnengewässern* (Bonn, Röhrscheid, 1970); and J. Barberis, *op. cit.* (footnote 76 above), pp. 35-45, and the works cited therein. See also C. Sosa-Rodriguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (Paris, Pedone, 1935). However, Berber concludes that "outside certain areas of Europe and perhaps North America, there are no rules of customary law governing water relations between independent

1962, the eminent jurist and then member of the Commission, Sir Humphrey Waldock, concluded that "some broad principles of international river law have now come into existence, though their precise formulation may still remain to be settled".²⁹⁵ He stated six principles, the third of which was formulated as follows:

(3) where one State's exercise of its rights conflicts with the water interests of another, the principle to be applied is that each is entitled to the equitable apportionment of the benefits of the river system in proportion to their needs and in the light of all the circumstances of the particular river system;²⁹⁶

States" (*Rivers in International Law, op. cit.* (footnote 77 above), p. 265). Berber's conclusion, as Mr. Schwebel explained in his third report, was probably attributable to the fact that he "takes a restrictive view of [the sources of] customary international law as his point of departure" (document A/CN.4/348 (see footnote 14 above), footnote 146; see also the works cited in that footnote). Berber does recognize, however, that "underlying almost every [municipal law] system is a principle according to which the user must in some way take into consideration the use of water by other users" (*Rivers . . .*, p. 254). He further acknowledges the existence of "the principle of good neighbourship and the principle of mutual and general consideration for each other between riparian States", which he regards as "general principles of law recognized by civilized nations" (*ibid.*, p. 266). His conclusion that there are no rules of customary law governing relations between States in respect of international watercourses would thus appear to be significantly limited by the other norms and practices he does recognize.

The doctrine of equitable utilization finds support in the following learned works and articles, *inter alia*: L. von Bar, "L'exploitation industrielle des cours d'eau internationaux au point de vue du droit international", *Revue générale de droit international public* (Paris), vol. 17 (1910), p. 281; A. W. Quint, "Nouvelles tendances dans le droit fluvial international", *Revue de droit international et de législation comparée* (Brussels), 58th year (1931), p. 325; C.-A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *Recueil des cours . . . 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 343 *et seq.*; R. B. Bilder, "International law and natural resources policies", *Natural Resources Journal* (Albuquerque, N.M.), vol. 20 (1980), p. 451; Andrassy, Griffin, Lipper and Villagrán Kramer, cited in footnote 76 above; and Bourne, *loc. cit.* (footnote 114 above).

Finally, authors of general works on public international law lend further support to the doctrine of equitable utilization as a norm of general international law. See, for example, P. Fauchille, *Traité de droit international public*, 8th ed., rev. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1925), tome I, part two, pp. 450 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, pp. 345-347 and 475; Brierly-Waldock, *op. cit.* (footnote 76 above), pp. 231-232; and C. Rousseau, *Droit international public* (Paris, Sirey, 1980), vol. IV, pp. 499-500.

²⁹⁵ Brierly-Waldock, *op. cit.* (footnote 76 above), p. 231.

²⁹⁶ The five other principles formulated by Sir Humphrey are worth noting:

"(1) where a river system drains the territories of two or more States, each State has the right to have that river system considered as a whole and to have its own interests taken into account together with those of other States; (2) each State has in principle an equal right to make the maximum use of the water within its territory, but in exercising this right must respect the corresponding rights of other States; (3) . . . ; (4) a State is in principle precluded from making any change in the river system which would cause substantial damage to another State's right of enjoyment without that other State's consent; (5) it is relieved from obtaining that consent, however, if it offers the other State a proportionate share of the benefits to be derived from the change or other adequate compensation for the damage to the other State's enjoyment of the water; (6) a State whose own enjoyment of the water is not substantially damaged by a development in the use of a river beneficial to another State is not entitled to oppose that development." (*Ibid.*, pp. 231-232.)

158. Similarly, Sir Hersch Lauterpacht has written:

... a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.²⁹⁷

Speaking in more general terms, he wrote:

The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of international law. This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage. . . . The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim *sic utere tuo ut alienum non laedas* is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognized by civilized States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.²⁹⁸

159. Under the heading "General principle: joint utilization of the watercourse by co-riparians", Charles Rousseau states the currently applicable international law as follows:

Contemporary international law considers all the riparians of the watercourse as a regional entity that is subject to the principle of joint utilization of the river and its tributaries. The direct consequence of this principle is a *prohibition on any exclusive utilization* by one of the riparian States by virtue of its territorial sovereignty and particularly a prohibition on any unilateral action by the upstream State that would, as a result of diversions effected at its discretion, deprive the downstream State or States of water.²⁹⁹

In a section entitled "Technical procedure: sharing of the water", Rousseau makes the following introductory statement:

There are a number of methods of apportioning the waters among the user States of the same river basin. All of them tend towards equitable apportionment, in accordance with the formula used by Professor Smith . . .³⁰⁰

The author adds:

"The application of these general principles may well involve problems of considerable difficulty in individual cases, as is shown by the detailed provisions of some of the existing treaties." (*Ibid.*, p. 232.)

A similar observation is made by Lipper in his well-known study on equitable utilization:

"Although the area of equitable utilization may not lend itself to the formulation of precise rules, it is nevertheless suitable for the formulation of general guiding principles.

"Stated somewhat differently, there are no mechanical formulas capable of application to all rivers and which, in every case when applied to a specific situation, will provide the correct allocation of the waters between the co-riparian States and a judicious resolution of conflicts among various uses of the waters. It is apparent, for example, that the needs of an arid Middle Eastern country for irrigation will not necessarily be fulfilled by applying solutions that have been successful in resolving disputes over hydroelectric power in the northwestern United States or Canada, or in resolving a timber-floating dispute in Scandinavia." (*Loc. cit.* (footnote 76 above), p. 41-42.)

²⁹⁷ Oppenheim-Lauterpacht, *op. cit.* (footnote 294 above), vol. I, p. 475.

²⁹⁸ *Ibid.*, pp. 345-347. See also P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'université, 1953), vol. I, p. 397.

²⁹⁹ Rousseau, *op. cit.* (footnote 294, *in fine* above), pp. 499-500.

³⁰⁰ *Ibid.*, p. 501, citing Smith, *op. cit.* (footnote 44 above), pp. 151-152.

160. After reviewing the municipal law of France, Italy, Switzerland, Germany and the United States, Georges Sauser-Hall concluded in 1953 that it is a generally recognized principle of law that:

... no diversion of a stream [is permitted] which is likely to cause serious injury to other riparians or communities whose territories are bordered or traversed by the same stream.³⁰¹

On the relations between Austria and Bavaria in respect of both contiguous and successive watercourses, Sauser-Hall concluded:

... in seeking to achieve the industrial development of a whole river area, the contracting States have been guided above all by good-neighbourly considerations, agreeing in some cases to the diversion of watercourses from their natural beds, and in others abandoning the intention to divert them and taking the requisite steps to maintain the volume of water estimated necessary for industry in the States downstream, and to make tolerable the backing-up of water in the territory of the State upstream from any dams established.³⁰²

161. Herbert W. Briggs, on the other hand, took the position in 1952 that "no general principle of international law prevents a riparian State from excluding foreign ships from the navigation of such a river [i.e. one not subjected to a special conventional régime] or from diverting or polluting its waters".³⁰³ Charles C. Hyde would seem at first glance to go even further, declaring that "the upstream proprietor . . . may in fact claim the right to divert at will and without restraint such waters as [it] may require, and that regardless of the effect produced upon the proprietor downstream".³⁰⁴ Juraj Andrassy has pointed out, however, that:

... An argument against this opinion is the view expressed by the same author in connection with water pollution. Invoking the Trail Smelter arbitration, Mr. Hyde affirms that States are required to prevent any use of their territory that would cause water or air pollution in the neighbouring State. A combination of the two principles enunciated by the learned author would lead to the conclusion that it would be forbidden to cause a marked reduction in fishing downstream, but that it would be legitimate to remove the watercourse by diverting it and in that way deprive the downstream State of any benefits, even the most necessary.³⁰⁵

Hyde also admits that "the increasing tendency of interested States to acquiesce through appropriate agreements in schemes of regulated diversions through accepted agencies bears testimony to the character of the practice that is in process of development".³⁰⁶ Commenting on this statement, Charles B. Bourne observes that while, for Hyde,

the Harmon doctrine was still the law in 1945, developing practice already foreshadowed a new rule. Much has happened in the development of law and practice of international rivers since 1945, so that Hyde's opinions on this point of law, and indeed the similar opinions of earlier authors, do not carry great weight today.³⁰⁷

³⁰¹ Sauser-Hall, *loc. cit.* (footnote 204 above), p. 517.

³⁰² *Ibid.*, p. 565; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 135-136, document A/5409, para. 627 and footnote 507.

³⁰³ H. W. Briggs, *The Law of Nations*, 2nd ed. (New York, Appleton-Century-Crofts, 1952), p. 274.

³⁰⁴ Hyde, *op. cit.* (footnote 85 above), p. 565.

³⁰⁵ Andrassy, "Les relations internationales de voisinage", *loc. cit.* (footnote 215 above), p. 120.

³⁰⁶ Hyde, *op. cit.*, p. 571.

³⁰⁷ Bourne, *loc. cit.* (footnote 114 above), pp. 206-207, citing the following earlier authors as holding opinions similar to Hyde's: Klüber (1821), Heffter (1888), Bousek (1913), and others cited in Berber, *op. cit.* (footnote 77 above), pp. 14-19, and in the ECE study

162. Indeed, most commentators approach the subject of the utilization of a watercourse common to two or more States in terms of the concept of "qualified", or "limited territorial sovereignty". For example, Lipper states that this concept, while not extending "as far as the principle of a community in the waters, nevertheless restricts the principle of absolute sovereignty to the extent necessary to ensure each riparian a reasonable use of the waters".³⁰⁸ After reviewing "governmental pronouncements", adjudications, treaties, conventions and declarations, and the writings of commentators and publicists, Lipper concludes:

The concurrence among lawyers and legal scholars that international rivers cannot be the subject of exclusive appropriation by one State is persuasive, when considered with the overwhelming evidence discussed previously, that the limited sovereignty principle is a rule of international law.³⁰⁹

163. Andrassy has written that "the most acceptable rule is the rule of equitable sharing applied in certain decided cases".³¹⁰ He concludes, in effect, that international law requires a "limited sovereignty" approach to questions relating to the use of international watercourses, because of the requirement that harm not be caused to other States:

A scrutiny of the rules of the law of neighbourly relations in connection with waters reveals, first of all, a well-established rule prohibiting any change in the natural conditions or in the existing régime if the change is harmful to the neighbour. A State cannot by means of works on its territory alter the direction of a watercourse, completely or partly divert it, or change its point of entry into neighbouring territory.³¹¹

(see footnote 77 above) (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), paras. 39 *et seq.*

Ian Brownlie, however (in *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979)), takes an unusually cautious approach for a modern writer:

"In this field the lawyer has to avoid the temptation to choose rough principles of equity governing relations between riparians, reflected in some treaty provisions and the work of jurists and learned bodies, as rules of customary law." (P. 271.)

He does admit, however, that:

"On some sets of facts . . . unilateral action, creating conditions which may cause specific harm, and not just loss of amenity, to other riparian States, may create international responsibility on the principles laid down in the *Trail Smelter* arbitration and the decision in the *Corfu Channel* case (Merits)." (*Ibid.*)

Brownlie acknowledges that, in the *Lake Lanoux* case, the arbitral tribunal recognized the last-mentioned principle. He then notes that the International Law Association adopted the Helsinki Rules "as a statement of existing rules of international law" (*ibid.*, p. 273), and, to conclude his treatment of the subject, he quotes the first two chapters of those Rules, but makes no attempt to reconcile his position with the equitable utilization approach adopted in the Rules. One is thus left in some doubt as to Brownlie's view of the present situation.

³⁰⁸ *Loc. cit.* (footnote 76 above), p. 18. Lipper discusses the theory of limited territorial sovereignty on pp. 23-38. See also Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", *loc. cit.* (footnote 76 above), pp. 26 and 37; and Bourne, *loc. cit.* (footnote 114 above), p. 189.

³⁰⁹ *Loc. cit.*, p. 38.

³¹⁰ "Les relations internationales de voisinage", *loc. cit.* (footnote 215 above), p. 120; Andrassy cites, *inter alia*, *Kansas v. Colorado* (1907) (see footnote 315 below).

³¹¹ "Les relations internationales de voisinage", *loc. cit.*, p. 117. Andrassy also states that, "since nature draws no distinction according to the designations used by man for watercourses, all watercourses which are in connexity should be regarded as a unit" (*ibid.*, pp. 115-116).

This assertion follows from Andrassy's more general conclusion that "there is a general obligation not to perform or allow any act that will cause harm to the neighbouring State".³¹²

(vi) *Decisions of municipal courts*

164. In his third report, Mr. Schwebel noted that "early formulations of the doctrine [of equitable utilization] can be found in national practice, particularly in connection with adjudications within federal States".³¹³ Courts of these States, in resolving competing claims of their quasi-sovereign political subdivisions concerning the use of waters forming or crossing their boundaries, often apply what they regard as principles of international law. Such decisions may thus be considered relevant to the present inquiry as constituting evidence of international law under either paragraph 1 (c) or paragraph 1 (d) of Article 38 of the Statute of the ICJ.³¹⁴ Several representative decisions of national courts will be noted briefly to illustrate the application by these courts of the doctrine of equitable utilization.

165. In 1907, the United States Supreme Court held, in *Kansas v. Colorado*, that the rights of the two States were to be accommodated "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream".³¹⁵ Illustrating the flexibility of the doctrine, the same Court decided in 1936 that, since the State of Washington was found to have no need for the waters of the Walla Walla River, it was not necessarily inconsistent with the principle of equality of rights for the State of Oregon to divert all of the flow of that river during times of water scarcity.³¹⁶

166. In the well-known *Donauversinkung* case (1927)³¹⁷ in Germany, involving a dispute between, on the one hand, the States of Württemberg and Prussia, and on the other, the State of Baden, over diversions by the latter, the upper riparian, the Supreme Court of Germany stated the following general principles of law:

³¹² *Ibid.*, p. 110. Andrassy continues: "Hence, the first duty is to refrain. . . . Still more, in some cases States are obliged themselves to undertake certain acts to prevent harmful effects on the neighbouring State." (*Ibid.*)

³¹³ Document A/CN.4/348 (see footnote 14 above), para. 44.

³¹⁴ Paragraph 1 (c) of Article 38 of the Statute refers to "the general principles of law recognized by civilized nations", and paragraph 1 (d) refers, *inter alia*, to "judicial decisions . . . of the various nations". See generally H. Lauterpacht, "Decisions of municipal courts as a source of international law", *The British Year Book of International Law*, 1929 (London), vol. 10, p. 65.

³¹⁵ *Kansas v. Colorado* (1907), *United States Reports*, vol. 206 (1921), p. 100.

³¹⁶ *Washington v. Oregon* (1936) (*ibid.*, vol. 297 (1936), p. 517). See also *Kansas v. Colorado* (1902) (*ibid.*, vol. 185 (1910), p. 125); *State of North Dakota v. State of Minnesota* (1923) (*ibid.*, vol. 263 (1924), p. 365); *Connecticut v. Massachusetts* (1931) (*ibid.*, vol. 282 (1931), p. 660); *New Jersey v. New York* (1931) (*ibid.*, vol. 283 (1931), p. 336); *Nebraska v. Wyoming* (1945) (*ibid.*, vol. 325 (1946), p. 589); and the other cases cited in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), footnote 92.

³¹⁷ *Württemberg and Prussia v. Baden* (1927) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116 (1927), appendix, p. 18; *Annual Digest of Public International Law Cases, 1927-1928* (London), vol. 4 (1931), p. 128, case No. 86).

. . . The exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure the interests of other members of the international community. . . . No State may substantially impair the natural use of the flow of such a river by its neighbour. . . .

The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.³¹⁸

167. In 1939, the Italian Court of Cassation rendered a decision in a dispute between a French company and an Italian company over the use of the River Roya.³¹⁹ The plaintiff had sued in France to recover for injuries allegedly suffered as a result of the defendant's construction of a power plant on the Italian portion of the river. The plaintiff recovered a judgment but the Italian courts refused to enforce it, relying on a treaty between France and Italy regulating the use of the river. Of present interest is the following statement made by the Italian Court of Cassation:

. . . International law recognizes the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation. . . . However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever régime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this régime, the opportunity of the other States to avail themselves of the flow of water for their own national needs.³²⁰

168. Finally, while not strictly speaking a judicial decision, the report of the Indus Commission (Rau Commission), established to hear the dispute between the Indian Provinces of Sind and Punjab over the latter's contemplated diversions of the Indus River, is relevant and instructive. The Commission obtained the agreement of the parties to a number of principles in order to achieve an agreed settlement of the dispute. Among those principles, which were distilled from an extensive review of the authorities, is the following:

(3) If there is no . . . agreement, the rights of the several Provinces and States must be determined by applying the rule of "equitable apportionment", each unit getting a fair share of the water of the common river ([citing] American decisions).³²¹

(vii) Summary and conclusions

169. It is clear from the foregoing survey of all the available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of

³¹⁸ *Entscheidungen* . . . , pp. 31-32; *Annual Digest* . . . , p. 131.

³¹⁹ *Société énergie électrique du littoral méditerranéen v. Compagnia imprese elettriche liguri* (1939) (*Il Foro Italiano* (Rome), vol. 64 (1939), part I, p. 1036; *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London), vol. 9 (1942), p. 120, case No. 47).

³²⁰ *Il Foro* . . . , p. 1046; *Annual Digest* . . . , p. 121. See also *Zürich v. Aargau*, judgment of 12 January 1878 of the Federal Court of Switzerland, affirming the equal rights of the cantons of Zürich and Aargau to the use of the waters in question (*Recueil officiel des arrêts du Tribunal fédéral suisse, 1878*, vol. IV, p. 34, at pp. 37 and 47); and the ECE study (see footnote 77 above) (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), para. 61.

³²¹ *Report of the Indus Commission and Printed Proceedings* (Simla, 1941; reprinted Lahore, 1950), pp. 10-11. The full set of principles is quoted in Whiteman, *op. cit.* (footnote 78 (a) above), pp. 943-944.

international watercourses—evidence including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators, and decisions of municipal courts in cognate cases—that there is overwhelming support for the doctrine of equitable utilization as a general, guiding principle of law for the determination of the rights of States in respect of the non-navigational uses of international watercourses. The doctrine is inherently general and flexible, making it suitable for adaptation and application to a wide variety of situations. Indeed, the applicability of the doctrine would appear to be limited only by potential political obstacles to the acceptance of equitable apportionment, rather than by legal considerations *per se*.³²²

170. Yet the very flexibility of the doctrine, which is its primary virtue, may be a source of disquietude to some, who may view it as affording insufficient protection, or as not lending itself to the formulation of precise rules. It is clear from the material reviewed above, however, that there does exist a "hard core" of norms in this area that are universally accepted, and that there do exist definite criteria to which States can refer in determining whether a particular allocation of uses and benefits is equitable or reasonable. As Lipper has noted:

It seems clear that the problems of each river are normally unique and general rules are valid only in so far as they are feasible in the particular situation. . . . On the other hand, the fundamental bases for water distribution need not be considered on an *ad hoc* basis.³²³

The following paragraphs contain a discussion of (a) the legal underpinnings of the doctrine, and (b) its "legal" nature. The Special Rapporteur will then conclude this portion of the report by giving an indication of his tentative views on how the Commission should deal, for the time being at least, with the matter of the determination of equitable use.

171. The bedrock upon which the doctrine of equitable utilization is founded is the fundamental prin-

³²² This statement assumes, of course, the absence of an applicable agreement.

It may be inquired whether the practice in a few cases of giving at least a degree of preference to existing uses is an exception to the doctrine of equitable utilization. For example, the United States Supreme Court has treated the doctrine of "prior appropriation" as a kind of regional custom in cases involving states located in the arid western part of the country, where the doctrine is followed as a matter of the internal law of the states concerned (see, for example, *Wyoming v. Colorado* (1922) (footnote 204 above), and *Nebraska v. Wyoming* (1945) (footnote 316 above)). In the former case, because the States involved applied the prior appropriation doctrine internally, the Court "deemed it fair to apply the same principle in an interstate controversy between them" (Lipper, *loc. cit.* (footnote 76 above), p. 54). Cf. the fourth principle formulated by the Rau Commission in the context of the dispute between the Indian Provinces of Sind and Punjab:

"In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one; . . ." (*Report of the Indus Commission* . . . , *op. cit.* (footnote 321 above), pp. 10-11.)

It is submitted that, where there is a pre-existing use by one State, this is properly seen in the international context as one factor to be taken into consideration in balancing the needs and interests of the States concerned in the process of arriving at an equitable allocation of the uses and benefits of the international watercourse. See generally Lipper, *loc. cit.*, pp. 49-62.

³²³ *Loc. cit.*, p. 42.

ciple represented by the maxim *sic utere tuo ut alienum non laedas*. As seen above, this maxim is a generally accepted principle of law governing the relations between States.³²⁴ In the context of the use of a watercourse which separates or traverses two or more States, this means that one of those States may not use or permit the use of the watercourse in such a way as to cause injury to the other(s). Thus the States are referred to as having "equal" or, perhaps more accurately, "correlative" rights in respect of use of the watercourse,³²⁵ a concept which finds expression in the doctrine of limited territorial sovereignty: a State has the sovereign right to make whatever use it wishes of waters within its territory, but that right is limited by the duty not to cause injury to other States.

172. Crucial to an understanding of the latter statement, and indeed of the doctrine of equitable utilization in general, is an appreciation of the meaning of the term "injury" in this context: the term is used in its legal, as opposed to its factual sense. Thus an allocation of the uses and benefits of the waters of an international watercourse between two or more States may entail a certain degree of harm—in the factual sense of unmet needs³²⁶—to one, or usually both States, and still be "equitable". This follows inevitably from the nature of the typical situation giving rise to a question concerning the rights of States in respect of international watercourses, namely a state of affairs in which there is insufficient water to satisfy the needs of the States involved, resulting in a conflict between those needs. As Mr. Schwebel explained in his third report:

... Each system State enjoys [the right to make use of the waters of an international watercourse system within its own territory], but, where the quantity or quality of the water is such that all the reasonable and beneficial uses of all the system States cannot be re-

³²⁴ Among the many authorities reviewed above supporting this proposition, see, for example: the *Corfu Channel* case (paras. 109-110 above); the *Lake Lanoux* arbitration (para. 121 above); the *Trail Smelter* arbitration (para. 127 above); Principle 21 of the Stockholm Declaration (para. 138 above); the Helsinki Rules, commentary (a) to article X (*op. cit.* (footnote 79 above), pp. 497-499); Lester, "Pollution", *loc. cit.* (footnote 178 above), p. 101; Oppenheim-Lauterpacht, *op. cit.* (footnote 294, *in fine* above), pp. 345-347; and the 1949 Memorandum by the Secretary-General (footnote 188 above), p. 34. See also the Charter of Economic Rights and Duties of States, adopted by the General Assembly in resolution 3281 (XXIX) of 12 December 1974, which provides:

"Article 3

"In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

For voluminous additional support for the inclusion of the *sic utere tuo* principle in the corpus of international law, see Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 113-129.

³²⁵ As Lipper states, "the corner-stone of equitable utilization is equality of right". He goes on to explain that this concept "means in the first place that all States riparian to an international waterway stand on a par with each other in so far as their right to utilization of the water is concerned" (*loc. cit.* (footnote 76 above), pp. 44-45, and the authorities cited and discussed).

³²⁶ Lipper's definition of the term "needs" will suffice for present purposes: "The term 'needs' embraces the economic and social requirements of the riparian States which cause them to be, to a greater or lesser degree, dependent on the river waters." (*Loc. cit.*, p. 44, and the authorities cited.)

alized to their full extent, what is termed a "conflict of uses" results. International practice then recognizes that some adjustments or accommodations are required in order to preserve each system State's equality of right. Such adjustments or accommodations are to be calculated on the basis of equity, failing specific agreement with respect to each system State's "share" in the uses of the waters. . . .³²⁷

173. Thus, under the principle of equality of right, no State whose territory is bordered or traversed by an international watercourse has an inherently superior claim to the use of the waters of that watercourse. Where there is a conflict among the water needs of the States making beneficial use of those waters, that conflict is to be resolved on the basis of equity, taking all relevant factors into account.³²⁸ Assuming two States are involved, an accommodation of their conflicting needs will, by definition, result in the full needs of one, or usually both States, not being met. The resulting non-fulfilment of needs may well entail harm in the factual sense to one or both States; but striking a reasonable balance between the interests or needs of the States involved, according to the doctrine of equitable apportionment, minimizes the factual harm to each to the extent possible, and produces a situation in which neither State suffers legally recognizable injury, for the right of one State ends where the other's right begins (which is simply another way of saying that the rights of the States involved are correlative rather than absolute). Each State may be said to have a right to an equitable share of the uses and benefits of the waters. In this way, the doctrine of equitable utilization is consistent with the *sic utere tuo* principle.

174. The line of demarcation separating or accommodating the rights of the States concerned is to be drawn so as to achieve a reasonable or equitable allocation of the uses and benefits of the waters. As has been seen, resolution of the conflicting water needs of States on the basis of equity is not new, and indeed there is increasing evidence of the use of the concept of equity in resolving disputes between States in other areas.³²⁹ Its

³²⁷ Document A/CN.4/348 (see footnote 14 above), para. 41, citing the resolution adopted by the Institute of International Law at its Salzburg session in 1961 (see para. 153 above). To the same effect, see, for example, the third principle formulated by the Rau Commission (para. 168 above).

³²⁸ The process and goals of resolving the conflicting needs of two or more States on the basis of the principle of equitable utilization has been described by Lipper as follows:

"Equitable utilization is concerned with:

"(1) examination of the economic and social needs of the co-riparian States by an objective consideration of various factors and conflicting elements . . . relevant to their use of the waters;

"(2) distribution of the waters among the co-riparians in such a manner as to satisfy their needs to the greatest extent possible;

"(3) accomplishment of the distribution of the waters by achieving the maximum benefit for each co-riparian consistent with the minimum of detriment to each." (*Loc. cit.* (footnote 76 above), p. 45.)

³²⁹ The delimitation of maritime boundaries is another such area, and is in some ways analogous to the apportionment of the uses and benefits of an international watercourse: whereas, unlike in the allocation of water, the fixing of a boundary is involved, both areas are fundamentally concerned with the allocation of resources as between two or more States. The use of equity in the area of maritime boundary delimitation derives from the Truman Proclamation on the continental shelf of 28 September 1945 (*United States Statutes at Large, 1945*, vol. 59, part 2, p. 884, proclamation No. 2667). As Mark B. Feldman has noted ("The Tunisia-Libya continental shelf case: Geographic

use in delimiting the rights of States in respect of an international watercourse should not, therefore, be viewed as being novel or somehow alegal.³³⁰

175. Finally, a few words should be said about the application of the principle of equitable utilization—i.e. about the manner in which an equitable allocation of the uses and benefits of the waters of an international watercourse is to be determined. This subject has been covered in great detail in reports of previous special rap-

justice or judicial compromise?", *American Journal of International Law* (Washington, D.C.), vol. 77 (1983), p. 228):

"... [the Truman Proclamation's] criterion of equitable principles was adopted by the ICJ in the *North Sea* cases and by the court of arbitration in the *Anglo-French Continental Shelf* case. Moreover, the concept was carried forward in the reference to 'special circumstances' in article 6 of the Geneva Convention on the Continental Shelf."

The author refers to the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports* 1969, pp. 32-33, para. 47, para. 86, and p. 53, para. 101 (C); the decision of 30 June 1977 by the Arbitral Tribunal in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, paras. 97 and 195 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 57 and 92-93); and the 1958 Geneva Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, p. 311).

In its Judgment of 24 February 1982 in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, *I.C.J. Reports* 1982, p. 18, the ICJ stated:

"the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;" (P. 92, para. 133, subpara. A (1).)

The Court made it clear that the result of the delimitation must be equitable:

"... The result of the application of equitable principles must be equitable. . . . It is . . . the result which is predominant; the principles are subordinate to the goal. . . ." (P. 59, para. 70.)

See also the Judgment of 12 October 1984 by a Chamber of the Court in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), *I.C.J. Reports* 1984, p. 246, in which it is stated:

"The fundamental rule of general international law governing maritime delimitations . . . requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result. . . ." (P. 339, para. 230.)

See generally J. Schneider, "The Gulf of Maine case: The nature of an equitable result", *American Journal of International Law* (Washington, D.C.), vol. 79 (1985), p. 539.

The 1982 United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122) also calls for the equitable delimitation of maritime boundaries in article 74, on the delimitation of the exclusive economic zone, and article 83, on the delimitation of the continental shelf. The relevant portions of paragraph 1 of those articles are identical and provide as follows:

"1. The delimitation . . . shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Finally, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (A/CONF.117/14) also makes use of equitable principles, for example in paragraph 2 of articles 28 and 31.

³³⁰ In addition to the examples provided in the previous footnote of the use of equitable principles as a legal doctrine, it is perhaps worth recalling the analysis of Judge Hudson in his concurring opinion in the *Diversion of Water from the Meuse* case, concerning the derivation of the PCIJ's equitable powers from "general principles of law recognized by civilized nations" (*P.C.I.J., Series A/B, No. 70*, p. 76).

porteurs,³³¹ and it is not proposed to repeat such treatment here. In the most basic terms, the task of arriving at an equitable allocation involves striking a balance between the needs of the States concerned in such a way as to maximize the benefit, and minimize the detriment, to each. According to the great weight of authority, the process of striking such a balance is to be approached by taking into account all relevant considerations. As stated in the arbitral award rendered in the *Lake Lanoux* case:

"... Consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right. . . ."

"... The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own."³³²

176. Various bodies have drawn up indicative lists of the interests, as well as other factors, to be considered in arriving at an equitable allocation. Prominent among these bodies are the Asian-African Legal Consultative Committee and the International Law Association.³³³ Similar lists are contained in article 8 as submitted by the previous Special Rapporteur and referred to the Drafting Committee in 1984 (see para. 28 above) and in article 7 as submitted by Mr. Schwebel in his third report.³³⁴ However, all these lists are based on the recognition that:

"... no automatically applicable fixed sets of factors, or a given formula for ranking or weighing the factors, can be devised that would fit all situations."³³⁵

177. Thus the implementation of the principle of equitable utilization depends ultimately upon the good faith and co-operation of the States concerned. Ideally, such co-operation in good faith should take place through institutional mechanisms established by the States concerned for the purpose, *inter alia*, of making determinations of equitable allocation. Such a determination should thus not await a state of affairs which gives rise to a dispute, but should be made in advance, as part of the comprehensive management of the entire watercourse system. The management of an international watercourse through institutional machinery has a number of advantages, among which are that scientific and technical experts can be involved at the planning stages, and that use allocations can be made before expectations become deeply rooted, positions are changed, and fiscal resources are committed.

³³¹ See especially the discussion by Mr. Schwebel in his third report of the *Lake Lanoux* arbitration, the proposals submitted to the Asian-African Legal Consultative Committee, the resolutions of the International Law Association and the implications of international agreements (document A/CN.4/348 (see footnote 14 above), paras. 92-110).

³³² United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 315, para. 22 (second and third subparagraphs) of the award; English trans. in *Yearbook . . . 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068.

³³³ The lists formulated by these two bodies are set out in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 94-96.

³³⁴ *Ibid.*, para. 106.

³³⁵ *Ibid.*, para. 101.

. . . In the past, such machinery has been lacking in most international watercourse systems, and the defensive, one might say "adversary", context within which use conflicts were taken up all too often gave rise to acrid and protracted disputes.³³⁶

178. Given the intensified demands being made upon freshwater resources throughout the world in connection with the development of States, the potential for disputes over increasingly scarce supplies of water is itself only too likely to grow. In the view of the Special Rapporteur, it would be most unfortunate if the Commission did not take advantage of the opportunity presented by its work on international watercourses to provide guidance to States by recommending that they establish institutional mechanisms with a view, *inter alia*, to avoiding such disputes over the allocation of international watercourses. Nevertheless, the Commission's immediate, and primary, task is the progressive development and codification of rules of law governing the non-navigational uses of international watercourses. In this regard, it is the tentative view of the Special Rapporteur—subject very much, of course, to the wishes of the Commission—that, while an explication of the types of factors to be taken into account in arriving at an equitable allocation should be offered in connection with a statement of the principle of equitable utilization (probably in the commentary to an article on that subject), the question whether an article containing a list of such factors should have a place in the draft could be postponed for future consideration. Such a course would allow the Commission to concentrate its attention at present on the formulation of the core of rules of general international law concerning the topic, while providing needed guidance on the determination of an equitable allocation.

(c) *The duty to refrain from causing "appreciable harm"*

179. Article 9 as submitted by the previous Special Rapporteur in his second report and referred to the Drafting Committee in 1984 (see para. 29 above) provides:

A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement.

This article may be seen as an expression, in the context of international watercourses, of the principle *sic utere tuo ut alienum non laedas*,³³⁷ which in turn forms the essential foundation for the doctrine of equitable utilization, as discussed earlier. The broad support for the *sic utere tuo* principle and its general acceptance as a norm of international law have already been noted. In the view of the Special Rapporteur, the major task of the Commission in relation to its consideration of article 9 is to determine how the principle is best expressed in the context of the non-navigational uses of international watercourses.

180. It has already been explained that an equitable allocation of the uses and benefits of an international watercourse may well entail the non-fulfilment of the

full needs of all the States concerned. Thus an equitable use by one State could cause "appreciable" or "significant" harm to another State using the same watercourse, yet not entail a legal "injury" or be otherwise wrongful. For this reason, the Special Rapporteur believes that the above text of article 9 should be redrafted in such a way as to bring it into conformity with the article or articles setting forth the principle of equitable utilization.

181. There are various possible ways in which this could be done. Regardless of the method chosen, the object should be to make clear that what is prohibited is conduct by which one State exceeds its equitable share, or deprives another State of its equitable share of the uses and benefits of the watercourse. To put it another way, the focus should be on the duty not to cause legal injury (by making a non-equitable use) rather than on the duty not to cause factual harm. This is not to deny by any means that there is a general duty to refrain from causing harm, in the factual sense, to another State; the point is simply that, in the context of watercourses, suffering even significant harm may not infringe the rights of the harmed State if the harm is within the limits allowed by an equitable allocation.

182. One way of achieving the goal described above would be simply to replace the words "appreciable harm to the rights or interests of" in the text of article 9 cited above by "injury to". The article would then read:

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause injury to other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

This approach has the advantage of not requiring redrafting of the entire article, but has the disadvantage of not making clear, in express terms, how the article fits in with the principle of equitable utilization. While this could be done in the commentary to the article, the Special Rapporteur believes that the better course would be to make the point clearly in the article itself: the articles should, where possible, speak for themselves, so that the set of articles clearly forms an integrated whole.

183. A second way of bringing article 9 into line with the principle of equitable utilization would be to replace the reference to causing appreciable harm by a reference to a State exceeding its equitable share, or depriving another State of its equitable share. Such a formulation might read:

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause that State to exceed its equitable share or to deprive another watercourse State of its equitable share of the uses and benefits of the watercourse, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

This wording is, in the Special Rapporteur's estimation, preferable to the first alternative set out above, because it focuses squarely on the kind of conduct which, in the field of the law of international watercourses, gives rise to legally recognizable injury. It also embodies the con-

³³⁶ *Ibid.*, para. 102.

³³⁷ *Ibid.*, para. 113.

cept that a State has a right to its equitable share, but no more.

184. A third method of formulating article 9 would be to make express reference to the duty to refrain from causing harm, but to make it clear that, even if a State's utilization of a watercourse does cause harm, the duty is not violated so long as the utilization is an equitable one *vis-à-vis* the other State(s). The article could thus be formulated as follows:

“In its use of an international watercourse, a watercourse State shall not cause appreciable harm to another watercourse State, except as may be allowable within the context of the first State's equitable utilization of that international watercourse.”

The particular advantage of this formulation is that it embodies in express terms the duty not to cause harm, but makes clear that this duty is subject to the rights a State may have by virtue of its equitable utilization of the international watercourse.³³⁸ This third alternative thus clearly reconciles the right of equitable utilization with the duty not to cause harm: a State's right to use a watercourse is limited by a duty not to cause harm to other States, but this duty is not absolute; some harm may have to be tolerated (i.e. is not wrongful), provided it is caused by conduct falling within the ambit of a use by one State that is “equitable” *vis-à-vis* the other State(s) concerned. Because it is more precise than the other two alternative formulations, the Special Rapporteur would submit that an article drafted along the general lines of this third alternative would best achieve the goals of a provision on this subject, viz. to set forth the “no harm” rule while making it consistent with the principle of equitable utilization.

185. As noted earlier in connection with the principle of equitable utilization, there is no mechanical formula for determining whether a particular use by one State is “equitable” *vis-à-vis* another State and thus whether, if it causes harm to that other State, the use is wrongful. Such a determination would obviously be simplified if

use of the watercourse were governed by an agreement or arrangement between the States concerned that applied the principle of equitable utilization to the watercourse; if use of the watercourse were governed by an authoritatively established régime of equitable utilization; or if there were an institutional mechanism within which such determinations could be made.

186. In the absence of such agreed means for facilitating a determination, however, the situation would be governed by the system of procedural rules (and the consequences of their non-observance) envisaged in chapter III of the outline submitted by the previous Special Rapporteur. (Some of these rules are contained in the articles submitted for the Commission's consideration in chapter III of the present report.) Thus conduct by which a State would exceed its equitable share, or deprive another State of its equitable share, would in principle be avoided by the rules of international law concerning notification and consultation in relation to new projects, programmes or uses that might cause appreciable harm to other States. If such notice is not provided, and a State claims that it may suffer or has suffered appreciable harm as a result of the new activities, that State is entitled to receive information from the State undertaking the new activities concerning the activities, their consequences and any proposed remedial measures.³³⁹ The (potentially) affected State is also entitled to compensation for any harm suffered as a result of being deprived of its equitable share.

187. The general and flexible nature of the principle of equitable utilization makes procedural rules such as those just described crucial, if possibly serious and protracted disputes over watercourse use are to be avoided. It is therefore not surprising that the myriad situations that have arisen throughout the world involving actual or potential use conflicts have given rise over the years to a large body of State practice supporting such procedural requirements. These requirements are the subject of chapter III of the present report.

³³⁸ See paragraph 1 of article 8 as submitted by Mr. Schwebel in his third report, *ibid.*, para. 156.

³³⁹ See section 2, paragraph 2, of the “schematic outline” submitted by Robert Q. Quentin-Baxter in his third report on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook . . . 1982*, vol. II (Part One), pp. 62-63, document A/CN.4/360, para. 53.

ANNEXES^a

Treaty provisions concerning equitable utilization

ABBREVIATIONS

<i>BFSP</i>	<i>British and Foreign State Papers</i>
<i>Legislative Texts</i>	United Nations Legislative Series, <i>Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation</i> (Sales No. 63.V.4).
Document A/5409	“Legal problems relating to the utilization and use of international rivers”, report by the Secretary-General, reproduced in <i>Yearbook . . . 1974</i> , vol. II (Part Two), p. 33.
Document A/CN.4/274	“Legal problems relating to the non-navigational uses of international watercourses”, supplementary report by the Secretary-General, reproduced in <i>Yearbook . . . 1974</i> , vol. II (Part Two), p. 265.

NOTE. The instruments are listed in chronological order; to conserve space, the titles of many of them have been abbreviated.

^a These annexes, placed for convenience at the end of chapter II, relate to paragraphs 75-99, which deal, in this chapter, with equitable utilization and participation.

ANNEX I

Treaty provisions concerning contiguous watercourses

The following is an illustrative list of treaty provisions relating to contiguous watercourses which recognize the equality of the rights of the riparian States in the use of the waters in question.^a

AFRICA

Agreement of 2 and 9 February 1888 between Great Britain and France with regard to the Somali Coast (British and French Protectorate); common use of wells on boundary (*BFSP, 1890-1891*, vol. 83, p. 672; *Legislative Texts*, p. 118, No. 16; document A/5409, para. 132);

Convention of 27 June 1900 between France and Spain for the demarcation of the French and Spanish possessions on the Sahara Coast and the Gulf of Guinea Coast: *art. V* (control and use of the waters of the Muni and Outamoni Rivers to be the subject of arrangements to be agreed between the two Governments) (*BFSP, 1899-1900*, vol. 92, p. 1014; *Legislative Texts*, p. 117, No. 15; document A/5409, para. 139);

Exchange of notes of 19 October 1906 constituting an Agreement between the United Kingdom and France relating to the frontier between the British and French possessions from the Gulf of Guinea to the Niger: respect for established rights (*BFSP, 1905-1906*, vol. 99, p. 217; *Legislative Texts*, p. 122, No. 22; document A/5409, para. 125). See the similar agreements between the United Kingdom and France defining the frontiers: (i) between the British and French possessions to the north and east of Sierra Leone (22 January and 4 February 1895) (*BFSP, 1894-1895*, vol. 87, p. 17; *Legislative Texts*, p. 119, No. 18; document A/5409, para. 130); (ii) between French Equatorial Africa and the Anglo-Egyptian Sudan (21 January 1924) (*BFSP, 1924*, vol. 119, p. 354; *Legislative Texts*, p. 125, No. 25; document A/5409, para. 127); (iii) between the British and French Mandated Territories in Togoland (21 October 1929, and 30 January and 19 August 1930) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. XXV, p. 452; *Legislative Texts*, p. 127, No. 26; document A/5409, para. 126);

Agreement of 22 November 1934 between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi: *art. 4* (right to divert up to half the volume of water); *art. 3* (prohibition of mining or industrial operations which may pollute the waters of contiguous or successive rivers or any tributary thereof) (League of Nations, *Treaty Series*, vol. CXC, p. 103; *Legislative Texts*, p. 97, No. 4; document A/5409, paras. 87 (a) and 88 (b));

Exchange of notes of 11 May 1936 and 28 December 1937 constituting an Agreement between the United Kingdom and Portugal regarding the boundary between Tanganyika Territory and Mozambique: *note I, para. 5* ("the inhabitants of both banks shall have the right over the whole breadth of the river to draw water, to fish and to remove saliferous sand for the purpose of extracting salt therefrom") (League of Nations, *Treaty Series*, vol. CLXXXV, p. 205; *Legislative Texts*, p. 136, No. 30; document A/5409, para. 148);

Convention of 26 July 1963 between Guinea, Mali, Mauritania and Senegal relating to the general development of the Senegal River basin: *art. 8* (development programmes affecting a riparian State must be approved by the Inter-State Committee established by article 1); *art. 13* (the Senegal River, including its tributaries, is declared an "international river") (*Revue juridique et politique* (Paris), vol. XIX (1965), p. 299; document A/CN.4/274, paras. 37-38);

Convention of 7 February 1964 between Guinea, Mali, Mauritania and Senegal relating to the status of the Senegal River: *art. 3* (riparian States undertake to submit to the Inter-State Committee established by the Convention of 26 July 1963, as from their initial

stage, projects whose execution is likely appreciably to alter certain features of the régime of the river); cf. *art. 2* (utilization of the river is open to each riparian State in respect of the portion lying in its territory and within its sovereignty) (*Revue juridique et politique* . . . (1965), p. 302; document A/CN.4/274, paras. 46-47);

Convention of 11 March 1972 between Mali, Mauritania and Senegal relating to the status of the Senegal River: *art. 1* (the Senegal River, in the territories of the contracting parties, is declared an "international river"); *art. 4* (any project likely to modify the characteristics of the régime of the river, etc., must have the prior approval of the contracting parties) (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. 16);

Cf. Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad): *art. 2* ("utilization of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights") (United Nations, *Treaty Series*, vol. 587, p. 9; document A/CN.4/274, para. 41).

AMERICA

Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters: *art. IV* (the parties will not permit construction or maintenance of works, etc., the effect of which is to raise the natural level of waters on the other side of the boundary, unless the action in question is approved by the Commission established by the Treaty); *art. VIII* (equal and similar rights in the use of boundary waters) (*BFSP, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260, No. 79; document A/5409, paras. 161 and 165 (a));

Treaty of Peace, Friendship and Arbitration of 20 February 1929 between the Dominican Republic and Haiti: *art. 10* (use of contiguous and successive rivers in a just and equitable manner) (League of Nations, *Treaty Series*, vol. CV, p. 215; *Legislative Texts*, p. 225, No. 68; document A/5409, para. 275);

Convention of 20 December 1933 regarding the determination of the legal status of the frontier between Brazil and Uruguay: *art. XIX* ("each of the two States shall be entitled to dispose of half the water") (League of Nations, *Treaty Series*, vol. CLXXXI, p. 69; *Legislative Texts*, p. 174, No. 49; document A/5409, para. 268);

Preliminary Convention of 17 July 1935 between Bolivia and Peru for the exploitation of fisheries in Lake Titicaca: *art. 3* (a convention shall be concluded providing for equality of rights and economic opportunities for Bolivian and Peruvian fishermen) (*Legislative Texts*, p. 164, No. 42; document A/5409, para. 247);

Treaty of 9 April 1938 for the delimitation of the boundary between Guatemala and El Salvador: *art. II* ("each Government reserves the right to utilize half the volume of water") (League of Nations, *Treaty Series*, vol. CLXXXIX, p. 275; *Legislative Texts*, p. 227, No. 70; document A/5409, para. 279);

Treaty of 3 February 1944 between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico: *art. 4* (allocation of the waters of the Rio Grande, including certain tributaries, without regard to the fluvial boundary line) (United Nations, *Treaty Series*, vol. 3, p. 313; *Legislative Texts*, p. 236, No. 77; document A/5409, para. 213 (a));

Agreement of 30 December 1946 between Argentina and Uruguay relating to the utilization of the rapids of the Uruguay River: *art. 1* (the waters of the river "shall be utilized jointly on a basis of equality") (*Legislative Texts*, p. 160, No. 40; document A/5409, para. 258).

ASIA

Treaty of Friendship of 26 February 1921 between Persia and the Russian Socialist Federal Soviet Republic: *art. 3* (equal rights of usage of waters) (League of Nations, *Treaty Series*, vol. IX, p. 383; *Legislative Texts*, p. 371, No. 102; document A/5409, para. 402);

Convention of 20 February 1926 between the USSR and Persia regarding the mutual use of frontier rivers and waters: apportionment

^a See also the instruments cited by J. Lipper, "Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), pp. 70-71, footnote 31.

* No information is available regarding the entry into force of this Convention.

- of frontier waters (*Legislative Texts*, p. 371, No. 103; document A/5409, para. 325);
- Convention of 8 January 1927 between the USSR and Turkey regarding the use of frontier waters: *art. 1* (the two parties shall have the use of one half of the water); *art. 11* (equal rights to use the waters); *art. 3 of Protocol* annexed to the Convention (the right of the Turkish Government to divert up to 50 per cent of the water contained in the reservoir formed by the dam) (*BFSP*, 1927, vol. 127, p. 926; *Legislative Texts*, p. 384, No. 106; document A/5409, paras. 306, 317 and 324);
- Final Demarcation Protocol of 3 May 1930 of the Commission on the Demarcation of the Turco-Syrian Frontier: *clause II* ("joint use" of the Tigris necessitates the formulation of rules concerning the rights of the parties; "the settlement of all questions relating to fishing and to the industrial or agricultural utilization of the waters shall be based on the principle of complete equality") (*Legislative Texts*, p. 290, No. 94; document A/5409, para. 416);
- Treaty of 18 January 1958 between the USSR and Afghanistan concerning the régime of the Soviet-Afghan State frontier: *art. 8, para. 1* (free use of frontier waters) (United Nations, *Treaty Series*, vol. 321, p. 77; *Legislative Texts*, p. 276, No. 86; document A/5409, para. 395).
- EUROPE
- Exchange of notes of 29 August and 2 September 1912 constituting an Agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes: *note 1, clause 1* ("the two nations shall have the same rights in the border sections of the rivers, each accordingly being entitled to half the flow") (*Legislative Texts*, p. 908, No. 246; document A/5409, para. 584);
- Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier: *art. 35* (equal rights to use of the water; allocation of half the water; consent required for allocation of more than half the water) (League of Nations, *Treaty Series*, vol. X, p. 201; *Legislative Texts*, p. 577, No. 166; document A/5409, para. 561 (b));
- Treaty of 27 January 1926 between Germany and Poland for the settlement of frontier questions: *art. 28* ("frontier waters may be utilized up to the frontier by persons having a right of user under the laws of the country [in question]"); *art. 31* ("the flow of the water must not be impeded by installations set up . . . in frontier waterways"); *art. 34* (the provisions regarding frontier waterways "shall apply by analogy to [non-frontier] waterways . . . which . . . flow into such waterways or lead water from the territory of one Party to that of the other") (League of Nations, *Treaty Series*, vol. LXIV, p. 113);
- Convention of 10 May 1927 between Finland and Sweden concerning the joint exploitation of the salmon fisheries in the Tornea and Muonio Rivers: *art. III* (each of the two States "shall be entitled to half the yield of the fisheries") (League of Nations, *Treaty Series*, vol. LXX, p. 201; *Legislative Texts*, p. 621, No. 171; document A/5409, para. 754);
- Convention of 14 November 1928 between Hungary and Czechoslovakia relating to the settlement of questions arising out of the delimitation of the frontier between the two countries: *art. 25, para. 1* (each party "is entitled to dispose of half the water flowing through frontier watercourses, subject to the rights already acquired") (League of Nations, *Treaty Series*, vol. CX, p. 425);
- Convention of 19 November 1930 between France and Switzerland respecting the Châtelôt Falls Concession on the Doubs: *art. 5* (each of the two riparian States shall have the right to half the output of the power-station) (*BFSP*, 1930, vol. 133, p. 487; *Legislative Texts*, p. 713, No. 199; document A/5409, para. 674);
- Agreement of 16 April 1954 between Czechoslovakia and Hungary concerning the settlement of technical and economic questions relating to frontier watercourses: *art. 23, para. 1* (the parties are entitled to half the natural flow of water) (United Nations, *Treaty Series*, vol. 504, p. 231; *Legislative Texts*, p. 564, No. 163; document A/5409, para. 539 (a));
- Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano: *art. III, para. 1* (the parties recognize the regulation of the lake "as a work of public interest") (United Nations, *Treaty Series*, vol. 291, p. 213; *Legislative Texts*, p. 856, No. 234; document A/5409, para. 724);
- Treaty of 9 April 1956 between Hungary and Austria concerning the regulation of water economy questions in the frontier region: *art. 2, para. 5* (without prejudice to acquired rights, each party shall have the use of half the natural water yield of sectors of watercourses forming the frontier) (United Nations, *Treaty Series*, vol. 438, p. 123; document A/5409, para. 570);
- Convention of 29 January 1958 between Romania, Bulgaria, Yugoslavia and the USSR concerning fishing in the waters of the Danube: *preamble* (the parties recognize "a common interest in the rational utilization and expansion of the stocks of fish in the river") (United Nations, *Treaty Series*, vol. 339, p. 23; *Legislative Texts*, p. 427, No. 125; document A/5409, para. 439);
- State Treaty of 10 July 1958 between Luxembourg and the Land Rhineland Palatinate of the Federal Republic of Germany concerning the construction of hydroelectric power installations on the Our: *art. 1* (the parties agree to utilize the waters of the Our for the operation of hydroelectric power installations and to strive for the most effective possible utilization of the power resources available) (*Legislative Texts*, p. 726, No. 202; document A/5409, para. 773);
- Treaty of 15 February 1961 concerning the régime of the Soviet-Polish State frontier and co-operation and mutual assistance in frontier matters: *art. 12, para. 2* (respect for the rights and interests of the other party in the use of frontier waters); *art. 18, para. 1* (equal division of the costs of cleaning frontier waters) (United Nations, *Treaty Series*, vol. 420, p. 161; document A/CN.4/274, paras. 179 and 185);
- Agreement of 30 November 1963 between Yugoslavia and Romania concerning the construction and operation of the Iron Gates Water Power and Navigation System on the River Danube: *art. 6, para. 1* (the parties shall participate in equal shares in the total investments required for construction of the system); *art. 8* (utilization of the water power potential harnessed by the system in equal shares) (United Nations, *Treaty Series*, vol. 512, p. 42; document A/CN.4/274, paras. 240-241);
- Treaty of 7 December 1967 between Austria and Czechoslovakia concerning the regulation of water management questions relating to frontier waters: *art. 3, para. 1* (each party undertakes to refrain from carrying out, without the consent of the other party, any measures relating to frontier waters which would adversely affect water conditions in the territory of the other party); *art. 3, para. 2* (each party undertakes to discuss in the Austrian-Czechoslovak Frontier Water Commission (established by the Treaty), before instituting proceedings concerning water rights, any planned measures relating to frontier waters); *art. 3, para. 3* (without prejudice to acquired rights, each party shall have the use, in frontier waters, of half the natural water yield); *art. 3, para. 5* (each party shall ensure that the operation of hydraulic installations of all kinds in frontier waters does not harm the water management interests of the other party) (United Nations, *Treaty Series*, vol. 728, p. 313);
- Agreement of 16 September 1971 between Finland and Sweden concerning frontier rivers: *chap. 1, art. 5* (in frontier rivers with branches, each party shall be entitled to an equal share of the water volume, even if a larger portion thereof discharges in one State than in the other) (United Nations, *Treaty Series*, vol. 825, p. 191; document A/CN.4/274, para. 310);
- Cf. Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning arrangements for co-operation in the Ems Estuary: *arts. 1 and 48* (the parties shall cooperate in the Ems Estuary in a spirit of good-neighbourliness, and this co-operation shall extend to questions not expressly regulated in the Treaty which may affect common interests) (United Nations, *Treaty Series*, vol. 509, p. 64; document A/CN.4/274, para. 165).

ANNEX II

Treaty provisions concerning successive watercourses

The following is an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned.

AFRICA

Protocol of 15 April 1891 between Italy and the United Kingdom for the demarcation of their respective spheres of influence in Eastern Africa: *art. III* (Italy undertakes not to construct on the Atbara, for irrigation purposes, any works which might sensibly modify its flow into the Nile) (*BFSP, 1890-1891*, vol. 83, p. 19; *Legislative Texts*, p. 127, No. 27; document A/5409, para. 128);

Treaty of 15 May 1902 between Ethiopia and the United Kingdom relative to the frontiers between the Anglo-Egyptian Sudan, Ethiopia and Eritrea: *art. III* (Ethiopia undertakes not to construct any work across the Blue Nile, Lake Tsana or the Sobat which would arrest the flow of their waters into the Nile, except in agreement with the United Kingdom and Sudanese Governments) (*BFSP, 1901-1902*, vol. 95, p. 467; *Legislative Texts*, p. 115, No. 13; document A/5409, para. 129);

Agreement of 9 May 1906 between Great Britain and the Independent State of the Congo, modifying the 1894 Agreement relating to their respective spheres of influence in East and Central Africa: *art. III* (the Congo undertakes not to construct any work on or near the Semliki (Isango) River which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government) (*BFSP, 1905-1906*, vol. 99, p. 173; *Legislative Texts*, p. 99, No. 5; document A/5409, para. 149);

Agreement of 22 November 1934 between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi: *art. 1* (water diverted shall be returned without substantial reduction at some point before the river or stream flows into the other territory) (League of Nations, *Treaty Series*, vol. CXC, p. 103; *Legislative Texts*, p. 97, No. 4; document A/5409, para. 86);

Agreement of 8 November 1959 between the United Arab Republic and Sudan for the full utilization of the Nile waters: *art. 1* (confirming certain "present acquired rights" of the parties); *art. 2* (highly detailed provisions on "Nile control projects and the division of their benefits between the two Republics"); *art. 3* ("projects for the utilization of lost waters in the Nile Basin")—*para. 1* ("the net yield of these projects shall be divided equally between the two Republics and each of them shall also contribute equally to the costs"); *art. 5, para. 2* (if a joint consideration by the two parties of claims of other riparian States to a share of Nile waters "results in the acceptance of allotting an amount of the Nile water to one or the other of the said States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan") (United Nations, *Treaty Series*, vol. 453, p. 51; *Legislative Texts*, p. 143, No. 34; document A/5409, paras. 110-111 and 113);

Cf. Convention of 26 July 1963 between Guinea, Mali, Mauritania and Senegal relating to the general development of the Senegal River basin: *arts. 8 and 13*.*

Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad): *art. 2*.*

Convention of 7 February 1964 between Guinea, Mali, Mauritania and Senegal relating to the status of the Senegal River: *arts. 2 and 3*.*

Convention of 11 March 1972 between Mali, Mauritania and Senegal relating to the status of the Senegal River: *arts. 1 and 4*.*

Agreement of 24 August 1977 for the establishment of the Organization for the Management and Development of the Kagera River Basin (Rwanda, Burundi and the United Republic of Tanzania): the parties commit themselves to the integrated management and development of the water resources of the Kagera Basin (United Nations, *Treaty Series*, vol. 1089, p. 165).

AMERICA

Convention of 21 May 1906 between the United States of America and Mexico concerning the equitable distribution of the waters of the Rio Grande^a for irrigation purposes: *preamble* ("desirous to pro-

vide for the equitable distribution of the waters"); *arts. I, II and III* (the United States agrees to deliver a specified volume of water to Mexico annually, without charge) (C. Parry, ed., *The Consolidated Treaty Series*, vol. 201 (1906), p. 225; *Legislative Texts*, p. 232, No. 75; document A/5409, paras. 201-203);

Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters: *art. IV* (the parties will not permit construction or maintenance of any works, etc., in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary the effect of which is to raise the natural level of waters on the other side of the boundary, except with the approval of the Commission established by the Treaty); *art. VI* (the waters of the St. Mary and Milk Rivers and their tributaries "shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other, by either country, so as to afford a more beneficial use to each") (*BFSP, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260, No. 79; document A/5409, para. 167 (b));

Treaty of Peace, Friendship and Arbitration of 20 February 1929 between the Dominican Republic and Haiti: *art. 10*.*

Treaty of 3 February 1944 between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico: *art. 10* (allocation of the waters of the Colorado River, including delivery to Mexico of a "guaranteed annual quantity", and additional amounts in case of a surplus); *art. 16, para. 1* (preparation by the International Boundary and Water Commission of recommendations for the "equitable distribution between the two countries of the waters of the Tijuana River system") (United Nations, *Treaty Series*, vol. 3, p. 313; *Legislative Texts*, p. 236, No. 77; document A/5409, paras. 214 (a) and 215 (a));

Treaty of 17 January 1961 between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin: *art. V* (Canada is entitled to one half of the downstream power benefits); *art. XII* (flooding of land in Canada necessary for the storage reservoir of a dam in the United States is permitted in exchange for the benefits accruing to Canada from the dam) (United Nations, *Treaty Series*, vol. 542, p. 244; *Legislative Texts*, p. 206, No. 65; document A/5409, paras. 194 (b) and 195);

Treaty of the River Plate Basin of 23 April 1969 (Brazil, Argentina, Bolivia, Paraguay and Uruguay): *art. 1* (the parties agree to join forces to promote the harmonious development and physical integration of the River Plate basin, and to take steps to promote the rational utilization of water resources, in particular by the regulation of watercourses and their multi-purpose and equitable development, etc.) (United Nations, *Treaty Series*, vol. 875, p. 3; document A/CN.4/274, para. 61);

Act of Santiago of 26 June 1971 concerning hydrologic basins (Argentina and Chile): *preamble* (the parties agree on fundamental rules which shall serve as a basis for a convention and which they declare to be immediately applicable); *para. 1* ("the waters of rivers and lakes shall always be utilized in a fair and reasonable manner"); *para. 4* ("each Party shall recognize the other's right to utilize the waters of their common lakes and successive international rivers within its territory in accordance with its needs, provided that the other Party does not suffer any appreciable damage") (OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2), pp. 495-496; document A/CN.4/274, para. 327);

Cf. Joint Declaration of 23 September 1960 of the tripartite conference at Buenos Aires (Argentina, Brazil and Uruguay) to examine the situation created by the 1946 Agreement between Argentina and Uruguay relating to the utilization of the rapids of the Uruguay River: Argentina and Uruguay recognize Brazil's right, in accordance with existing international instruments and the rules of international law, freely to carry out hydraulic works of any nature on the Brazilian reaches of the Uruguay River and its tributaries; Brazil will, in turn, in accordance with international doctrine and practice, consult with the other riparian States before carrying out any hydraulic works which may alter the present régime of the Uruguay River; the three States declare their intention to prepare a

* See annex I.

^a The Rio Grande is a successive river in the sense that it rises in and flows through the United States before reaching the point at which it begins to form the boundary between the United States and Mexico.

* See annex I.

joint regional plan for the utilization and reclamation of the entire basin of the Uruguay River and the adjacent regions (document A/5409, para. 267 and footnote 228).

ASIA

Agreement of 20 October 1921 between France and Turkey with a view to promoting peace: *art. XII* ("the waters of Kuveik shall be shared . . . in such a way as to give equitable satisfaction to the two Parties") (League of Nations, *Treaty Series*, vol. LIV, p. 177; *Legislative Texts*, p. 288, No. 91; document A/5409, para. 409);

Treaty of 22 November 1921 between Afghanistan and the United Kingdom for the establishment of neighbourly relations (Indo-Afghan frontier): *art. 2* (protection of existing rights of irrigation) (League of Nations, *Treaty Series*, vol. XIV, p. 47; *Legislative Texts*, p. 273, No. 83; document A/5409, para. 412);

Agreement of 4 December 1959 between Nepal and India on the Gandak River Irrigation and Power Project: *clause 10* (*pro rata* reduction of water supplies during periods of shortage) (*Legislative Texts*, p. 295, No. 96; document A/5409, para. 350);

Cf. Agreement of 5 November 1977 between Bangladesh and India on sharing of the Ganges waters: *preamble* ("sharing" and "optimum utilization" of the water resources of the region by joint efforts) (*International Legal Materials*, vol. XVII (1978), p. 103; to be published in United Nations, *Treaty Series*, No. 16210).

EUROPE

Treaty of 12 May 1863 between Belgium and the Netherlands to regulate the régime of the diversion of water from the Meuse (concluded to settle definitively the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels): *art. 5* (allocation of the amount of water to be removed); *art. 7* (prohibition of diversion from their natural courses of watercourses which rise in Belgium and flow into the Netherlands) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 2nd series, vol. 1, p. 117; *Legislative Texts*, p. 550, No. 157; document A/5409, paras. 736 and 738-739);

Boundary Treaty between Spain and France of 26 May 1866: *art. XX* (the canal carrying the waters of the Aravo to Puigcerdá, situated almost entirely in France, is the private property of the Spanish town of Puigcerdá) (*BFSP*, 1865-1866, vol. 56, p. 212; *Legislative Texts*, p. 671, No. 184; document A/5409, para. 959). See also Final Act of the delimitation of the international frontier of the Pyrenees between France and Spain of 11 July 1868: *sect. IV, art. 1* (distribution of water of the Puigcerdá canal on the basis of the rotation principle: 12 hours per day for each group of users) (*BFSP*, 1868-1869, vol. 59, p. 430; *Legislative Texts*, p. 674, No. 186; document A/5409, para. 982 (a));

Convention of 28 October 1922 between Finland and the Russian Soviet Republic concerning the maintenance of river channels and the regulation of fishing on watercourses forming part of the frontier between Finland and Russia: *art. 3* (prohibition of diversion of water from the watercourses or erection of any constructions therein likely to have a detrimental effect on the flow of water, the fish, land or other property in the territory of the other State) (League of Nations, *Treaty Series*, vol. XIX, p. 183; *Legislative Texts*, p. 642, No. 173; document A/5409, para. 520);

Provisions of 6 November 1922 relating to the common frontier between Belgium and Germany, drawn up by a Boundary Commission made up of representatives of the British Empire, France, Italy, Japan, Belgium and Germany under the terms of the Treaty of Versailles of 28 June 1919 concerning that frontier: *part III, art. 4* (Belgium and Germany undertake not to permit any deterioration

of the present régime of the watercourses which cross their common frontier); *part II, clause 8, and part III, arts. 1 and 3* (Germany and Belgium undertake to reach agreement prior to taking any measures which might have an adverse effect on the quantity or quality of water flowing through supply pipes crossing the frontier); *part III, art. 2* (no construction, establishment or factory which might pollute the waters of the Dreilägerbach and Vedre Basins with its effluents shall be permitted; agreement on protective measures required prior to the construction of any installation which might have an adverse effect on the nature of those waters; neither State may permit any diversion of watercourses which might adversely affect the supply of water from basins on its territory without prior agreement with the other State) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. XIV, p. 834; *Legislative Texts*, p. 411, No. 118; document A/5409, paras. 465-466);

Convention of 11 May 1929 between Norway and Sweden on certain questions relating to the law on watercourses: *art. 12, para. 1* (one country may not authorize an undertaking without the approval of the other country if the undertaking is likely to involve considerable inconvenience in the latter country in the use of a watercourse) (League of Nations, *Treaty Series*, vol. CXX, p. 263; *Legislative Texts*, p. 871, No. 237; document A/5409, para. 545 (h) (i));

Agreement of 16 October 1950 between Austria and the Bavarian State Government concerning the diversion of water: apportionment of water (Austria waives, without compensation, the right to divert any water of one river and its tributaries; Bavaria, in return, agrees, without compensation, to the diversion by Austria of a portion of the waters of four other rivers, except during specified low-water periods) (*Legislative Texts*, p. 469, No. 136; document A/5409, para. 627);

Convention of 25 May 1954 between Yugoslavia and Austria concerning water economy questions relating to the Drava: *preamble* (developing the utilization of the waters of the Drava for hydroelectric purposes with a view to preventing any harmful effects from the operation of Austrian power-stations and having regard to the diversion of water from the Drava Basin); *art. 4* (prior consultation required should Austria contemplate plans for new diversions or works which might affect the Drava River régime to the detriment of Yugoslavia; failing an agreed settlement, the matter shall be referred to the Court of Arbitration provided for by the Convention) (United Nations, *Treaty Series*, vol. 227, p. 111; *Legislative Texts*, p. 513, No. 144; document A/5409, paras. 693 and 697);

Treaty of 9 April 1956 between Hungary and Austria concerning the regulation of water economy questions in the frontier region: *art. 2, para. 6* (the State situated upstream on a watercourse which intersects the frontier shall not be entitled to decrease by more than one third the natural minimum water flow into the territory of the other State, as determined by the Commission established by the Treaty) (United Nations, *Treaty Series*, vol. 438, p. 123; document A/5409, para. 570);

Convention of 27 May 1957 between Switzerland and Italy concerning the use of the water power of the Spöl: *preamble* (utilization of the waters of the Spöl is of major interest to the development of the electrical resources of Italy (upstream) and Switzerland (downstream); the two States agree to fix the shares of hydraulic power to which each is entitled); *art. 1* (Switzerland consents to the diversion of some of the water flowing from Italy and to the use of the corresponding water power on the Italian side) (*Legislative Texts*, p. 859, No. 235; document A/5409, paras. 849 and 850 (a)). See also Agreement of 18 June 1949 between Switzerland and Italy on the Reno di Lei hydraulic power concession (*Legislative Texts*, p. 846, N. 231; document A/5409, paras. 792 *et seq.*);

Agreement of 18 July 1957 between Italy and Yugoslavia concerning the supply of water to the commune of Gorizia: *art. 1* (continuation of the water supply to the commune of Gorizia) (*Legislative Texts*, p. 866, No. 236; document A/5409, para. 711).

CHAPTER III

Consideration of selected issues dealt with in chapter III of the outline

188. In his preliminary report, the Special Rapporteur proposed giving consideration, in his second report, to certain of the issues dealt with in chapter III of the outline submitted by the previous Special Rapporteur (see para. 47 above). The first five articles (arts. 10-14) of that chapter, entitled "Co-operation and management in regard to international watercourses", deal with the kinds of procedural requirements that are an indispensable adjunct to the general principle of equitable utilization. Some of these requirements have already been alluded to in the previous chapter of the present report. In this final chapter, the Special Rapporteur proposes to offer a broad overview of procedural rules, and to consider the manner in which they best fit into the framework of the draft as a whole. This discussion will be of a somewhat preliminary nature, as it is offered with a view to facilitating consideration by the Commission of the manner in which the elaboration of this part of the draft should proceed. The Special Rapporteur will conclude the report by submitting five draft articles for the Commission's consideration and offering some observations concerning future work on procedural rules.

A. Overview

189. As indicated earlier, procedural rules—most of which amount to obligations of conduct rather than obligations of result³⁴⁰—form an essential part of the overall system of law governing the non-navigational uses of international watercourses. It has been seen that this is due to the flexibility of the principle of equitable utilization, a principle which derives from the necessity of reconciling conflicting needs in order to maximize benefits and minimize harm to States utilizing the same resource.

190. The necessity of adjustments that is implicit in the principle of equitable utilization requires that channels of communication between the States concerned remain open in order to permit the free flow of information as well as the resolution of actual or potential inconsistencies between watercourse uses. It is clear that the modalities for such communication are best provided for in specific agreements tailored to take into account the unique characteristics of the individual States

³⁴⁰ Of course, some obligations of conduct inevitably shade into obligations of result. For example, the obligation to negotiate with regard to the determination of equitable shares is linked with the obligation to achieve an equitable apportionment of those shares. See, for example, the passage from the arbitral award in the *Lake Lanoux* case cited above (para. 123 and footnote 214). Cf. also the obligations to negotiate and to achieve an equitable apportionment in respect of marine resources, enunciated, for example, by the ICJ in *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *Merits*, Judgment of 25 July 1974, *I.C.J. Reports 1974*, pp. 31-34, paras. 73-75, 78 and 79 (3); and in the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 46-47, para. 85.

and watercourses concerned. It does not follow, however, that there exist no general norms concerning the methods by which equitable shares are determined and allocations are readjusted. Indeed, the practice of States in relation to international watercourses throughout the world has increasingly recognized that, where water resources are insufficient to satisfy the needs of all the States concerned, allocations of uses, benefits and obligations concerning conservation must be arrived at through mutual consultation and co-operation.

191. The norms operative in this field derive from the same fundamental considerations that apply to the apportionment of other resources upon which more than one State depends. It is therefore not surprising that allocation of those resources is governed by the same kinds of obligation. Apportionment of fisheries³⁴¹ and delimitation of the continental shelf³⁴² are two examples of other situations in which international law has been held to require (a) an equitable apportionment, and (b) negotiations in good faith with a view to achieving such an apportionment. More generally, the necessity of co-operation between two or more States in respect of an international watercourse flows both from the fact of their mutual dependence upon the watercourse and, as the ICJ has said of the duty to negotiate in respect of fisheries, "from the very nature of the respective rights of the Parties".³⁴³ Previous special rapporteurs have surveyed in their reports the extensive support for the obligation to co-operate and for the other procedural rules for the implementation of the principle of equitable utilization.³⁴⁴

192. The object of procedures for the determination and maintenance of an equitable allocation of the uses and benefits of an international watercourse is always the attainment of such an apportionment through an agreed resolution of any actual or potential conflict between the uses two or more States wish to make of the watercourse. Common sense indicates, and the practice

³⁴¹ See the *Fisheries Jurisdiction* case (footnote 340 above). This case, in which a State (the United Kingdom) other than the coastal State (Iceland) had rights in a fishery, concerned the sort of situation generally encountered when a watercourse is used by more than one State.

³⁴² See the *North Sea Continental Shelf* cases (footnote 340, *in fine* above).

³⁴³ *Fisheries Jurisdiction*, *I.C.J. Reports 1974*, p. 32, para. 75. Of course, the nature of the States' rights in the *Fisheries* case differs from the nature of States' rights in respect of watercourses. In both cases, however, there is the potential for harm to be caused to one or more States due to their conflicting demands upon a finite resource, and the consequent need to arrive at an equitable adjustment of the parties' shares.

³⁴⁴ See especially the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 14 above), paras. 113-186, and particularly paras. 170-186. See also C. B. Bourne, "Procedure in the development of international drainage basins: The duty to consult and to negotiate", *The Canadian Yearbook of International Law*, 1972 (Vancouver), vol. X, p. 212; and Kirgis, *op. cit.* (footnote 85 above), pp. 16-87.

of States confirms, that such a system of procedures will not function effectively if: (a) it does not provide a mechanism for determining whether a State is exceeding its equitable share; (b) it gives a "veto" to a State potentially affected by another State's planned use; or (c) it allows a State to take action that could significantly affect other States without first notifying and consulting with those States.³⁴⁵ Thus, to be effective, procedural rules must, at minimum, provide for several different situations. For convenience of discussion, these situations will be divided into two categories: problems concerning existing uses, and problems concerning new uses. In all cases, it will be assumed for the sake of simplicity that only two States, States A and B, are involved.

193. With regard to the first category, the typical situation would be one in which State A believes that State B is exceeding its equitable share—or, to put it another way, that State B is depriving State A of the latter's equitable share. Resolution of such a situation will require: (a) determination whether State B is in fact exceeding its equitable share; (b) if so, correction of the situation through appropriate measures (e.g. adjustment of State B's uses, or compensation of State A in some appropriate manner). The smooth and effective functioning of this resolution process cannot perhaps be guaranteed in every case by rules of general international law, but such rules at least provide a framework for the achievement of an equitable accommodation. This framework can, and should, be supplemented by more detailed procedural rules, tailored to the individual situation, in specific basin-wide agreements.

194. The question arises whether this kind of situation is adequately provided for in the articles in chapter II of the outline, concerning equitable utilization, or whether, alternatively or in addition, it should be addressed in separate provisions in chapter III. The principal obligations in question are the duties to cooperate,³⁴⁶ consult³⁴⁷ and negotiate in good faith with a

³⁴⁵ These very basic criteria do not, of course, exhaust the requirements for a comprehensive set of procedures for international watercourse management. The regular collection and exchange of information and data, control and management of pollution, and a warning system concerning hazards are some of the other subjects which should be addressed and for which States have seen fit to make provision. For an extensive discussion of these and other aspects of international watercourse management, see Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 187 *et seq.*

³⁴⁶ See the *North Sea Continental Shelf* cases (footnote 340, *in fine* above) and the *Lake Lanoux* arbitration (footnote 192 above), particularly the fifth, seventh, eighth and ninth principles summarized in paragraph 124 of the present report. See also, for example, General Assembly resolution 3129 (XXVIII) of 13 December 1973 on "Co-operation in the field of the environment concerning natural resources shared by two or more States"; and article 3 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly in resolution 3281 (XXIX) of 12 December 1974.

³⁴⁷ See generally Kirgis, *op. cit.* (footnote 85 above), and the sources cited therein; and Bourne, "Procedure in the development of international drainage basins . . .", *loc. cit.* (footnote 344 above). Cf. article 6 of the Montreal Rules on Water Pollution in an International Drainage Basin:

"Article 6

"Basin States shall consult one another on actual or potential problems of water pollution in the drainage basin so as to reach, by

view to arriving at an equitable allocation.³⁴⁸ These obligations are dealt with in paragraph 2 of article 8 and paragraphs 1 and 3 of article 10 as submitted by the previous Special Rapporteur.³⁴⁹ It is the tentative view of the present Special Rapporteur that, since such a situation essentially calls for the determination of the proper shares of the States involved, it would be appropriate to address it in article 8, which deals with that subject. Additional treatment of this issue in chapter III would not seem necessary. The duties in question could be stated more specifically in paragraph 2 of article 8 if the Commission considers it appropriate.

195. The second category of situations which articles on procedural rules must take into account encompasses problems concerning new uses of watercourses. In this connection, at least two types of situation must be addressed. With regard to both, we may begin with the hypothesis that States A and B are availing themselves of no more (qualitatively or quantitatively) than their respective equitable shares of the uses and benefits of the watercourse. In the first type of situation in this category, State A wishes to initiate a new use of the watercourse which may have significant adverse effects on State B's use thereof. State B's right to an equitable share will be adequately protected only if, at minimum:³⁵⁰ (a) State A informs State B of the proposed use; (b) State A consults with State B concerning, for example, the effect of the proposed use on the parties' shares, as well as any adjustments that may be necessary to maintain an equitable apportionment; (c) State A negotiates with State B concerning any differences as to the above or other matters, with a view to arriving at an equitable allocation; (d) in the event that State A fails to inform State B of the proposed use and State B is generally aware of the proposal, State B is entitled to invoke State A's obligations to provide information, consult and negotiate.

196. This kind of situation is addressed in chapter III of the outline submitted by the previous Special Rapporteur in his second report, in particular in articles 11 to 14.³⁵¹ Alternatively, it could be dealt with in connection with the obligation not to cause appreciable harm set out in article 9.³⁵² However, since article 9 as referred

methods of their own choice, a solution consistent with their rights and duties under international law. This consultation, however, shall not unreasonably delay the implementation of plans that are the subject of the consultation." (ILA, *op. cit.* (footnote 291 above), p. 541.)

³⁴⁸ See the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases (footnote 340 above).

³⁴⁹ For the text of article 8, see footnote 28 above; for the text of article 10, see document A/CN.4/381 (see footnote 16 above), para. 64. Cf. article 7, paragraph 2 (duty to consult to determine equitable use), as submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), para. 106.

³⁵⁰ These procedures are characterized as being the minimum necessary because, ideally, they should not be *ad hoc*, but should be part of an institutionalized programme of regular exchange of data and information.

³⁵¹ Document A/CN.4/381 (see footnote 16 above), paras. 67-74.

³⁵² See article 8 as submitted by Mr. Schwebel in his third report, which sets out the obligation not to cause appreciable harm in paragraphs 1 and 2, and lays down rules concerning notification, consultation and negotiation in paragraphs 3 *et seq.* (document A/CN.4/348 (see footnote 14 above), para. 156).

to the Drafting Committee does not make provision for the kinds of procedural rules outlined above, the Commission may find it convenient, for the time being at least, to deal with them in chapter III.

197. The second type of situation involving new uses that should, in some manner, be addressed in the draft is the following: State A wishes to make a new use of the international watercourse but is factually not able to, at least in part because of uses already being made (pursuant, it may be assumed, to a previously accepted equitable allocation) by State B. Whether a readjustment of the parties' shares is required by the principle of equitable utilization obviously depends on a number of factors not mentioned in this illustration.³³³ This type of situation is not expressly provided for either by the articles in chapter II or by those in chapter III of the outline submitted by the previous Special Rapporteur. It may be covered implicitly by articles 6 and 7, and possibly by article 8, depending on how those provisions are interpreted. But, since State A's proposed new use, by definition, cannot be made unilaterally, the specific provisions in chapter III on notification and consultation would not appear to be intended to address such a situation. It could, of course, be considered to fall within the more general provisions of article 10 of the outline. The Special Rapporteur would therefore appreciate the Commission's guidance as to how and in what part of the draft this type of situation should be covered.

B. Draft articles concerning procedural rules

198. In the light of the foregoing discussion, and bearing in mind the authorities surveyed in chapter II and in the present chapter, the Special Rapporteur submits for the Commission's consideration five draft articles which address some of the situations outlined above. It may be that, due to various of the factors identified in section A above, this consideration should be only of a preliminary nature. The Special Rapporteur is nevertheless prepared to proceed with formal consideration of the articles if the Commission deems this advisable.

³³³ See, for example, the factors listed in: article 8 as referred to the Drafting Committee in 1984 (see footnote 28 above); article 7 as submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), para. 106; and article V of the Helsinki Rules (see para. 154 above). Relevant factors might include, for example: the extent to which the competing uses are essential to human life, socially and economically valuable, capable of modification in order that they may be accommodated, or capable of being satisfied by increasing the efficiency of basin-wide water utilization; and the extent to which the conflict in uses may be resolved through the payment of compensation by State A to State B. A fact which is important but not mentioned here because it is implicit in the facts posited is that State B is presently making uses of the watercourse which State A may request be modified. It is clear that existing uses should be given some degree of protection, but not so much as to freeze development of an international watercourse system. Thus such a use should be allowed to continue so long as the factors justifying it are not outweighed by factors indicating that it should be modified, phased out, or terminated (with the payment of compensation, where appropriate) in order to accommodate a competing use that is incompatible. Cf. article VIII of the Helsinki Rules and commentary (a) thereto (see footnote 79 above).

Article 10. Notification concerning proposed uses

A [watercourse] State shall provide other [watercourse] States with timely notice of any proposed new use, including an addition to or alteration of an existing use, that may cause appreciable harm to those other States. Such notice shall be accompanied by available technical data and information that is sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.

Comments

(1) The fact that this article is identified as article 10 is without prejudice to future inclusion of an article concerning, for example, general principles of cooperation, along the lines of article 10 submitted by the previous Special Rapporteur.

(2) This article covers the same general subject as article 11 submitted by the previous Special Rapporteur.

(3) The term "watercourse" appears in square brackets when used as an adjective to modify "State(s)" pending the Commission's decision on the use of the term "system".

(4) The term "timely" is intended to require notice sufficiently early in the planning stages to permit meaningful consultation and negotiation, if these are necessary.

(5) The term "proposed" is intended to indicate that the new use is still in the preliminary planning stages and has not yet been undertaken, authorized or permitted.

(6) The Commission may find it desirable to define, at an appropriate juncture, such terms as "use" and "proposed use", in order to avoid the necessity of making clear, in the articles themselves or in commentaries, that such terms refer to use of the watercourse concerned and include, for example, projects, programmes and additions to or alterations of existing uses.

(7) It would seem obvious that the proposed new use contemplated by the article is one that is to be undertaken by or within the State that is required to give the notification. If this is not sufficiently clear from the present formulation of the article, however, it can easily be made so.

(8) While, technically, no legal injury is caused unless a State is deprived of its equitable share, the article is couched in terms of "harm" in order to facilitate a joint determination of whether any harm entailed by the new use would be wrongful (because the new use would exceed the proposing State's equitable share) or would have to be tolerated by potentially affected States (because the new use would not exceed the proposing State's equitable share).

(9) The reference to "available" technical data and information is intended to indicate that the notifying State is generally not required to do additional research at the request of the potentially affected State, but must provide only such relevant data and information as have been developed in relation to the proposed use and are readily accessible. (A subsequent article will cover information that need not be disclosed for national security

reasons.) If the notified State desires information that is not readily available, but is in the sole possession of the notifying State, it would generally be appropriate for the former to offer to indemnify the latter for expenses incurred in producing that information.

Article 11. Period for reply to notification

1. A [watercourse] State providing notice of a proposed new use under article 10 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the proposed use and to communicate their determinations to the notifying State. During this period, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use.

2. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the proposed use or the attainment of an agreed resolution under paragraph 3 of article 12.

Comments

(1) This article covers the same general subject as article 12 submitted by the previous Special Rapporteur.

(2) It will be observed that paragraph 1 does not refer to a specific period of time (e.g. six months) that must be allowed, at minimum, for study and evaluation. This is because what is a "reasonable" period will vary widely according to the circumstances of each case. A six-month period may be unreasonably long in some cases and unreasonably short in others. If the notified State is automatically given what under the circumstances is an unreasonably long period for study and evaluation, this may operate to discourage the notifying, or proposing, State from giving notice. Conversely, a specific, generally applicable period that is unreasonably short when applied to a concrete case may none the less raise a presumption of reasonableness which is so strong that it is very difficult for the potentially affected States to overcome. Notwithstanding these considerations, however, it may be desirable to have some objective point of reference—such as a six-month period—built into the article in order to assist the States concerned, in the event of disagreement, in arriving at a mutually acceptable period that is reasonable under the circumstances. This is an issue that merits careful consideration by the Commission.

(3) The obligation to negotiate set forth in paragraph 2 is drawn by analogy from the same obligation in respect of the determination of reasonable or equitable shares. Both processes entail a weighing of

relevant considerations. Moreover, since an unduly short period may result in the initiation of a use which upsets an equitable allocation, the opportunity for meaningful study and evaluation is closely tied to both the duty to avoid causing injury and the principle of equitable utilization.

(4) The last sentence of paragraph 2 is designed to ensure, as far as possible, that the flexible means provided in that paragraph for the determination of a reasonable period for study and evaluation do not themselves consume an unreasonable amount of time or unduly impede other aspects of the process of accommodation.

Article 12. Reply to notification; consultation and negotiation concerning proposed uses

1. If a State notified under article 10 of a proposed use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 11.

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

3. If under paragraph 2 of this article the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the proposed use to eliminate the causes of harm, adjustment of other uses being made by either of the States, and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

Comments

(1) This article covers the same general subject as article 13 submitted by the previous Special Rapporteur.

(2) It will be noted that two separate determinations are necessary under paragraph 1: a determination that the proposed use would, or is likely to, cause the notified State appreciable harm; and a determination that such use would, or is likely to, result in the notifying State's depriving the notified State of its equitable share. The reason both are required is that, as explained earlier in this report, the fact that one State's use of a watercourse causes another State harm does not, in itself, mean that the second State has sustained legally recognizable injury.

(3) The compensation envisaged in paragraph 3 may take a variety of forms, including the payment of an indemnity, the provision of electric power or flood-

control measures, or allowing the notified State to increase one of its existing uses.

(4) The obligation to negotiate set out in paragraph 3 is based on the requirements laid down by the ICJ in paragraph 85 of its judgment in the *North Sea Continental Shelf* cases.³⁵⁴

(5) The requirements of paragraph 4 are based on paragraph 78 of the ICJ's judgment in the *Fisheries Jurisdiction* case³⁵⁵ and the arbitral award in the *Lake Lanoux* case.³⁵⁶ The use of the term "interests" is based on the *Lake Lanoux* award, which required that consideration be given "to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right".³⁵⁷

Article 13. Effect of failure to comply with articles 10 to 12

1. If a [watercourse] State fails to provide notice to other [watercourse] States of a proposed new use as required by article 10, other [watercourse] States which believe that the proposed use may cause them appreciable harm may invoke the obligations of the former State under article 10. In the event that the States concerned do not agree upon whether the proposed new use may cause appreciable harm to other States within the meaning of article 10, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 12, with a view to resolving their differences.

2. Subject to article 9, if the notified State fails to reply to the notification within a reasonable period in accordance with article 12, the notifying State may proceed with the initiation of the proposed use, in accordance with the notification and other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 10 and 11.

3. If a [watercourse] State fails to provide notification of a proposed use as required by article 10, or otherwise fails to comply with articles 10 to 12, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article 9.

Comments

(1) This article covers the same general subject as article 14 submitted by the previous Special Rapporteur.

(2) Paragraph 1 provides for the situation in which the proposing State fails to provide notice of a planned new use as required by article 10. It allows another State—which may have learned indirectly and only in very general terms of the proposed new use—to invoke the proposing State's obligations under article 10 to provide a detailed notification.

³⁵⁴ See footnote 340 above.

³⁵⁵ *Ibid.*

³⁵⁶ See the passages from paragraph 22 of the award cited above (para. 122 and footnotes 212 and 213).

³⁵⁷ See footnote 212 above.

(3) The proposing State may not have provided notice because of its belief that the new use would not be likely to cause appreciable harm to other States. In such a case, paragraph 1 would require the proposing State, at the request of the other States concerned, to enter promptly into negotiations with them with a view to reaching agreement on whether appreciable harm might result from the proposed new use.

(4) Paragraph 2 would allow the proposing State to proceed with the new use if the notified State fails to reply within a reasonable period. However, the proposing State remains under the obligation set forth in article 9 not to cause legal "injury" to other States using the watercourse.

(5) Paragraph 3 is intended to encourage compliance with the notification, consultation and negotiation requirements of articles 10 to 12 by making a proposing State liable for any harm to other States resulting from the new use, even if such harm would otherwise be allowable under article 9 as being a consequence of the proposing State's equitable utilization of the watercourse. This assumes, of course, that article 9 will be reformulated to take into account the distinction between factual "harm" and legal "injury".

Article 14. Proposed uses of utmost urgency

1. Subject to paragraph 2, a State providing notice of a proposed use under article 10 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 12, proceed with the initiation of the proposed use if the notifying State determines in good faith that the proposed use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the proposed use and of its intention to proceed with the initiation of that use.

2. The notifying State may not proceed with the initiation of a proposed use under paragraph 1 unless it is in full compliance with the requirements of articles 10, 11 and 12.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the proposed use under paragraph 1, except such as may be allowable under article 9.

Comments

(1) This article is similar in some respects to paragraph 3 of article 13 submitted by the previous Special Rapporteur in his first report³⁵⁸ and paragraph 7 of article 8 submitted by Mr. Schwebel in his third report.³⁵⁹

(2) The principal object of the article is to permit the notifying, or proposing, State to proceed with the new use in certain extraordinary situations involving public emergencies. The examples of threats to public health or safety are given in the text of the article in order to em-

³⁵⁸ Document A/CN.4/367 (see footnote 15 above), para. 125.

³⁵⁹ Document A/CN.4/348 (see footnote 14 above), para. 156.

phasize the gravity and exceptional nature of the circumstances envisaged.³⁶⁰

(3) The requirement in paragraph 1 that the proposing State make a determination of utmost urgency "in good faith" is drawn by analogy from the good faith requirement laid down in paragraph 78 of the ICJ's judgment in the *Fisheries Jurisdiction* case.³⁶¹

(4) As in the case of paragraph 3 of article 13, the reference to article 9 in paragraph 3 of the present article is based on the assumption that article 9 will be

reformulated to distinguish between factual "harm" and legal "injury".

C. Concluding remarks concerning further draft articles on procedural rules

199. The draft articles set out above do not address some of the situations described in section A of the present chapter, in particular those in which: (a) State A believes that State B is currently exceeding its equitable share; (b) State A wishes to make a new use of the watercourse but is factually unable to do so because of uses being made by State B. Whether it is necessary to draft other articles containing procedural rules governing these and other situations will depend on the Commission's views as to how the various situations outlined above should be addressed.

³⁶⁰ For further explanation of the purposes and requirements of this article, see Mr. Schwebel's third report, *ibid.*, paras. 165-166.

³⁶¹ See footnote 340 above.

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

[Agenda item 7]

DOCUMENT A/CN.4/402*

Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur

[Original: Spanish]
[13 May 1986]

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CHAPTER I

Introduction

1. Although the present report will focus for the most part on the schematic outline proposed by the previous Special Rapporteur, Robert Q. Quentin-Baxter, in his third report, as amended in his fourth report,¹ it appears useful first to consider two important questions: the distinction between “responsibility” and “liability” in Anglo-Saxon legal terminology; and the unity of the topic.

A. Use of certain terms

2. The significance of the first question far transcends the simple question of terminology in one of the official languages of the United Nations, as will now be shown. In his preliminary report,² the previous Special Rap-

porteur explained that the choice of the term “liability” in the English title of the present topic stemmed from an exchange of views at the twenty-fifth session of the International Law Commission, when it was pointed out that “responsibility” referred in common law to the consequences of unlawful acts, whereas “liability” also referred to the very obligation imposed by the primary norm.³ In French, since *responsabilité* was the only available word, it would be used to cover both mean-

The other reports submitted to the Commission by the previous Special Rapporteur, at the thirty-third to thirty-sixth sessions, were:

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

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

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

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

³ Document A/CN.4/334 and Add.1 and 2 (see footnote 2 above), para. 10.

* Incorporating documents A/CN.4/402/Corr.1, 2 and 4.

¹ See footnote 21 below.

² The preliminary report was submitted to the Commission at its thirty-second session: *Yearbook* . . . 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

ings. It should be added that Spanish, which is also an official language of the United Nations, also does not make the same distinction as English, and the only available term is *responsabilidad*. In his fifth report, however, the previous Special Rapporteur appeared to reach different conclusions regarding the use of the two terms. On the basis of how the terms were used in certain treaties, specifically those relating to outer space and the marine environment, he concluded that the texts "make it clear that the term 'responsibility' has in these treaties quite a different meaning. It refers to the content of a primary obligation, not to its breach".⁴

3. For its part, the word "liability" was set in a somewhat different light in the fifth report, compared with the preliminary report. In considering article 235, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea,⁵ the previous Special Rapporteur noted that it was "clear that 'liability' may arise whether or not there has been a breach of an international obligation".⁶ He added: "The phrase 'responsibility and liability', as used in the United Nations Convention on the Law of the Sea, therefore corresponds closely to the twin themes of prevention and reparation, which form the basis of the present topic."⁷ In support of that conclusion, he made reference to many other legal norms.⁸

4. These apposite comments were confirmed by another writer versed in common law, L. F. E. Goldie. Examining the shades of difference between the English terms "responsibility" and "liability", and referring to their use in article 139, paragraphs 1 and 2, of the United Nations Convention on the Law of the Sea and in articles VI and XII of the 1972 Convention on International Liability for Damage Caused by Space Objects,⁹ he observed that the two words

... are used with different connotations. Thus, in both treaties, responsibility is taken to indicate a duty, or as denoting the standards which the legal system imposes on performing a social role, and liability is seen as designating the consequences of a failure to perform the duty, or to fulfil the standards of performance required. That is, liability connotes exposure to legal redress once responsibility and injury arising from a failure to fulfil that legal responsibility have been established. Although, at times, publicists and judges may employ the two terms (responsibility and liability) almost interchangeably or synonymously, in this presentation they will be used in the two distinct senses just stipulated.¹⁰

⁴ Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 39.

⁵ *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.

⁶ Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 39.

⁷ *Ibid.*, para. 40.

⁸ *Ibid.*, footnotes 100 and 101.

⁹ United Nations, *Treaty Series*, vol. 961, p. 187.

¹⁰ L. F. E. Goldie, "Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk", *Netherlands Yearbook of International Law*, 1985 (The Hague), vol. XVI, p. 180. Later in the article, he cited the following passage from an earlier study of his in which he had enunciated the same concepts:

"The term responsibility thus includes the attribution of the consequences of conduct in terms of the duties of a man in society. Secondly, it can denote the role of the defendant, 'as the party responsible' for causing a harm. In this second sense it establishes the actor's contingent liability. Liability, on the other hand, may be

With reference to liability for risk in domestic law, and giving as examples the so-called "enterprise liability" and "products liability", Goldie stated:

... All the categories under discussion have become predicated on notions of the actor's legally imposed social responsibilities. These are to observe the safest procedures and protective methods and, where necessary, to provide clear warnings. Alternatively the actor is called upon to compensate victims either for harms arising from his failure to observe his duties or, even when these are fully observed, still compensate for harms which nevertheless occur. . . . In this sense the term responsibility represents the law's perspective of what an actor in society owes.¹¹

5. Accordingly, as stated in the quotation above (para. 3) from the fifth report, the distinction between the English terms "responsibility" and "liability" "corresponds closely to the twin themes of prevention and reparation". In short, the law considers that certain persons are responsible for specific obligations before the event that produces the injurious consequences. In that sense, responsibility refers to the host of obligations which the law imposes on persons because of the function they perform, which in the context of the present topic means the State, whose obligation to exert control derives from the exclusivity of the jurisdiction which it exercises in its territory. Thus, in the absence of an agreed régime for assigning direct responsibility to individuals in certain cases, the State not only would be liable when there were injurious consequences of certain activities carried out in its territory or under its control, but also would be responsible for obligations of prevention, i.e. all the duties involved in avoiding or minimizing such consequences. The term *responsabilidad* in Spanish (and no doubt *responsabilité* in French too), by encompassing the two separate connotations of the English terms, would cover the duty of prevention and the duty of reparation without difficulty, setting in a new light a strong objection that has been raised to the inclusion in the present topic of obligations of prevention, namely that, in law, liability is strictly confined to the consequences of the breach of an obligation. According to that viewpoint, prevention has nothing to do with liability.¹²

B. Unity of the topic

6. The extension of the scope of the term "liability" has made room in the title and in the topic itself for obligations of prevention and is thus consistent with the

used to contrast that notion and to indicate the consequences of a failure to perform those duties which derive from that responsibility—redress. That is to say, failure to observe one's responsibilities, or . . . being responsible in a causal sense for harm, carry the legal consequences (i.e. both the sanctioning and compensatory function) of incurring liability." ("Responsibility and liability in the common law", in *Legal Aspects of Transfrontier Pollution* (Paris, OECD, 1977), p. 344.)

He had concluded with an idea that is relevant to the present topic:

"These pragmatic considerations point to the importance of distinguishing, in appropriate cases, between responsibility as a constant factor and liability as subject to a number of variable considerations in the process of decision." (*Ibid.*)

¹¹ "Concepts of strict and absolute liability . . .", *loc. cit.* (footnote 10 above), p. 181.

¹² See *Yearbook . . . 1982*, vol. I, p. 284, 1743rd meeting, para. 40, and p. 289, 1744th meeting, para. 26 (comments by Mr. Thiam).

views expressed both in the Commission and in the Sixth Committee of the General Assembly¹³ to the effect that the various matters relating to this aspect should definitely not be left aside. Both aspects therefore have their place in the title; what remains to be identified is the intrinsic unifying link in this symbiosis between prevention and reparation, which may at first appear heterogeneous. For the previous Special Rapporteur, the basis of the prevention-reparation continuum lay in prevention, because all the aspects related to prevention were much more firmly established in State practice than the aspects related to reparation. Indeed, he stated in his fourth report:

But what is "prevention" and what is "reparation"? Reparation has always the purpose of restoring as fully as possible a pre-existing situation; and, in the context of the present topic, it may often amount to prevention after the event. . . .¹⁴

The link between prevention and reparation would seem to lie in their practical application, since they are the same concept viewed from different perspectives or, alternatively, at different moments. As the previous Special Rapporteur stated in his second report,¹⁵ "due diligence" or the "duty of care" even covers reparation for any injury that can be reasonably attributed to the lawful conduct of a lawful activity. However, treaty régimes provide ample evidence that compensation is a less adequate form of prevention, and it should not be allowed to become a tariff for causing avoidable harm.¹⁶

7. Finally, there would appear to be a conceptual difference between rules of prevention and rules of reparation only when the latter emanate from the wrongfulness of an act, in other words when they are secondary rules. In his fourth report, the previous Special Rapporteur stated that, from a formal standpoint, the subject-matter of the present topic "must be expressed as a compound 'primary' obligation that covers the whole field of preventing, minimizing and providing reparation for the occurrence of physical transboundary harm".¹⁷ It should again be recalled that, as prevention and reparation fall within the domain of primary rules, it follows that, if injury is done which subsequently gives rise to the obligation to make reparation, that reparation is imposed by the primary rule in terms of the lawfulness of the activity in question; only if the source State fails in its primary obligation to make reparation does the question become one of secondary rules, with the notion of responsibility for the wrongful act which the State's violation of that primary obligation constitutes. Thus the present topic can be dealt with entirely within the context of primary rules.

8. Here, then, is a criterion for unity of form as referred to above (para. 6). What, however, would be the

¹³ See the previous Special Rapporteur's third report, document A/CN.4/360 (see footnote 2 above), para. 9 and footnote 12; and his fourth report, document A/CN.4/373, para. 10 and footnote 31.

¹⁴ Document A/CN.4/373 (see footnote 2 above), para. 47.

¹⁵ Document A/CN.4/346 and Add.1 and 2 (see footnote 2 above), para. 40.

¹⁶ *Ibid.*, para. 91.

¹⁷ Document A/CN.4/373 (see footnote 2 above), para. 40.

topic's unity of substance? To test a theory here one might perhaps look to the injury itself to discover the criterion which unifies prevention and reparation. Viewed in this way, the injury acts as a true magnet: everything revolves around it. In the case of reparation, it is the injury that has been done which is important; in the case of prevention, it is the potential injury that counts, in other words the risk. Reparation is justified by the injury done, which appears to be the suspensive condition whose fulfilment in turn entails an obligation. Obligations of prevention derive from the risk involved, from the likelihood of injury, from its characteristic predictability. If an activity entailed no risk, or if there were no likelihood of injury, obligations of prevention would be unnecessary.

9. The fact that injury, whether actual or potential, is such a key factor makes for a clear-cut distinction between the present topic and that of State responsibility for wrongful acts, placing the present topic squarely in the domain of international responsibility in the sense accepted thus far by the Commission. Actually, under part 1 of the topic of State responsibility, injury is not a *sine qua non* for responsibility, contrary to what many writers maintain is required under contemporary customary law.¹⁸

10. In fact, in his second report on State responsibility, the then Special Rapporteur, Mr. Ago, said:

One last point should be mentioned before concluding. In addition to the two elements, the subjective and the objective, that have been shown to be constituent elements of an internationally wrongful act which is *per se* a source of responsibility, reference is sometimes made to a third element, which is usually termed "damage". There is, however, some ambiguity in such references. In some instances, those who stress the requirement that a damage should exist are in fact thinking of the requirement that an external event should have occurred; as has been noted in the preceding paragraphs, such event must in some cases be present in addition to the actual conduct of the State if that conduct is to constitute a failure to carry out an international obligation. . . .¹⁹

He concluded by saying:

. . . It therefore seems inappropriate to take this element of damage into consideration in defining the conditions for the existence of an internationally wrongful act.²⁰

C. Scope of the topic

11. The schematic outline of the topic proposed by the previous Special Rapporteur²¹ deals primarily with the duty of the source State to avoid, minimize or repair any

¹⁸ See, for example, E. Jiménez de Aréchaga, "International responsibility", in *Manual of Public International Law*, M. Sorensen, ed. (London, Macmillan, 1968), p. 534. According to K. Zemanek: "Because claims for material damages sustained by nationals abroad were so often at the source of international judicial practice, damage came to be regarded, in judicial practice and doctrine, as a constituent element of responsibility." ("La responsabilité des Etats pour faits internationalement illicites ainsi que pour faits internationalement licites", *Responsabilité internationale* (Paris, Pedone, 1987), p. 19.)

¹⁹ *Yearbook . . . 1970*, vol. 11, p. 194, document A/CN.4/233, para. 53.

²⁰ *Ibid.*, p. 195, para. 54.

²¹ For the text of the schematic outline, see the previous Special Rapporteur's third report, document A/CN.4/360 (see footnote 2 above), para. 53; and for the changes made to it, see the fourth report, document A/CN.4/373, paras. 63-64.

“appreciable” or “tangible” physical transboundary loss or injury when it is possible to foresee a risk of such loss or injury associated with a specific dangerous activity. Since that duty of the State is subject to factors such as the distribution of responsibility and of costs and benefits, it is seen to constitute, in the words of the previous Special Rapporteur in his fourth report, a “concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority”.²² Three major clarifications should be made with regard to this general statement:

(a) The scope of the topic will be confined to physical activities giving rise to physical transboundary harm, inasmuch as State practice is at present insufficiently developed in other areas.

(b) The statement of principles in section 5 of the schematic outline will be amplified and strengthened to the extent that a review of State practice is found to justify, and the statement of factors in section 6 will be adjusted accordingly. This process will determine “the

²² Document A/CN.4/373 (see footnote 2 above), para. 63.

degree to which the solutions contained in the schematic outline approach the standard of strict liability”.²³

(c) The scope may be influenced by an examination of the role which international organizations may play, not, in principle, by occupying the role of the source State, but rather to the extent that the procedures indicated in sections 2, 3 and 4 of the schematic outline “may all be substantially affected by the way in which States interact as members of international organizations”.²⁴ Similarly, it would seem that the consultative procedures of international organizations and the technical services which they provide may fulfil the functions contemplated in section 3 or play a relevant role in the assessment of reparation under section 4.²⁵

The present Special Rapporteur accepts these observations as a point of departure, contingent upon whatever the future development of the topic may suggest.

²³ *Ibid.*

²⁴ *Ibid.*, para. 64.

²⁵ *Ibid.*

CHAPTER II

The schematic outline

12. In his preliminary report, the present Special Rapporteur indicated his intention to concentrate his future work on what he considered to be the most important raw material for the present topic, the schematic outline.²⁶ The reason for this is that the general notions of the schematic outline have met with acceptance in the Commission and in the Sixth Committee of the General Assembly, despite some criticisms and suggestions for improvement. The first task, therefore, seems to be to review the schematic outline to try to get a clear idea of its dynamics, to re-examine its theoretical bases and to correlate it with State practice in the matter.

13. The present analysis, then, will have to be directed primarily towards understanding how the schematic outline works and bringing out the various obligations arising from it. At the present stage, we will work only on the outline itself and not on the amendments proposed in the first five draft articles submitted subsequently by the previous Special Rapporteur in his fifth report,²⁷ which will be considered separately and involve such important questions as whether the topic covers “situations” as well as “activities”. Section 1 of the outline establishes the scope of the topic, gives the necessary definitions and makes one reservation. Some aspects of the scope have already been commented on above. Something else needs to be said, however, regarding the activities that constitute the very focus of

the schematic outline and the substance of the topic. The activities in question are those “within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State” (sect. 1.1). No indication is given of the kind of risk that is meant. Nothing is said about whether the risk lies in the existence of a very slight probability of catastrophic injury, for example, or whether we are to consider only the activities that Jenks termed “ultra-hazardous”,²⁸ or again whether the risk lies in the certainty of minor injury with a cumulative effect, as in the case of pollution. Presumably, then, what is meant are activities that have a higher-than-normal likelihood of causing substantial injury within the territory of another State or in localities under its control.

14. In cases where an activity of the kind described is about to begin or has already begun, and the State within whose territory or control the activity takes place has become aware of its nature, that State has an initial obligation: to warn the State that might eventually be affected about the situation and to provide it with “all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable, and the remedial measures it proposes” (sect. 2, para. 1). It would have the same obligation in a case where the affected State was the first to be aware of the circumstances and so informed the source State (sect. 2, para. 2).

²⁶ *Yearbook . . . 1985*, vol. II (Part One), pp. 100-101, document A/CN.4/394, paras. 14 *et seq.*

²⁷ Document A/CN.4/383 and Add.1 (see footnote 2 above), para. 1.

²⁸ See C. W. Jenks, “Liability for ultra-hazardous activities in international law”, *Recueil des cours de l'Académie de droit international de La Haye, 1966-I* (Leyden, Sijthoff, 1967), vol. 117, p. 105.

15. If a dispute arises because the affected State does not agree that the measures proposed are sufficient to safeguard its interests, the source State has a second obligation: to “co-operate in good faith to reach agreement with the affected State” upon the establishment of fact-finding machinery, provided that the affected State has so proposed (sect. 2, para. 5). Such machinery actually aims at more than a mere investigation of the facts. It is a genuine conciliation procedure, since it can “assess . . . implications”—an entirely natural stipulation—but can also “to the extent possible, recommend solutions” (sect. 2, para. 6 (a)). The report made would be advisory, not binding (sect. 2, para. 6 (b)).

16. What is the nature of these first two obligations? Actually, the schematic outline distinguishes between the duty to provide information—section 5, paragraph 4, stipulating that the failure to do so shall entail certain adverse procedural consequences (liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury)—and all other tasks that are part of the first two obligations (proposing preventive measures as part of the first obligation, co-operating in the establishment of fact-finding and conciliation machinery as part of the second). Failure to comply with the first two obligations in the outline does not in itself give rise to any right of action, as expressly stated in section 2, paragraph 8, and section 3, paragraph 4.

17. The matter, however, does not end there. The two paragraphs just mentioned stipulate a continuing duty that holds good until the original activity has ended, although the nature of that duty is not entirely clear in the outline, since the wording is somewhat ambiguous. Following the statement that the acting State “has a continuing duty to keep under review the activity that gives or may give rise to loss or injury”, there is the phrase “to take whatever remedial measures it considers necessary and feasible to safeguard the interests of the affected State; and, as far as possible, to provide information to the affected State about the action it is taking”. Naturally that wording can be changed and made more objective when the relevant article is eventually drafted. If that is done, the text would set forth an obligation which, if an injury occurred, would justify a comparison between the preventive measures actually taken and those which would effectively have prevented that injurious result; and this would perhaps introduce into the topic a kind of “due diligence”.

18. Under certain specific conditions, which are basically the failure of the fact-finding and conciliation machinery—either because more than a reasonable time has elapsed for its establishment or the completion of its terms of reference (sect. 3, para. 1 (a)), or because one of the States concerned is not satisfied with the findings (sect. 3, para. 1 (b))—or, of course, a recommendation to that effect in the report of the fact-finding machinery (sect. 3, para. 1 (c)), a third obligation arises for the States concerned to enter into negotiations “at the request of any one of them with a view to determining whether a régime is necessary and what form it should take” (*ibid.*, *in fine*). Here the parties would be encouraged to apply the principles set out in section 5 and

refer to the matters set out in section 7; but because provision is made for them to agree otherwise, they would not be obligated to do so. Likewise, paragraph 4 of section 3 stipulates that their duty to enter into negotiations does not entail any possibility of a right of action, and it reiterates the duty of care in terms identical with those of paragraph 8 of section 2.

19. Section 4 of the schematic outline is extremely important from the theoretical point of view: members of the Commission will recall the lengthy debates to which liability for risk, or “strict liability”, has given rise. In fact, this is the very heart of the topic, since an attempt is being made to establish the rights of the parties when an activity of the type considered in the outline has caused injury and no agreed régime exists to determine those rights, either because the parties have not yet reached agreement—although negotiations have been initiated—or because one of them has refused to begin negotiations. At this point it is necessary again to enumerate the obligations referred to above. The first three mentioned are obligations to establish a régime; those considered below are obligations to make reparation for the injury caused. The obligation referred to in paragraph 17 above, on the other hand, relates entirely to prevention.

20. Section 4, paragraph 2, establishes the duty to make “reparation” in principle for “any such loss or injury”. This should be read in conjunction with the principle—perhaps the most important one in the schematic outline—contained in section 5, paragraph 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”. But this principle is subject to two major conditions. The first, also contained in section 4, paragraph 2, is: “unless it is established that the making of reparation for a loss or injury of that kind or character is not in accordance with the shared expectations of those States”. The second condition, contained in section 4, paragraph 3, relates to the very process of negotiation: in addition to the previously mentioned expectations, “account shall be taken of the reasonableness of the conduct of the parties, having regard to the record of any exchanges or negotiations between them and to the remedial measures taken by the acting State [now termed “source State”] to safeguard the interests of the affected State”. Furthermore, “account may also be taken of any relevant factors, including those set out in section 6, and guidance may be obtained by reference to any of the matters set out in section 7”. It appears, therefore, that negotiations may result in reparation, the amount of which may vary according to such factors as the nature of the injury, the nature of the activity in question and the preventive measures taken. Conceivably, the parties might agree that reparation should not be made because of exceptional circumstances that make it inappropriate. To sum up, negotiation is an open process which should take numerous factors into account in settling the question of compensation.

21. The Spanish text of section 4, paragraph 2, reads: . . . *a menos que conste que la reparación . . . no responde a las expectativas compartidas de esos Estados*. The English text, on the other hand, reads:

“... unless it is established that the making of reparation... is not in accordance with the shared expectations of those States”. The words “unless it is established” could have been translated by their exact Spanish equivalent: *a menos que se establezca*. The expression *a menos que conste* could give rise to a much more strict interpretation with respect to the burden of proof. In the English text, this is not very clear; generally speaking, positive facts must be proven, not the lack of them. In any event, if it was the intention of the schematic outline to let the burden rest with the source State, the latter could no doubt rely on presumption and all the probative elements. In the Spanish text, however, the burden of proof undoubtedly lies with the source State, and in addition a form of negative proof is required of that State, namely that somewhere it should be expressly stated that reparation was not a shared expectation. That, at least, is a possible interpretation and one which would in fact cancel out any conditions and make reparation always appropriate in practice, because of the impossibility of proving the contrary. The foregoing comments do not, therefore, stem from mere semantic considerations, especially if it is taken into account that some forms of strict liability—the least strict—avail themselves of an inverted form of *onus probandi* as a technique for achieving their purposes.

22. The “shared expectations” are those that “(a) have been expressed in correspondence or other exchanges between the States concerned or, in so far as there are no such expressions, (b) can be implied from common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community” (sect. 4, para. 4). What is the nature of these “shared expectations”? The expectations have a certain capacity to establish rights. This falls within the purview of the principle of good faith, of estoppel, or of what is known in some legal systems as the doctrine of “one’s own acts”. If one of the parties acts on the basis of expectations created by the other, it may have the right on more than one occasion to some reparation if, through the fault of the other party, those expectations are not met. There is a certain contractual or quasi-contractual force in this matter of expectations. Is that how they were intended to be characterized in the schematic outline? This hypothesis cannot be ruled out, at least if the text of section 4, paragraph 4 (a), is borne in mind: it indicates that expressions of shared expectations should be sought first in “correspondence or other exchanges between the States concerned” and elsewhere only “in so far as there are no such expressions”. But the real intention here seems to have been to rely on the whole range of approaches common to both parties, or to a region, or lastly to the entire international community. Such expectations would base reparation on more or less customary, or quasi-customary, law. This is illustrated by certain cases cited below,²⁹ in one of which it was pointed out that, before a hazardous activity was begun, it was an accepted principle in Europe that mandatory negotiations would be held with any States that might be affected.

²⁹ See footnote 40 (a) below.

23. In short, the schematic outline has two basic objectives: to provide States with a procedure for the establishment of régimes to regulate activities which give rise or may give rise to transboundary injury; and to make provision for situations where such injury occurs prior to the establishment of such a régime.

24. With regard to the first objective, the source State is basically under two types of obligation:

(a) to notify the State which will presumably be affected about a dangerous activity being undertaken in the source State, to inform it of the characteristics of that activity in relation to the foreseeable damage and to propose remedial measures;

(b) to co-operate in good faith in the establishment of fact-finding and conciliation machinery if, in the view of the affected State, such measures are not sufficient.

The outline expressly provides that failure to fulfil either of these obligations does not in itself give rise to any right of action, although failure to inform the affected State entails certain adverse procedural consequences.

25. An additional obligation exists during the period when the source State fails to fulfil the first two obligations. It is safe to say that, in any event as soon as the dangers of an activity become known, the source State should continuously monitor such activity and take whatever measures it considers necessary and feasible to safeguard the interests of the affected State.

26. The second objective seems intended to establish a régime governing reparation for injury. Its theoretical basis has various elements: on the one hand, the previous Special Rapporteur sought to base it on obligations of prevention, in such a way that those obligations (whose incorporation into State practice and general international law seems to have been generally recognized) also include the obligation to make reparation in cases where injury has been sustained. Notwithstanding this, the obligation to make reparation is also based on a form of strict liability, the automatic nature of which is tempered by the two conditions already referred to: shared expectations and negotiation (see para. 20), which involve the matters embodied in section 7, so that formulas for balancing the respective interests are apparently sought through determination of the injury caused by a specific act and reparation for such injury.

27. Of the principles, factors and matters set out in the schematic outline, the principles in section 5 should be considered here in view of their great importance to the functioning of the mechanisms whose dynamics we are attempting to explain.

(a) The first principle (para. 1) seeks to reflect the content of Principle 21 of the United Nations Declaration on the Human Environment (Stockholm Declaration),³⁰ or, in other words, to ensure that all human activities in the territory of a particular State are conducted with as much freedom as is compatible with the interests of other States. This is the guiding principle in the whole matter, the principle that authorizes and

³⁰ 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.

justifies the balance-of-interests test and is at the basis of all régimes, as well as of any compensation provided when no régime exists.

(b) The second principle (para. 2) is that of prevention and, where applicable, the related principle of reparation. The scope of preventive measures is determined in turn by the importance of the activity in question and its economic viability.

(c) The third principle (para. 3) is that an innocent victim should not be left to bear his loss or injury, subject to the conditions already referred to. A form of balancing of interests is also involved here, according to the distribution of the benefits of the dangerous activity, the means at the disposal of the source State and the standards applied in the affected State and in regional and international practice.

(d) Finally, there is a principle (para. 4) relating to legal procedure already commented on (para. 16 above): an affected State that has not received information from the source State concerning the nature and effects of an activity and the means of verifying and assessing that information is allowed liberal recourse to inferences of fact and circumstantial evidence in order to establish whether the activity does or may give rise to loss or injury. This principle seems intended to redress the im-

balance which exists, with respect to the nature and effects of an activity, between the source State, which has exclusive jurisdiction over its territory, and the affected State, which cannot investigate that activity and its effects because of this exclusive jurisdiction.³¹

28. What is the nature of these principles? In the case of the institution of régimes, such principles can play a guiding role that would facilitate their establishment. In the case of injury caused when no régime exists, however, they seem to contain a more preemptory element. At least one of the parties may invoke them, and they may be dispensed with only if both parties so agree. The rest of the schematic outline, although relevant to the present topic, has no decisive influence on the dynamics of the outline. At any rate, its influence appears to be limited to the subjects mentioned in paragraph 26 above, namely the factors to be borne in mind by the parties (sect. 6), the matters concerning prevention and reparation (sect. 7) and the possible establishment of mechanisms for the settlement of disputes (sect. 8). All of these will be examined as work on the topic progresses.

³¹ See the reasoning of the ICJ in the *Corfu Channel* case (merits), Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 18.

CHAPTER III

Critical analysis of the schematic outline

A. Activities

29. First, it should be noted that the schematic outline consistently considers "activities" which lead to injurious consequences, and not "acts", to which reference is made in both the English and Spanish titles of the topic. In this manner, without expressly stating so, it bridges the gap between those language versions and the French version, in which the title refers to *activités*. An activity comprises, in a certain perspective, a series of acts. It is activities which involve an element of danger and relate to the characteristic form (or even, in some cases, the statistical frequency) of injuries. It is activities, and not just isolated acts—the regulation of which is more difficult—which are the subject of consideration with a view to the establishment of a régime. It is easy to see the wide variety of acts of different kinds subsumed under an activity of the type being considered under the present topic, such as the activity of running a plant of the Trail Smelter type, and the many and varied acts by various persons which finally converge in the production of its harmful emissions. This position thus appears correct and, at some point, it might be worth amending the English and Spanish titles of the topic accordingly.

30. The activities dealt with in the schematic outline are those "which give rise or may give rise" to transboundary injury (sect. 1.1). In other words, they are activities which involve risk; but the type of risk involved is not specified. We have seen above (para. 13, *in fine*)

that, depending on the degree of risk, various types of activities can be envisaged. Zemanek distinguishes between those which cause injury only in the event of an accident, and those which permanently cause the emission of harmful substances.³² Gunther Handl, for his part, excludes one type of activity in the second category from the scope of the topic, namely activities in which the source State, because the emissions are constant and entirely foreseeable, has or should have not only knowledge of the significant transboundary injury caused, but also the capacity to prevent it. In such a case, we would be faced with an internationally

³² Zemanek considers that:

"The term 'liability for risk' is frequently used for this type of liability. But the term is inappropriate in the present context since it must be applied to two situations, only one of which involves an element of risk proper:

"(a) the risky activity itself: in this case, injury does not arise in the normal performance of the activity, but may occur in the event of an accident. It is the extent of the injury which gives cause for concern, and this is why such activities are permitted only on condition that any resulting injury will be compensated for;

"(b) the permanent emission of harmful substances: in this case, society seems to accept a certain degree of pollution (which is frequently not clearly perceived by the individual), but if the limit established is exceeded, either by accident or by a change in technical standards, the resulting damage must be compensated for.

"We propose the use of the term 'absolute liability' to cover the two cases. The term also implies that such liability is not the consequence of a crime." (*Op. cit.* (footnote 18 above), p. 17.)

wrongful act.³³ Both writers admit the existence of a minimum amount of injury, or threshold, which, according to established custom, would be borne by the affected State; but Handl stresses that, if there at least exists an awareness that the threshold might be exceeded and if the source State has the capacity to prevent that, we would be faced, as already stated, with the question of responsibility for wrongful acts. That would certainly be the case when the substantial injury in question had been prohibited. Yet it should be noted here that, even in these cases of "permanent emission of harmful substances", as Zemanek terms them, there is a possibility of accident for which causal responsibility would arise, as was demonstrated in the *Trail Smelter* case.³⁴ There the arbitral tribunal laid down certain precepts and conditions for the prevention of a substantial degree of injury, but nevertheless established a régime for compensation in the event of accidental injury—even if the conditions for prevention had been met.

31. In short, if an activity has not been prohibited, even though it may be dangerous and liable to be prohibited in the future, it comes within the scope of the present topic. The qualification of "twilight zone" can be applied only to the shifting boundary of activities

³³ Handl states:

"... The basic question is, of course, as to when State conduct which is lawful *per se* because it is in itself expressive of a legitimate exercise of a sovereign right, but which produces harmful transboundary effects, must be deemed to be internationally wrongful. ... Certainly, States are under a general obligation to refrain from causing transboundary harm. But this obligation does not imply that affected States enjoy absolute protection against transboundary environmental interference. For international practice clearly suggests that only 'substantial', 'significant' or similarly qualified transnational harm will amount to an infraction of the affected State's right. The *ex post facto* assessment of the 'substantiality' of the harmful transnational effects thus merely serves to determine whether one State's use of the shared natural resource, permissible *per se* as it is, has resulted in the violation of another's rights. A finding of such an infraction of itself does not, however, allow inferences as to the quality of the injury-causing conduct as internationally wrongful."

Immediately afterwards, however, he arrives at this important concept:

"Instead, a conclusion to this effect may be suggested by the nature of the transboundary pollution. If it is of the continuous kind, the source State is likely to know or might be presumed to know of the transborder flow of pollutants. Such knowledge will be increasingly presumable as States begin to establish environmental quality standards for the protection of human health and welfare and of natural resources. Standards of this sort entail the need for close monitoring of environmental concentrations of pollutants and the patterns of their dispersion; States are consequently bound to become more aware of significant transboundary flows of pollutants. Thus where States intentionally discharge pollutants in the knowledge that such discharge is bound to cause, or will cause with substantial certainty, significant harmful effects transnationally, the source State will clearly be held liable for the resulting damage. The causal conduct will be deemed internationally wrongful. Most cases of injurious transboundary environmental effects involve continuous transboundary pollution. Most of these situations consequently intrinsically involve questions of State responsibility."

(G. Handl, "Liability as an obligation established by a primary rule of international law: Some basic reflections on the International Law Commission's work", *Netherlands Yearbook of International Law*, 1985 (The Hague), vol. XVI, pp. 56-59.)

³⁴ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), p. 1905.

that are moving towards prohibition, and not to other aspects, since it is clear that within this topic there will be activities which, although they may cause significant injury, will be permitted because, on balance, the assessment of conflicting interests indicates continuation of the activity despite its risks and compensatable injury.

32. To these two types of activities, characterized by foreseeable risk and potential injury, should be added others in which injury is not foreseeable, as in the circumstances precluding wrongfulness on the grounds cited in articles 31 (*Force majeure* and fortuitous event), 32 (Distress) and 33 (State of necessity) of part 1 of the draft articles on State responsibility.³⁵ Article 35 of that draft provides: "Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act." That reservation would be followed up in the present draft with an obligation to compensate by virtue of the principle enunciated in section 4, paragraph 3, subject of course to the conditions already referred to (shared expectations, negotiations).

33. The activities and cases involved are certainly heterogeneous, but this does not undermine the unity of the topic, which is provided by the occurrence of injury. Moreover, it should be noted that in all legal systems responsibility for wrongful acts and liability for risk overlap, since the latter generally provides an appropriate complement to the former.³⁶

B. Obligations

34. Analysis seems to demonstrate that there are two types of obligation relating to the régime: to inform and to negotiate.

35. The first obligation which arises is that of the source State to inform the State which might be affected that an activity has begun or will begin in its territory which it considers dangerous, and to provide that State with all the necessary data concerning the characteristics of the activity, the risks which it creates and the type of injury which it may cause, so that that State may make its own evaluation of the situation. The same obligation arises for the source State if the potentially affected State draws its attention to such an activity which has begun or is about to begin in the territory of the source State. This obligation seems to have two distinct objectives. One is the general objective of co-operating with the affected State in such circumstances. But it should not be forgotten what such circumstances involve, namely the existence of a risk and, therefore, possible injury for the affected State. Furthermore, according to the régime established in the schematic outline, this is injury for which the source State would in principle be liable, because the innocent victim, also in principle,

³⁵ *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

³⁶ According to Handl: "This expectation [of homogeneity of the content of the topic] appears, however, unreasonable in view of the fact that in most domestic legal systems there co-exist pockets of strict liability or liability without fault, whose rationale cannot necessarily be reduced to a common denominator." (*Loc. cit.* (footnote 33 above), p. 63.)

should not be left to bear it. The second objective is to prevent injury attributable to the source State. This gives greater force to the obligation than the simple, more or less general, duty to co-operate.

36. As an apparent corollary, the violation of this obligation authorizes the affected State to resort to means which would otherwise be prohibited in order to establish the dangerous nature of the activity (sect. 5, para. 4) and, it should be added—although the schematic outline does not expressly say so—if need be, in order to establish a presumption, unless the contrary is proved, that there is a causal relationship between the activity and the injury when injury has been caused before any régime has been agreed upon. The first hypothesis envisages the situation in which, in spite of the initial refusal, it has been possible to establish fact-finding machinery, and seems to be an adequate reflection of the reasoning of the ICJ in the *Corfu Channel* case,³⁷ since in rejecting the possibility that the United Kingdom could seek evidence in Albanian territory, the Court resorted to inferences concerning the Albanian Government's knowledge of the existence of the minefield. Indeed, what other possibility is there in view of the exclusive nature of territorial sovereignty? On the basis of what was stated above, therefore, we can consider this obligation to inform as one of the obligations of prevention.

37. The other obligations seem to be all subsumed under the obligation to negotiate. But to negotiate what? In general, the obligation is to negotiate a régime aimed at preventing, minimizing and possibly compensating for injury resulting from the activity in question. Under section 2, paragraph 1, the proposal of remedial measures is an additional aspect of the obligation to inform. Without prejudice to the fact that the source State, if it indeed intends to take preventive measures concerning that activity, must inform the affected State of them, it is quite obvious that, if it informs the affected State of the dangers arising from a new activity, it must also propose measures to prevent, minimize or compensate for any resulting injury. If it is the affected State which points out the danger of an activity which the source State does not consider dangerous, that would be a different matter. Then there would not yet exist an obligation to propose measures because there would not yet be agreement as to the facts. But it is clear that the source State has the obligation to inform the affected State of the characteristics of the activity with a view to determining whether or not it carries any risk. In the first situation, there would be an obligation to propose preventive measures, and this obligation is related to that of negotiating a régime, since such measures are the first step in any negotiation process.

38. Nevertheless, this general obligation to negotiate a régime actually presupposes a prior agreement by the parties as to the facts surrounding the activity in question. This is only logical. The obligation to negotiate must derive from some common basis, and if the parties do not agree that the activity is indeed dangerous, it will be necessary to establish that fact and determine its exact significance. Thus the schematic outline provides

that, if the measures proposed seem insufficient to the affected State, fact-finding machinery should be established; and it should be added that the same action should be taken when the source State disagrees about the degree of danger posed by the activity in question (sect. 2, paras. 4-5). In both cases, the initial obligation to propose measures is transformed into another obligation—that of negotiating the establishment of the fact-finding and conciliation machinery. Therefore it cannot be said that a breach of the first two obligations set forth in section 2 does not entail any consequences: a breach of the obligation to inform entails an adverse procedural consequence for the source State; and the second obligation is transformed into another specific obligation: the obligation to establish the machinery.

39. The obligation to inform, however, relates not only to the establishment of a régime, but also to reparation, i.e. reparation for actual injury. It seems obvious that, if injury results from an activity carried out in one State, on the danger of which that State has failed to provide any information to States exposed to risk, the source State is put in a very unfavourable situation, not only from the procedural viewpoint (the presumptive cause-and-effect relationship between the activity and the injury), but also because its act is considered a wrongful act entailing all the consequences of such acts. Let us imagine, for example, that the United States of America had not issued warnings and had not taken all the precautionary measures which it took before beginning its nuclear tests. There can be little doubt that, in such circumstances, the significance of the "*Fukuryu Maru*" case (1954)³⁸ would have been very different. It is therefore inappropriate to provide in section 2, paragraph 8, that a breach of this obligation does not give rise to any right of action, particularly with regard to the causing of injury. Here, as with regard to the obligation to negotiate fact-finding machinery, there are three possibilities. The first is to leave the text of the outline as it stands in order to enable States to reach a consensus more easily and avoid the problems of being presented with a régime which imposes on them, from the beginning, obligations with serious consequences. The second possibility is to reflect those consequences explicitly in the draft. The last possibility is purely and simply to delete from section 2, paragraph 8, the sentence concerning the lack of a right of action.

40. In order to facilitate the Commission's task in taking a decision concerning these three possible approaches, reference should be made here to the nature of the obligation to negotiate, since it might be thought that it is an incomplete obligation, or so-called "soft law", in which case it might seem natural that a breach should not entail any consequences. This matter was studied by the Commission in the early reports on the law of the non-navigational uses of international water-courses, and there is no need to add much to what was stated there.³⁹ The above analysis shows that the obliga-

³⁸ See M. M. Whiteman, ed. *Digest of International Law* (Washington, D.C.), vol. 8 (1967), p. 764.

³⁹ See in particular the first report of Mr. Schwebel on that topic: *Yearbook . . . 1979*, vol. II (Part One), p. 165, document A/CN.4/320, paras. 86-87.

³⁷ See footnote 31 above.

tion to negotiate is well established in international law as a means of resolving conflicts of interest, and that this is particularly true with regard to the conflicts considered here, where the obligation is linked to the prevention of injury for which one of the parties to the negotiations may be liable. Here the general prohibition against causing injury to another, as contained in the maxim *sic utere tuo ut alienum non laedas*, can have the effect of reinforcing the obligatory nature of negotiation as a necessary mechanism for compliance with that principle of law.⁴⁰ Indeed, the obligation to negotiate does not seem to be so much an incomplete obligation as

⁴⁰ Mention should be made in this regard of Article 33 of the Charter of the United Nations, as well as:

(a) the provisions of numerous multilateral agreements in which this obligation has repeatedly been laid down, such as article 5 of the Convention on Long-range Transboundary Air Pollution (E/ECE/1010); article 142, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (see footnote 5 above); article III of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (United Nations, *Treaty Series*, vol. 970, p. 211); article 12 of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (1983), p. 227);

(b) the provisions of numerous bilateral treaties, such as articles II (1), IV and V of the 1975 Agreement between Canada and the United States of America relating to the exchange of information on weather modification activities (United Nations, *Treaty Series*, vol. 977, p. 385); articles 30 and 31 of the 1922 Agreement for the Settlement of Questions relating to Watercourses and Dikes on the German-Danish Frontier (League of Nations, *Treaty Series*, vol. X, p. 201); article 3 of the 1931 General Convention between Roumania and Yugoslavia concerning the hydraulic system (*ibid.*, vol. CXXXV, p. 31); article 14 of the 1929 Convention between Norway and Sweden on certain questions relating to the law on watercourses (*ibid.*, vol. CXX, p. 263);

(c) certain well-known legal decisions, such as the advisory opinion of the PCIJ of 15 October 1931 in the case concerning *Railway Traffic between Lithuania and Poland*, which for the first time defined the obligation to negotiate as "not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements" (*P.C.I.J., Series A/B, No. 42*, p. 116); the judgment of the ICJ of 20 February 1969 in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3) and that of 25 June 1974 in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case (*I.C.J. Reports 1974*, p. 3); the *Lake Lanoux* arbitral award of 16 November 1957 (United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068);

(d) State practice, which also offers interesting examples along the same lines as those cited above. Certain cases have already been referred to (para. 22, *in fine* above). One concerned the installation of a nuclear plant for the generation of electricity at Dukovany, Czechoslovakia, 35 kilometres from the Austrian border. In this case, the Czechoslovak Government agreed to hold discussions with the Austrian Government concerning the safety of the plant. Another case related to the construction of a nuclear plant at R  thi, Switzerland, in the upper Rhine valley near the Austrian border. Following objections raised by the Austrian Government, negotiations were held between Switzerland and Austria and led to a total re-evaluation of the project by the Swiss Government. Yet another case concerned the construction of a refinery in Belgium near the border with the Netherlands. The latter State raised objections and pointed out that it was an accepted principle in Europe that, before beginning any activity that might cause injury to neighbouring States, the source State should negotiate with them. The Belgian Parliament itself expressed similar concern and asked the Government how it proposed to resolve the problem. (For further details on these cases and other precedents, see the Secretariat study on State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law: *Yearbook . . . 1985*, vol. II (Part One)/Add.1, document A/CN.4/384, paras. 97-113.)

one whose violation is not always easy to determine. It is helpful in this regard to refer to the *Lake Lanoux* arbitral award (1957), which set forth two concepts applicable to the line of argument being developed here:

. . . Thus, one speaks, although often inaccurately, of the "obligation of negotiating an agreement". In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.⁴¹

The two concepts of interest in this passage are: (a) that a real obligation is undeniably involved; (b) the examples of how that obligation may be violated.

41. As to the three possibilities which arise in relation to the obligation to negotiate in the present draft, the following considerations are relevant:

(a) Since there exists an obligation to negotiate, as concluded in the preceding paragraphs, there is reason to believe that its non-fulfilment by a State would normally entail some adverse consequence. For example, the affected State could very well neglect to carry out, as a form of retaliation, one of its obligations under another treaty whose provisions are particularly useful to the source State. This is possible if one takes into account article 73 of the 1969 Vienna Convention on the Law of Treaties.⁴² If the text of the schematic outline is left as it is, the affected State might be prohibited from availing itself of this possibility given to it under general international law. It seems somewhat dangerous for the draft to deny any right of action, and the present argument would militate against the first possibility, namely that of leaving the text as it is.

(b) Should the Commission include sanctions in the draft? The Special Rapporteur believes that, if the draft is ever transformed into a treaty, the States parties would be able to resort to the provisions of article 60 of the 1969 Vienna Convention. Adding anything further to that r  gime would not seem to be very practical.

(c) The best approach therefore seems to be to delete the first sentence of paragraph 8 of section 2, and of paragraph 4 of section 3, of the schematic outline. We will see later what should be done to the second sentence of these two paragraphs.

C. Injury caused in the absence of a treaty r  gime

42. Section 4 of the schematic outline has given rise to the greatest difficulties in the Commission and in the Sixth Committee of the General Assembly, as well as in legal doctrine, because it envisages a situation in which, in the absence of a treaty r  gime establishing the rights of the parties, injury is caused to persons or things within the territory of one State as a result of activities carried out within the territory or control of another

⁴¹ *International Law Reports, 1957 . . .*, p. 128.

⁴² United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140.

State. Anticipating, for the sake of clarity, the commentary to section 5, we may note here that the schematic outline establishes the principle that "an innocent victim should not be left to bear his loss or injury" (para. 3), but of course only "in so far as may be consistent with the preceding articles". We have already seen (paras. 20-22 above) that, under the system followed, reparation is subject to two important conditions: (a) shared expectations, and (b) negotiation itself, which may possibly lead to other factors being taken into account.

43. Obviously, the purpose of these provisions is to mitigate the absolute liability of the source State for the injury caused, so that the automatic mechanisms deriving from that liability do not enter into play. This aspect is undoubtedly one of the major contributions of the schematic outline towards alleviating the difficulties which have arisen in the Commission and also among States in general regarding the possible operation of strict liability at the international level without any agreement regarding specific activities. We have already seen (para. 20 above) what it is that the parties are to negotiate about. To this we may add what the previous Special Rapporteur said in his fourth report regarding Caubet's opinions:

. . . Failing an explicit stipulation in an applicable régime, there must always be room for evaluation of such issues as the way in which a loss or injury should be characterized, and whether that kind of loss or injury was foreseeable; whether the loss or injury is substantial; and whether the quantum of reparation is affected by any question of sharing, or by a change in the circumstances that existed when the activity which gave rise to the loss or injury was established. . . .⁴³

In respect of this stage of negotiation, Handl notes that we are faced with a "negotiable duty", or a duty which is negotiable for the source State, and that "the prospect of acceptability" of the draft by States in general "comes at the cost of a significant dilution of the normative contents of liability".⁴⁴

44. It remains to be seen whether that price has to be paid, and only time will tell. For now, negotiation is an inevitable step if there is no machinery for settling disputes in the draft itself. How else can the rights of the parties be brought into line with the principles laid down in section 5? Moreover, in the case of an activity for which there is no régime, and for which general principles therefore have to be applied, how can the amount of reparation be determined with a view to an eventual distribution of costs if preventive measures have been taken and other factors already mentioned or those referred to in section 6 have been considered? How can it be determined whether the injury is tangible, considerable or appreciable—or whatever term is to be used—and whether the threshold of tolerance which custom seems to have laid down in this respect has been crossed?

45. According to section 4, paragraph 1 (*in fine*), "the States concerned shall negotiate in good faith to achieve this purpose", i.e. to determine the rights and obligations of the parties. The aim of this provision seems to be to establish a further obligation to negotiate, this

time not about a régime but about reparation for the injury caused. It may be noted that, in respect of this obligation to negotiate, the right of action is not denied, as it is in the case of the obligation to negotiate fact-finding machinery or a régime under section 3.

46. With regard to "strict" liability, previous reports made a considerable effort, first, as we have already seen, to minimize its effects, and secondly, to consider it as only one of several factors which provide legal justification for any reparation made in cases of injury occurring in the absence of a treaty régime. Indeed, we have seen that the obligation of reparation is based on the obligation of prevention, which is considered to be enshrined in international law: the obligation of reparation is really no more than "prevention after the event".⁴⁵ Furthermore, if examined closely, recourse to the concept of "shared expectations" may be interpreted as an attempt to find a second component of the obligation of reparation, which would naturally be in addition to its existing function as a factor limiting the automatic application of strict liability. This second component would derive, perhaps, from the "quasi-contractual" nature of shared expectations, when exchanges between the parties reveal areas of imperfect agreement between them, or else from the "quasi-customary" nature of the expectations (if that heterodox expression may be used), when they arise from "common legislative or other standards or patterns of conduct normally observed by the States concerned, or in any regional or other grouping to which they both belong, or in the international community", as laid down in section 4, paragraph 4 (b).

47. Even if the foregoing is accepted, the third component of the obligation of reparation has to be strict liability. As the previous Special Rapporteur stated in his third report:

At the very end of the day, when all the opportunities of régime-building have been set aside—or, alternatively, when a loss or injury has occurred that nobody foresaw—there is a commitment, in the nature of strict liability, to make good the loss. . . .⁴⁶

Thus we move on to the much-debated subject of strict liability.

48. The first point to be made is that strict liability is not monolithic: its operation is far from uniform; in other words, there are various degrees of strictness. Indeed, the Special Rapporteur believes that it is necessary to talk of "forms" of strict liability. Goldie draws attention to differences in Anglo-Saxon law between "strict liability" and "absolute liability", depending on how rigorously they are applied.⁴⁷

⁴³ See paragraph 6 and footnote 14 above.

⁴⁴ Document A/CN.4/360 (see footnote 2 above), para. 41.

⁴⁵ Goldie writes:

" . . . While it is true that in some older writings these qualifiers [strict and absolute] were used interchangeably to describe such liability, usage was effectively changed after the publication of Sir Percy Winfield's influential article, 'The Myth of Absolute Liability' almost sixty years ago.

"Professor Winfield argued with a cogency which still influences the profession that the exculpatory rules which the courts have developed to mitigate the rigour of the defendant's liability under *Rylands v. Fletcher* (and those which have been evolved in jurisdictions recognizing the alternative doctrine of ultra-hazardous ac-

(Continued on next page.)

⁴³ Document A/CN.4/373 (see footnote 2 above), para. 54.

⁴⁴ Handl, *loc. cit.* (footnote 33 above), p. 72.

49. With regard to international law, Goldie draws attention to the differences along the lines mentioned to be found in conventions, such as those concerning nuclear power, which have incorporated the innovative concept of "channelling". This involves "[tracing] liability back to the nuclear operator, no matter how long the chain of causation, nor how novel the intervening factors (other than a very limited number of exculpatory ones)".⁴⁸ There are very few exceptions to liability in this area, as may be seen in article 9 of the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as amended by its 1964 Additional Protocol,⁴⁹ under which the only grounds for exonerating the nuclear operator are:

... disturbances of an international character such as acts of armed conflict and invasion, of a political nature such as civil war and insurrection, or grave natural disasters of an exceptional character, which are catastrophic and completely unforeseeable, on the grounds that all such matters are the responsibility of the nation as a whole. . . .⁵⁰

Thus some of the traditional grounds for exoneration, such as many cases of *force majeure*, fraudulent acts, acts of God or acts committed by third persons, would not be taken into account. Even negligence on the part of the plaintiff is not enough to exonerate the nuclear operator completely.⁵¹

50. Other treaties which establish forms of absolute liability are cited by Goldie in the same article, to which members of the Commission are referred for further examples.⁵² For instance, there is the 1972 Convention on International Liability for Damage Caused by Space Objects⁵³ (where liability is less strict, since "channelling" would not occur and the plaintiff State would have to prove the causal connection). In the field of marine pollution, too, there are varying degrees of strictness of liability. It has become stricter over the years. The International Convention on Civil Liability for Oil Pollution Damage, adopted at Brussels in 1969,⁵⁴ marked a departure from the view of the International Maritime Committee, whose draft convention was based on the concept of fault and on a reversal of the *onus probandi*. Thus the régime established at Brussels, under article III of the Convention, could be termed one of "absolute liability". It was completed with the establishment in 1971 of a compensation fund to provide additional compensation, with even more

limited grounds for exemption (see para. 59 below). Lastly, the International Conference on Liability and Compensation for Damage in Connection with the Carriage of Certain Substances by Sea, held in London in 1984 under the auspices of IMO, adopted two Protocols—one amending the 1969 Brussels Convention, and the other the 1971 Convention establishing the international compensation fund—which increased the amounts to be paid.⁵⁵

51. Liability for risk, or strict liability, is nothing more than a technique applied in law to obtain a result. In other words, State responsibility and international responsibility differ only in degree of prohibition, as mentioned earlier. To attain the goal of preventing certain acts, or of compensation for them should they occur, there can be various types of mechanisms leading to régimes of varying strictness, depending on the international community's general assessment of the situation. It is obvious that, in the examples given in the preceding paragraph, the international community, and the States participating in those treaty régimes, had strong feelings about the risks created, and the result was a form of liability that Goldie prefers to call "absolute" rather than "strict". However, what seems certain is that there is no clear-cut division between the two types of liability, but rather many shades of strictness, ranging from "channelling" and the almost total lack of exceptions, to more benign forms, such as the simple reversal of the burden of proof or recourse to inferences which would work in favour of the plaintiff.⁵⁶ It goes

⁵⁵ Goldie, *loc. cit.*, pp. 202-204. The London Conference also had before it a draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, which, even more significantly, extended liability to other dangerous substances. See Final Act of the Conference with texts of instruments and resolutions adopted (IMO publication, Sales No. 456 85.15.E). The draft convention, issued by IMO as document LEG/CONF.6/3, is published in *International Legal Materials* (Washington, D.C.), vol. XXIII, No. 1 (January 1984), p. 150.

⁵⁶ For example, the Argentine Civil Code provides for several degrees of liability. Concerning liability for subordinates, in which risk is considered the key factor:

"... if it can be proved that the accident was solely the fault of the victim, there shall be no grounds for compensation; if concurrent fault can be proved, compensation shall be partial. These solutions are not incompatible with the theory of created risk, because if it can be proved that it was the victim's fault, then it has been proved that the dangerous activity was not the sole cause of the accident; and if there was more than one cause, damage should be proportional in the light of those circumstances." (G. A. Borda, *Manual de obligaciones*, 4th ed. (Buenos Aires, Perrot, 1970), p. 484.)

In contrast, the liability of proprietors of hotels, inns and similar establishments, and that of captains of vessels and shipping agents for damage caused to the property of occupants of such establishments or to property being shipped, as well as liability for damage caused by objects thrown from a house, are subject to a stricter régime. Under article 1118 of the Civil Code, those in charge are not exonerated "even if they can prove that it was impossible for them to prevent the damage".

There are varying degrees of liability for damage caused by animals. Here, too, liability is considered to relate to the created risk even though, according to the traditional theory, it should be based on fault *in vigilando*, since it is often impossible to attribute any fault to the person held responsible (Borda, *op. cit.*, p. 500). The grounds for exoneration are: (a) if the animal was provoked by a third party (art. 1125); (b) if the animal broke loose or lost its way through no fault of its keeper (art. 1127), meaning that a third party was solely at fault; (c) *force majeure* or the victim's fault (art. 1128). In the case of a ferocious animal (art. 1129), on the other hand, neither *force*

(Footnote 47 continued.)

tivities) render the adjective 'absolute' something of a misnomer; hence the phrase 'strict liability' has come to be preferred in the usages of the common law. On the other hand, in this article the term 'absolute liability' has been revived, not in order to ignore Professor Winfield's important point as to accuracy in nomenclature, but to indicate that a more rigorous form of liability than that usually labelled "strict" is now before us, especially in the international arena."

("Concepts of strict and absolute liability . . .", *loc. cit.* (footnote 10 above), p. 194.)

⁴⁸ *Ibid.*, p. 196.

⁴⁹ United Nations, *Treaty Series*, vol. 956, p. 251, at p. 341.

⁵⁰ See *European Yearbook* (The Hague), vol. VIII (1961), p. 249, "Explanatory memorandum", para. 48; cited by Goldie, *loc. cit.* (footnote 10 above), p. 196.

⁵¹ Goldie, *loc. cit.*, p. 197.

⁵² *Ibid.*, pp. 193-204.

⁵³ United Nations, *Treaty Series*, vol. 961, p. 187.

⁵⁴ *Ibid.*, vol. 973, p. 3.

without saying that these forms of absolute liability, which are so strict in attributing the consequences to the source State, would be appropriate only in conventions on specific and very dangerous activities, and not in a general régime such as the one under consideration here. Naturally, if, under the present articles, States conclude specific conventions on certain activities, they will choose the form of liability they deem most appropriate for the risk in question or the nature of that risk. But in the case of prevention of or reparation for damage when a régime is not already in place—the situation under consideration here—liability should be of the least strict form, or should be conditional. This seems to be the intent of the schematic outline, which establishes a régime in which liability is not very strict and is subject to the above-mentioned conditions, which seem appropriate provided a few amendments are made.

52. As already indicated, the concept of liability for risk, or strict liability, has aroused some strong opposition in the Commission and in the Sixth Committee of the General Assembly, for it has been said, perhaps rightly so, that it is not based on any norm of general international law. That, of course, is possible if one is thinking of a very basic general norm which can be applied to a specific case. But we have all the elements that are needed to present such liability almost as a consequence which derives from premises that can be borne out by pure logic. Those premises are at the cornerstone of the international legal order. There is actually no need to prove that that foundation also includes the concept of sovereignty, a concept to which we should refer if we wish to indicate what is the basis for the undeniable right of every State to refuse to tolerate any disruption of the use and enjoyment of its territory. From the theoretical point of view, a State has no obligation whatsoever to tolerate the slightest disruption of such use and enjoyment arising from the action of another State, or of persons in the territory of that other State. That is the principle in its purest form.

53. The other side of the coin, also stemming from the same principle of territorial sovereignty, is the so-called right of a State to conduct or authorize any action within its territory without giving any thought to the consequences for the territory of other States. Both premises are based on the idea of sovereignty, and neither is valid if formulated in that manner. It is common knowledge that sovereignty is, like the god Janus, two-faced. This is so because of an inherent contradiction: there is no true sovereignty when there is co-existence with other, equal entities. The idea of sovereignty is incompatible with the idea of multiplicity, since sovereignty refers to an entity on its own, not one among a whole set of equals. Sovereignty in absolute terms would exist in a universal empire, not in a community of nations such as ours. Both concepts are in-

majeure nor blamelessness of the keeper is an exonerating factor. There may be grounds for exoneration when it is the victim's own fault.

In the case of damage caused by objects, and further to the amendment to article 1113 and related articles of the Civil Code by Act No. 17.711 of 1968, a distinction is made according to whether or not the object itself was defective or dangerous. If it was not, the person who owns or has the object can be exonerated by proving he was not at fault; if it was, he has to prove that it was the fault of the victim or of a third party not accountable to him (*ibid.*, p. 505).

compatible with international law and with mere factitious coexistence among equals. Thus the concept of absolute freedom of action of a State in its own territory, based on the premise that any activity authorized by the source State is valid, and that if it causes damage, that damage cannot be compensated for under international law, is as far removed from reality as the opposite assumption, namely that, since it is forbidden to cause damage because it would interfere with another State's use and enjoyment of its territory, any activity likely to create a risk is in principle prohibited and cannot be undertaken without the prior approval of the other States. Finally, if there is to be compensation for injury to aliens in the territory of a State, what can be said of injury inflicted upon persons living in their own country? The conclusion is clear. At the very root of the international legal order is sovereignty, conceived in the only way it can be, given the fact of international co-existence, namely in the context of interdependence. In turn, such coexistence is inconceivable unless the coexisting States are equal before the law. To disregard a State's right to undisturbed use and enjoyment of its territory (and therefore to refuse to be a party to a régime which regulates the rights and obligations of every State with respect to an activity), or to refuse to make reparation for damage caused, only upsets the balance, destroys the equality between States. The principle of equality before the law is very general, and if it is to be implemented, there must be more specific rules, which would be either primary or secondary depending on the nature of the topic. Therefore, proposing rules to implement it amounts to nothing more than the inevitable application of a legal technique to the situation.

54. A legal norm, then, cannot be based on an international "reality" which does not exist, since absolute independence, or absolute sovereignty, does not exist. In contrast, interdependence has always existed and is becoming more and more prevalent; it is also the basis in international law for liability for risk. As reflected in the schematic outline, there have been commendable efforts to base the obligation of reparation as well on the obligation of prevention. This is acceptable because prevention and reparation obviously form a "continuum", since both have similar purposes, i.e. to ensure that, in the conduct of an activity, the impact of the damage it causes—in other words, its negative aspect—is as minor as possible: in the first case, through preventive measures; in the second, through compensation which offsets the consequences as much as possible. As we have seen (chap. I, sect. B), the subjects of damage, its prevention and elimination are central to the present topic. It is therefore fair for an activity which is socially useful, but which creates a risk, to be subject to examination for the various interests in question to be considered, and for it to be allowed when the interests are balanced, so as to guard against any violation of the sovereign equality of States. The legal conceptualization of the matter may well be novel. Cowan, for example, sees the creation of risk by a dangerous activity as an expropriation of certain rights.⁵⁷ The fact is

⁵⁷ Recalling Cowan's view, Goldie writes:

"Perhaps a principle may be seen as emerging whereby an enterprise which in the course of its (ultra-hazardous) business engenders

(Continued on next page)

that, if no remedy is provided for the damage they cause, these activities actually transfer the cost from the agent to the victim. Through the damage done to them, third parties would be paying the cost that should be charged to the enterprise. At the international level, other States would be paying for an activity beneficial to one particular State. It could justifiably be argued that reparation constitutes a veritable "internalization" of costs: costs which appear to be unjustly dissociated from an enterprise or activity are absorbed by it, become internalized.⁵⁴

55. We have already seen that the requirement of shared expectations in the schematic outline is a moderating force, and that they might also serve to reinforce the obligation of reparation. Despite these positive aspects, further thought should be given to this concept. In the first place, expectations are something less than a right: they are a hope grounded in logic and in prior experience that something will happen, in this case that compensation will be made. Expectations undeniably play some role in law, and there have been instances in which courts have granted some form of compensation or satisfaction to those who had expectations with good reason.

(Footnote 57 continued.)

the possibility of injuries to the members of the public who consume its wares or come into contact with its operations is liable for damage arising from the risk it creates. To [impose on] an enterprise [mere fault liability] would have the effect of enabling it to conduct its operations at the expense of others and to throw a valid operating cost onto the shoulders of its neighbours, or onto those of the ultimate consumers of its products or services. Professor Cowan has aptly called the emerging judicial policy which gives recovery under these conditions 'the policy of [viewing a] deliberately created risk as [an] expropriation'." (*Loc. cit.* (footnote 10 above), p. 185.)

⁵⁴ According to Fleming:

"On its most prosaic level the problem may be illustrated by an oil-drilling incident in which the operator decided to 'blow out' a well and proceeded to do so in accordance with established procedures. These, however, were in no way proof against unknown and harmful substances being belched from the bowels of the earth, including the arsenic that was spewed over neighbouring pastures. Here the operator had resolved the invidious choice facing him by subordinating the interests of others to his own. The chances of something deleterious coming up might have been comparatively small though clearly recognized, and the more perplexing because they were irreducible by anything short of not proceeding with the blow-out. Yet the latter was necessary and accustomed procedure in oil-drilling—an industry of paramount economic importance which it would not be justifiable to impede for less than absolutely compelling reasons. To say that the operator's choice was negligent would imply that for him to proceed would be unlawful and could be enjoined by injunction. It is precisely to resolve this dilemma that the law may say to him: 'What you propose to do is not prohibited and we therefore cannot stop you. Yet if you proceed, you must be prepared to foot the bill should anything go wrong, as you hope it will not though well aware that it might.'" (J. G. Fleming, *An Introduction of the Law of Torts* (Oxford, Clarendon Press, 1967), pp. 158-159; cited by Goldie, *loc. cit.*, p. 187.)

On this basis, Goldie concludes that damage caused by certain activities, such as the ones considered here, should be regarded as having been caused without fault. But it should also be regarded as having entailed a compensatable expropriation of certain rights—which he calls "amenities", such as the right of each individual to pure water and clean air—and a breach of personal security, when harm occurs as a consequence of a lawful activity (*loc. cit.*, p. 189). Failure to compensate for this expropriation would be tantamount to unjust enrichment. In national law, these "amenities" should be viewed as both a personal and a property right. "In international law, analogies with both of these categories should be received and developed in terms of the territorial integrity of States . . . and their sovereign right to enjoy their natural resources." (*Ibid.*, p. 193.)

56. The survey of State practice relevant to the present topic prepared by the Secretariat contains some concepts that are of interest here. For example, it states:

This study has not ignored the difficulties of evaluating a particular instance as "evidence" of State practice. Different policies may motivate the conclusion of treaties or decisions. Some may be compromises or accommodations for extraneous reasons. But repeated instances of State practice, when they follow and promote similar policies, may create expectations about the authoritative nature of those policies in future behaviour. Even though some of the policies may not have been explicitly stated in connection with the relevant events, or may purposely and explicitly have been left undecided, continuous similar behaviour may lead to the creation of a customary norm. Whether or not the materials examined here are established as customary law, they demonstrate a trend in expectations and may contribute to the clarification of policies concerning some detailed principles of the international liability topic. Practice also demonstrates ways in which competing principles, such as "State sovereignty" and "domestic jurisdiction", are to be reconciled with the new norms."

The appreciable quantity of practice examined, then, while it does not yet justify declaring the existence of customary norms in this area, does appear to have made it possible to find well-founded expectations, or at least a trend in those expectations.

57. The use of such cautious language demonstrates the difficulty of the present topic. If the conclusion of such a comprehensive survey is that it shows certain trends in the creation of expectations, it seems unreasonable to demand fulfilment of such a legally cumbersome requirement as proof of shared expectations. Cases may occur in which such expectations do arise easily, as when they are reflected in the record of negotiations between the parties. There may be other cases in which a shared regional expectation may be admitted by the judge or by another party to the negotiations, as appears to have happened in the examples referred to earlier concerning the installation of nuclear power plants and a refinery near the borders between various European countries.⁵⁵ But, in general, such evidence would be difficult to find. Perhaps we could take something from what was defined in the schematic outline as shared expectations, without necessarily accepting the entire concept. One aspect, referred to in section 4, paragraph 4 (b), seems to be important and should not fail to be taken into account: the existence of common legislative or other standards. Perhaps the key here lies in the standards of domestic law, whether embodied in legislation or in court decisions. Indeed, it seems very unfair for a State in whose territory or under whose control the activity in question takes place to provide for compensation if an accident occurs in its territory and yet refuse to make reparation for injury in the territory of another State. Nor does it appear very logical that an affected State which does not provide under its domestic law for compensation for such occurrences should be allowed to claim it when the injury originates in a neighbouring State. Specific norms would not be called for in this case because that would entail involvement in the complexities of interpreting the domestic law of States; it would be sufficient for there to be standards requiring compensation. This may provide the draft with sufficiently broad application,

⁵⁵ *Yearbook . . . 1985*, vol. II (Part One)/Add.1, document A/CN.4/384, para. 10.

⁵⁶ See footnote 40 (d) above.

since the majority of States in the international community include such standards in their domestic law.⁶¹

58. Nevertheless, it would not be consistent with the nature of the damage-compensation system to put the burden of proof of the existence of such standards on the affected State. The following would be conceivable, then, as an exception: the source State might be exempted from compensation if it demonstrated that the relevant standards did not exist either in its domestic law or in that of the affected State. Another admissible exception might be the existence of a regional practice on the basis of which compensation would not be provided in such cases, or the practice of the affected State of not providing compensation in similar situations. It is important to emphasize the regional or individual nature of this type of negative expectation, since the exception must be specific. This would not be possible in the context of a general situation.

59. Some conventions provide for exceptions in specific cases of *force majeure* or fortuitous event (not all cases of *force majeure* and not all fortuitous events). As we have seen (para. 49 above), the exceptions in the 1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy, as amended by its 1964 Additional Protocol, are very limited. The same criteria for exemption are recognized in article III, paragraph 2 (a), of the 1969 International Convention on Civil Liability for Oil Pollution Damage,⁶² namely that the pollution damage "resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character". Under article 4, paragraph 2 (a), of the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage,⁶³ the Fund is allowed a similar exemption, which is limited, however, to acts of war, hostilities, civil war or insurrection. Article 3, paragraph 2 (a), of the draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea⁶⁴ includes such criteria as "an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character".

60. Other conceivable exceptions, as stipulated in various international conventions⁶⁵ and in the domestic

law of many countries, are negligence on the part of the victim and the action of third parties with intent to harm.

61. These exceptions, which mitigate the application of strict liability, might not be appropriate if the source State behaved in a way that was incompatible with its obligations to provide information and to negotiate, in so far as, in respect of the first obligation, it knew or should have known of the dangerous nature of the activity in question. In that regard, a liberal approach should be taken to the assessment of the evidence, as mentioned earlier in connection with the *Corfu Channel* case (see para. 36). This would be a way of encouraging States to comply with the obligations referred to, and it would seem fair, moreover, that any State which displays flagrant disregard for the rights and interests of neighbouring countries should not be allowed later to take shelter in exceptions.

62. As was seen earlier, the subject of prevention has been a focal point in the debates on the present topic, which have shown, in particular, that the majority is in favour of keeping the concern for prevention as an essential part of the draft.⁶⁶ With prevention, as with all aspects of the topic, the balance of interests comes into play as an important standard for measuring obligations. In cases where countries enter into ultimately successful negotiations aimed at establishing a régime for a hazardous activity, the role of the draft as set out in the schematic outline can be none other than to provide general guidelines for any treaty eventually signed. This is not the problem which requires our attention, then, except in relation to hazardous activities on which the parties have not yet come to an agreement.

63. The obligation contained in the final part of paragraph 8 of section 2, and of paragraph 4 of section 3, of the schematic outline is a duty of due diligence based, in the event of injury, on criteria relating to the state of technology in terms of the possibility of avoiding the injury in question, and the proportionality between the precautions to be required and the danger created by the activity, always bearing in mind that, if the potential injury actually occurs, reparation must be made as provided for in the outline. To obtain the desired result of avoiding the injury or eradicating its consequences as far as possible, it would theoretically be possible to combine a régime of responsibility for wrongful acts with a régime of liability for risk, as seems to be the case of the régime established by the arbitral tribunal in the *Trail Smelter* case.⁶⁷ That régime laid down a series of procedures to be followed by the industry in question in order to reduce pollution to the lowest possible acceptable level, as compatible with the profitability of the enterprise, given the current state of technology. Presumably, if the expected standard level of pollution exceeded the established limits, there would have to be an investigation; and if the latter revealed that the procedures had not been followed, the Canadian State might have engaged in wrongful conduct by, for example, neglecting its duties in respect of control over the smelter's activity. It seems that, in this example,

⁶¹ Of interest in this regard is a study by M. H. Arsanjani entitled "No-fault liability from the perspective of the general principles of law" (to be published). It demonstrates that the principles of liability for risk, in its various categories and forms, have been accepted by a large number of countries, so much so that the author feels that the necessary conditions exist for considering it a general principle of law in the sense of Article 38 of the Statute of the ICJ:

"Strict liability as a legal concept has now been accepted by most legal systems, especially those of technologically developed countries with more complex tort laws. . . . But it is evident that strict liability is a principle common to a sizeable number of countries belonging to different legal systems, that have particularly been confronted by activities relevant to the use of this principle. While States may differ as to the particular application of this principle, their understanding and formulation is substantially alike."

⁶² See footnote 54 above.

⁶³ United Nations, *Treaty Series*, vol. 1110, p. 57.

⁶⁴ See footnote 55 above.

⁶⁵ See the Secretariat's survey of State practice, document A/CN.4/384 (see footnote 40 (d), *in fine* above), paras. 484-507.

⁶⁶ See footnote 13 above.

⁶⁷ See footnote 34 above.

even when substantial injury does not occur, it could be a question of the Canadian Government's obligations of conduct, as such obligations are defined in article 20 of part 1 of the draft articles on State responsibility:

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation.⁶⁸

Coexisting with this régime of State responsibility is a régime of liability for risk, for even if all the indicated procedures have been followed, when injury occurs as a result of what might be considered to be an accident, reparation must still be made.

64. The duty of due diligence appears to be of a different nature here: it is contingent upon the occurrence of injury. Only if injury occurs do the consequences of the breach come into play, and they do so within the régime of liability for risk, becoming a new obligation of compensation whose scope is modified (increased) by the incidence of the unfulfilled obligations. They would not be autonomous obligations, such as those of conduct, where mere non-compliance is already a source of unlawfulness, but obligations subsumed in the régime of liability for risk which depend for their functioning on the same condition: the occurrence of injury. A comparison might be made with the obligation to prevent a given event defined in article 23 of part 1 of the draft articles on State responsibility:

Article 23. Breach of an international obligation to prevent a given event

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.⁶⁹

The procedures and precautions adopted are the exclusive concern of the State which is under the obligation, and only if the event to be prevented occurs does the comparison begin to be made between the preventive methods followed and those which should have been followed according to the rules of the game.

65. One major difference between prevention in the case of the obligation to prevent a given event and prevention in a régime of liability for risk is that the former may entail exemption from adverse consequences for the State which used reasonable means to prevent the result,⁷⁰ whereas, under the régime of liability

for risk, compensation is always due, although the amount depends on all the factors mentioned above, including the exceptions. Thus it may be said that, in such a régime, obligations are not autonomous, but are subject to the same condition as reparation (i.e. the occurrence of injury), and that their effect, in any event, is to aggravate the legal and, at times, the material position of the source State. For between the obligation to prevent a given event and the obligation of reparation under a régime of liability for risk—even though it is not an entirely pure régime in the case of the schematic outline—there is the same difference as between secondary and primary obligations. In the case of secondary obligations, the occurrence of the event which was to be prevented gives rise to the possibility of wrongful conduct on the part of the State (that is to say, if the means taken to prevent the event were not reasonable or were predictably inadequate), whereas the other case involves not wrongfulness, but the fulfilment of an obligation which provided for reparation in its very formulation.

66. We therefore come to the conclusion that the obligation laid down at the end of section 2, paragraph 8, and of section 3, paragraph 4, forms part of a régime of prevention whose primary effects, which come into play only after injury has occurred, are to aggravate the legal and material position of the source State. But what happens with regard to the obligation to inform (sect. 2, paras. 1 and 2), and to negotiate on a régime (sect. 3, para. 1)? Is that a true obligation of prevention? It appears that to some extent it may be. Warning a State that may be affected, and informing it of the activity to be undertaken, its nature and its possible injurious effects, will help to prevent or minimize injury because of the unilateral precautions which the affected State may take. But the immediate purpose of this obligation is to prompt the parties to formulate a régime which establishes their rights and obligations in respect of the activity, a régime which takes into consideration the balancing of interests, the unilateral obligation of prevention, and the parties' obligation to co-ordinate their activities with regard to prevention and reparation. Although prevention, in this case, may be a prime concern in such régimes, it is not the only concern. This appears to be the main difference between prevention in this instance and prevention as discussed earlier, which consisted of unilateral measures to be taken by the source State to control the activity and to take into account the interests of those who might be affected.

67. Would this feature make the obligations under consideration autonomous? In other words, is it necessary to wait until injury has occurred for these

⁶⁸ *Yearbook . . . 1980*, vol. II (Part Two), p. 32.

⁶⁹ *Ibid.*

⁷⁰ In paragraph (6) of the commentary to article 23 of part 1 of the draft articles on State responsibility, the Commission stated:

" . . . the occurrence of the event [the injury, in the present case] is not the only condition specifically stipulated for the existence of a breach of an international obligation requiring the State to achieve the result of preventing the occurrence of that event. In assuming obligations of this kind, States are not underwriting some kind of insurance to cover co-contracting States against the occurrence, whatever the conditions, of events of the kind contemplated, i.e. against the occurrence of the event even regardless of any material possibility of the State's preventing it from occurring in a given case. The State can obviously be required only to act in such a way that the possibility of the event is obstructed, i.e. to frustrate the occurrence of the event as far as lies within its power. Only when the

event has occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said not to have been achieved. . . . It is hardly necessary to add that the objective of each obligation and the more or less essential character of the prevention of this or that type of event must also be taken into account, once the event to be prevented has occurred, in comparing the conduct actually adopted by the State and the conduct that it might reasonably have been expected to adopt to prevent the event from occurring." (*Yearbook . . . 1978*, vol. II (Part Two), pp. 82-83.)

obligations to come into play, as in the preceding case? This question is very important, for obviously if the answer is in the affirmative, any conduct that is incompatible with such obligations would be wrongful, and it would be worth discussing whether or not they should be included in the topic. In the opinion of the Special Rapporteur, the obligations to inform and to negotiate are sufficiently well established in international law, and any breach of these obligations thus gives rise to wrongfulness. However, all things considered, that does not mean that they cannot be included in the draft.

68. At the beginning of this report (chap. I, sect. A), we examined the scope of the term "responsibility" in reference to the duties incumbent upon certain persons. It is clear that the duties to inform and to negotiate come within the framework of international liability for activities that are not prohibited. So we return to the complexities of the title of the topic and to the distinction between "acts" and "activities". The Special Rapporteur believes, as stated earlier (para. 29), that the French version is the right one and that it gives the topic its real scope. According to the terms of reference given it by the General Assembly, the Commission must deal with injurious consequences arising out of activities not prohibited by international law. Activities are shaped by complex and varied components which are so inter-related that they are almost indistinguishable from one another. Around a given activity there are countless individual acts which are intimately related to the activity.

Some of these acts may well be wrongful, but that does not make the activity itself wrongful. Thus there is nothing to prevent the Commission, when it considers establishing a régime of liability for injurious consequences arising out of activities not prohibited by international law, from also considering acts—since they are inseparable from activities—which are wrongful because they are incompatible with established obligations (in the present case, the obligation to inform and negotiate). That, then, is the scope of the Commission's terms of reference and it will remain within them if it also includes in the treaty régime obligations concerning the establishment of a régime the breach of which gives rise to wrongfulness.

69. The critical analysis of the schematic outline shows that it appears to have been based on certain principles: those that are fundamental and necessary to the topic are correctly stated in general terms in section 5. However, some doubts persist regarding more specific aspects, which will become clearer as the topic develops and an attempt is made to express in articles the concepts contained in that section. In this task, which comes next, the Special Rapporteur hopes to be guided by the general thrust of those texts, and also to test them against the criterion of how they function within the resulting body of law, with State practice constantly in the background. The Special Rapporteur believes that this is the best way of arriving at a final formulation of the principles permeating the topic.

**RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS
(SECOND PART OF THE TOPIC)**

[Agenda item 8]

DOCUMENT A/CN.4/401

**Third report on relations between States and international organizations
(second part of the topic), by Mr. Leonardo Díaz González,
Special Rapporteur**

[Original: Spanish]
[9 May 1986]

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NOTE

Multilateral conventions cited in the present report:

	<i>Source</i>
Convention on the Privileges and Immunities of the United Nations (New York, 13 February 1946)	United Nations, <i>Treaty Series</i> , vol. 1, p. 15.
Convention on the Privileges and Immunities of the Specialized Agencies (New York, 21 November 1947)	<i>Ibid.</i> , vol. 33, p. 261.
Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961)	<i>Ibid.</i> , vol. 500, p. 95.
Vienna Convention on Consular Relations (Vienna, 24 April 1963)	<i>Ibid.</i> , vol. 596, p. 261.
Convention on Special Missions (New York, 8 December 1969)	United Nations, <i>Juridical Yearbook 1969</i> (Sales No. E.71.V.4), p. 125.
Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975)	United Nations, <i>Juridical Yearbook 1975</i> (Sales No. E.77.V.3), p. 87.

Introduction

1. The Special Rapporteur submitted his second report¹ on "Relations between States and international organizations (second part of the topic)"² to the International Law Commission at its thirty-seventh session, in 1985.

2. In that report, the Special Rapporteur considered the question of the notion of an international organization and possible approaches to the scope of the future draft articles on the topic. He also examined the question of the legal personality of international organizations and the legal capacity resulting therefrom.

3. The report contained a draft article on the latter question, with two alternatives regarding presentation.³

4. The Commission also had before it a supplementary study prepared at the Commission's request by the Secretariat on the basis of the replies to the further questionnaire sent in 1978 by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA on the practice of those organizations concerning their status, privileges and immunities.⁴

5. The Commission considered the topic at its 1925th to 1927th and 1929th meetings, from 15 to 18 July 1985.

¹ *Yearbook . . . 1985*, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

² The first part of the topic, relating to the status, privileges and immunities of representatives of States to international organizations, was the subject of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, adopted at Vienna on 14 March 1975 (hereinafter referred to as "1975 Vienna Convention on the Representation of States").

³ The two alternatives of the draft article submitted by the Special Rapporteur read as follows:

"TITLE I. LEGAL PERSONALITY

"ALTERNATIVE A

"Article 1

"1. International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- "(a) contract;
- "(b) acquire and dispose of movable and immovable property; and
- "(c) institute legal proceedings.

"2. The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."

"ALTERNATIVE B

"Article 1

"International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

- "(a) contract;
- "(b) acquire and dispose of movable and immovable property; and
- "(c) institute legal proceedings.

"Article 2

"The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization."

⁴ Document A/CN.4/L.383 and Add.1-3, reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

The discussion, although very useful, was incomplete because of the short time available to consider the topic. Accordingly, the Commission was not able to take a decision on the draft article submitted by the Special Rapporteur and therefore deemed it advisable to resume the discussion at its thirty-eighth session to enable more members to express their views on the matter.

6. The Commission also requested the Special Rapporteur to examine the possibility of submitting at the thirty-eighth session his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic, as well as a schematic outline of the subject-matter to be covered by the various draft articles.⁵

I. Discussion of the topic in the Sixth Committee at the fortieth session of the General Assembly⁶

7. During the fortieth session of the General Assembly, representatives in the Sixth Committee who made statements in connection with the present topic, with two or three exceptions, expressed appreciation of the Commission's continuation of the work on the subject. As on other occasions, mention was made of the interest, importance and complexity of the topic and the desirability of codifying it.

8. One representative questioned the usefulness of the Commission continuing its work on the topic.⁷ Another representative stated that his delegation "continued to have doubts about the scope for useful work by the Commission".⁸ Another representative considered that the topic should not be accorded high priority, since Governments were disinclined to expand the privileges and immunities of international organizations.⁹ Nevertheless, another representative pointed out in that regard that it was the General Assembly that had requested the Commission to study the subject and that it was important for the Commission to continue its work on the topic.

9. One representative said that the nature of the topic was such that it was likely to give rise to a variety of doctrinal difficulties, but added that, on balance, his delegation was not troubled by the general thrust of the work submitted by the Special Rapporteur.¹⁰

10. Another representative said that his country, as a host country of the United Nations and other important international organizations, took a keen interest in the question of relations between States and international

⁵ *Yearbook . . . 1985*, vol. II (Part Two), p. 67, para. 267 (d) and (e).

⁶ See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. F.

⁷ *Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 31st meeting, para. 32 (Australia).

⁸ *Ibid.*, 32nd meeting, para. 33 (United Kingdom).

⁹ *Ibid.*, 31st meeting, para. 15 (New Zealand).

¹⁰ *Ibid.*, 29th meeting, para. 37 (United States of America).

organizations and was pleased to note that the study of the second part of the topic was being pursued.¹¹

11. A number of representatives expressed support for the first draft article submitted by the Special Rapporteur, concerning the legal personality of international organizations. It was said in this connection that, by providing in the first article that international organizations should enjoy legal personality under international law, the Special Rapporteur was proposing to give expression to the basic principle which should be the foundation of the draft articles. One representative referred in particular to paragraph 2 of the draft article (alternative A), which provided that the capacity of an international organization to conclude treaties was governed by the relevant rules of that organization. While the principle of the sovereign equality of States identified States as the primary subjects of international law, that was not so in the case of international organizations, which were the result of an act of will on the part of States which gave such organizations juridical features. It was essential not to lose sight of that principle, on which the draft article was based, when the topic was being considered. It was reasonable, in view of the difference in nature between States and international organizations, to limit the capacity of the latter. It was also to be noted that the draft article touched on the law of treaties. Another representative was of the view that the two paragraphs of the article should be considered as two separate articles.

12. The point was made by one representative that, in connection with the first draft article, on the legal personality of international organizations, a question arose as to the basis on which international organizations could be subject to the internal law of States. This was a matter to be resolved through individual agreements between States and each organization. It was inappropriate for such a matter to be considered in the context of the present topic.

13. As to the Commission's future work on the topic, support was expressed for the conclusions set forth in paragraph 267 of the Commission's report on its thirty-seventh session, and in particular for the recommendation that the Special Rapporteur should present a schematic outline of the subject-matter to be covered by the various draft articles he intended to prepare on the topic.¹² The hope was also expressed that the Special Rapporteur and the Commission would be in a position to provide as complete a definition as possible of an international organization as a subject of international law, a definition which was currently lacking.

14. The suggestion was made by one representative that the views of States should be submitted to the Commission, together with information on the status of the multilateral conventions on the topic. Another representative suggested that the views of international organizations themselves should be sought. It was also noted that the questionnaire addressed to international organizations in 1978 (see para. 4 above) had omitted to pose the basic question whether codification and

development of the law on the topic were necessary or desirable.

II. Conclusions regarding the discussion in the Commission and in the Sixth Committee of the General Assembly

15. The conclusions reached by the Commission as a result of its brief discussion on the topic at its thirty-seventh session were set out in its report on that session, submitted to the General Assembly at its fortieth session, and included the following:

(d) . . . the Special Rapporteur may examine the possibility of submitting at the thirty-eighth session of the Commission his concrete suggestions, bearing in mind the views expressed by members of the Commission, on the possible scope of the draft articles to be prepared on the topic;

(e) The Special Rapporteur may also consider the possibility of presenting at the Commission's thirty-eighth session a schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic;¹³

16. From the discussion in the Sixth Committee it may be inferred that the majority of representatives were in agreement with the conclusions reached by the Commission, particularly as regards the "possible scope of the draft articles to be prepared on the topic" and the presentation by the Special Rapporteur of a "schematic outline of the subject-matter to be covered by the various draft articles he intends to prepare on the topic".

17. The previous Special Rapporteur, the late Abdullah El-Erian, had discussed these issues in his preliminary report¹⁴ and in his second report,¹⁵ submitted to the Commission at its twenty-ninth session (1977) and its thirtieth session (1978), respectively. After consideration of the topic, the Commission endorsed the conclusions and recommendations of the Special Rapporteur and referred them to the General Assembly in its reports on its 1977 and 1978 sessions.¹⁶ The General Assembly, in turn, approved those conclusions and recommendations.¹⁷

18. The present Special Rapporteur therefore took as his point of departure the fact that both the Commission and the General Assembly had approved the conclusions and recommendations of the previous Special Rapporteur. The present Special Rapporteur in fact referred to this matter in his preliminary report, submitted to the Commission at its thirty-fifth session.¹⁸

19. The Commission also endorsed the conclusions and recommendations contained in the preliminary report of the present Special Rapporteur and referred

¹³ *Ibid.*

¹⁴ *Yearbook . . . 1977*, vol. II (Part One), p. 139, document A/CN.4/304.

¹⁵ *Yearbook . . . 1978*, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

¹⁶ *Yearbook . . . 1977*, vol. II (Part Two), p. 127, para. 95; and *Yearbook . . . 1978*, vol. II (Part Two), p. 147, para. 156.

¹⁷ General Assembly resolutions 32/151 of 19 December 1977 (para. 6) and 33/139 of 19 December 1978 (para. 6).

¹⁸ *Yearbook . . . 1983*, vol. II (Part One), p. 228, document A/CN.4/370, para. 11.

¹¹ *Ibid.*, 28th meeting, para. 56 (Austria).

¹² See footnote 5 above.

them to the General Assembly in its report on its thirty-fifth session.¹⁹ The General Assembly, in turn, approved those conclusions and recommendations.²⁰

III. Scope of the draft articles

20. In his preliminary report, the previous Special Rapporteur referred to three categories of privileges and immunities which might form the subject-matter of the study: (a) those of the organization; (b) those of officials of the organization; (c) those of experts on mission for the organization and of persons having official business with the organization who are not representatives of States. He also referred to resident representatives and observers, who may be sent by one international organization to another international organization or represent that organization.²¹

21. In the Commission itself, during the discussion of that preliminary report at the twenty-ninth session, in 1977, reference was made to the possible content and scope of the study, including the following questions dealt with by the Special Rapporteur: the place of custom in the law of international immunities; the differences between inter-State diplomatic relations and relations between States and international organizations; the scope of privileges and immunities; and the uniformity or adaptation of international immunities.²²

22. Other questions which arose during the discussion were: the need for an analysis of the practice of States and international organizations in the field of international immunities and its impact on the United Nations system; the need to study the internal law of States regulating international immunities; the possibility of extending the scope of the study to all international organizations, whether universal or regional; the need to take account of the particularities of diplomatic law in its application to relations between States and international organizations; and the need to reconcile the functional requirements of international organizations and the security interests of host States.²³

23. In the conclusions set out in his second report, submitted in 1978, the previous Special Rapporteur said it was gratifying that, in the discussions in the Commission and the Sixth Committee,

Subject to a few reservations which concerned matters of approach and methodology rather than principle, members of the Commission and delegations to the Sixth Committee were in favour of a study of the immunities of international organizations with a view to completing the work of the Commission in the field of diplomatic law, which culminated in the adoption of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention [on the Representation of States].²⁴

¹⁹ *Yearbook . . . 1983*, vol. II (Part Two), pp. 80-81, para. 277.

²⁰ General Assembly resolution 38/138 of 19 December 1983, para. 3.

²¹ *Yearbook . . . 1977*, vol. II (Part One), pp. 153-155, document A/CN.4/304, paras. 70-73 and 78.

²² *Ibid.*, pp. 151 *et seq.*, chap. IV.

²³ *Yearbook . . . 1977*, vol. II (Part Two), p. 127, para. 94.

²⁴ *Yearbook . . . 1978*, vol. II (Part One), p. 282, document A/CN.4/311 and Add.1, para. 117.

24. Moreover, there was agreement in the Commission and in the Sixth Committee that, at the beginning, the subject-matter of the study should not be unnecessarily restricted. Accordingly, it was agreed that the Special Rapporteur should be given some latitude. The same broad outlook was adopted by the Commission and the Sixth Committee with regard to the inclusion of regional international organizations and in connection with the subject-matter, inasmuch as the question of priority would have to be deferred until the study was completed.²⁵

25. The situation has not changed since. The present Special Rapporteur expressly mentioned this in his preliminary report when he consulted the Commission on the matter. The Special Rapporteur took it for granted that the schematic outline prepared by his predecessor in his two reports and approved by both the Commission and the General Assembly was still valid and was to serve as a guide for the continuation of the Commission's work on the topic. That outline can, of course, be broadened or amended, depending on the needs of the study and the Commission's decisions in that regard. The Commission endorsed that criterion by approving the conclusions contained in the Special Rapporteur's preliminary report, which were in turn approved by the General Assembly (see para. 19 above).

26. As already stated (para. 15 above), in the conclusions reached following its discussion of the Special Rapporteur's second report at its thirty-seventh session, the Commission requested the Special Rapporteur to present a schematic outline of the subject-matter to be covered by the draft articles. The three categories of privileges and immunities referred to in previous reports on the topic as possibly constituting this subject-matter have also been mentioned (para. 20 above).

27. When they were first discussed, at the twenty-ninth session, these three categories were approved by the Commission. One member, however, suggested that "a few problems should be selected for consideration at the first stage, such as those concerning international organizations, and that the much more delicate problems, such as those relating to international officials, should be left till later".²⁶

IV. Scope of privileges and immunities: privileges and immunities of international intergovernmental organizations

28. Apart from the contractual capacity of international intergovernmental organizations (capacity to contract, to acquire movable and immovable property and to institute legal proceedings) discussed in the Special Rapporteur's second report,²⁷ the United Nations and the specialized agencies enjoy certain privileges and immunities recognized in the general conventions and headquarters agreements and also in other supplementary instruments.

²⁵ See *Yearbook . . . 1983*, vol. II (Part Two), p. 80, paras. 269 and 276.

²⁶ *Yearbook . . . 1977*, vol. I, p. 210, 1453rd meeting, para. 13 (Mr. Reuter).

²⁷ See footnote 1 above.

29. From an analysis of headquarters agreements (the most comprehensive and precise instruments on this subject), the general conventions and the replies to the questionnaire addressed to the specialized agencies and IAEA on their practice concerning their status, privileges and immunities (see para. 4 above), a tentative outline can be drawn up of the privileges, immunities and other facilities accorded to international intergovernmental organizations and serve as a guide to the subject-matter to be covered by the draft articles, as requested by the Commission.

30. It is clear that all the privileges granted to international organizations in the instruments in question are founded on the principle underlying the legal status of those organizations, i.e. the guarantee afforded by the host country that they can, with complete freedom and independence, exercise on its territory their constitutional and statutory activities or any other activity connected with the functions assigned to them. Some host countries, as has been pointed out on other occasions, expressly include this guarantee in the headquarters agreements concluded with international organizations. This is the case with Switzerland, which expressly includes it in the headquarters agreements to which it is a party.²⁸ The first article of such agreements is usually worded as follows:

The Federal Council guarantees . . . the independence and freedom of action belonging to it as an international institution.

This question will be examined further in due course. For the time being, the purpose is simply to draw up an outline in compliance with the Commission's wishes.

31. The tentative outline is as follows:

- I. Privileges and immunities of the organization
 - A. Non-fiscal privileges and immunities:
 - (a) immunity from legal process;
 - (b) inviolability of premises and exercise of control by the organization over those premises;
 - (c) immunity of property and assets from search and from any other form of interference;
 - (d) inviolability of archives and documents;
 - (e) privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in diplomatic bags, etc.);
 - B. Financial and fiscal privileges:
 - (a) exemption from taxes;
 - (b) exemption from customs duties;
 - (c) exemption from currency controls;
 - (d) bank deposits.
- II. Privileges and immunities of officials
 - A. Non-fiscal:
 - (a) immunity in respect of official acts;
 - (b) immunity from national service obligations;
 - (c) immunity from immigration restrictions and registration of aliens;
 - (d) diplomatic privileges and immunities of executives and other senior officials;
 - (e) repatriation facilities in times of international crisis;
 - B. Financial and fiscal:
 - (a) exemption from taxation of salaries and emoluments;
 - (b) exemption from customs duties.

III. Privileges and immunities of experts on mission for, and of persons having official business with, the organization.

32. Under article VI of the 1946 Convention on the Privileges and Immunities of the United Nations, experts on mission for the United Nations are accorded certain immunities. The 1947 Convention on the Privileges and Immunities of the Specialized Agencies does not include an equivalent article: the sole reference to experts appears in article VIII, section 29, in which the States parties are requested to grant travel facilities to "experts and other persons" travelling "on the business of a specialized agency". However, the provisions of article VI of the 1946 Convention are reproduced in annexes I to IV, VII and XII to the 1947 Convention, relating to ILO, FAO, ICAO, UNESCO, WHO and IMCO.²⁹

33. In addition to experts sent on mission by the United Nations or the specialized agencies, another category of persons (other than representatives of Member States) may be granted certain privileges and immunities, namely persons who have official business with the United Nations or specialized agencies. A number of headquarters agreements and supplementary agreements contain provisions whereby such persons are granted rights of transit to the premises of the organization in question (such as article IV of the Headquarters Agreement between the United Nations and the United States of America,³⁰ article 9 of the Agreement between UNESCO and France regarding the Headquarters of UNESCO and the privileges and immunities of the Organization on French Territory³¹ and article V, section 27, of the Headquarters Agreement between ICAO and Canada³²).

34. In keeping with the possible scope of the draft articles sketched out above, the Special Rapporteur proposes the following schematic outline of the subject-matter to be covered by the draft:

1. Definitions and scope. Bases of privileges and immunities:
 - (a) international organization;
 - (b) international officials;
 - (c) other persons connected with the functioning of the organization (experts, etc.);
 - (d) other terms used.
2. Legal personality.
3. Property and assets.
4. Privileges and immunities of the international organization:
 - A. Non-fiscal:
 - (a) immunity from legal process;
 - (b) freedom of assembly:
 - (i) freedom of access, stay and movement both for representatives of States and for experts and officials of the organization;
 - (ii) speedy issue of visas free of charge and exemption from any measure to restrict the entry into the host country of aliens or to control the conditions of their stay;
 - (iii) repatriation facilities in times of international crisis;

²⁹ United Nations, *Treaty Series*, vol. 33, pp. 290 *et seq.*; and vol. 645, p. 340.

³⁰ *Ibid.*, vol. 11, p. 11.

³¹ *Ibid.*, vol. 357, p. 3.

³² *Ibid.*, vol. 96, p. 155.

²⁸ See A. H. Zarb, *Les institutions spécialisées du système des Nations Unies et leurs membres* (Paris, Pedone, 1980), p. 221.

- (c) inviolability of premises;
- (d) inviolability of archives and documents;
- (e) communication facilities (use of codes, diplomatic bag, dispatch of correspondence, etc.);
- B. Financial and fiscal: exemption from taxes, customs duties, currency controls, etc.
- 5. Privileges and immunities of officials:
 - A. Non-fiscal:
 - (a) immunity in respect of official acts;
 - (b) immunity from national service obligations;
 - (c) immunity from immigration restrictions and registration of aliens;
 - (d) diplomatic privileges and immunities of executives and other senior officials;
 - (e) repatriation facilities in times of international crisis;
 - B. Financial and fiscal:
 - (a) exemption from taxation of salaries and emoluments;
 - (b) exemption from customs duties.
- 6. Privileges and immunities of experts on mission for, and of persons having official business with, the organization.
- 7. Laissez-passer.
- 8. Abuse of privileges and immunities.
- 9. Withdrawal of privileges and immunities.
- 10. Settlement of disputes.
- 11. Final clauses.

35. Naturally, the above outline does not constitute an exhaustive enumeration. It was drawn up in order to meet the request made by the Commission and may be amended at any time if circumstances require, or if the Commission deems it appropriate for any reason, or on the proposal of the Special Rapporteur.

V. Conclusions

36. The evolution of international law relating to the legal status and privileges and immunities of international organizations has resulted in a substantial body of legal norms regulating this area of international activity. This body of norms consists of an elaborate and varied network of treaty law, which requires harmonization, and a wealth of practice, which needs to be consolidated. From the discussions in the Commission and the Sixth Committee of the General Assembly in 1985, it can be affirmed that the Commission's conclusions in the past concerning the present topic are still valid.

37. In embarking on the work of developing and codifying this branch of diplomatic law, on the express instructions of the General Assembly, the Commission intends to complete the *corpus juris* of diplomatic law elaborated on the basis of its earlier work and embodied in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States.

38. Furthermore, far from the idea that Governments are disinclined to expand the privileges and immunities of international organizations, as was stated by one representative in the Sixth Committee (see para. 8 above), the supplementary study prepared by the Secretariat indicates that, as of 1 June 1985, 90 States were parties to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.³³

39. Similarly, States which are not parties to the 1947 Convention or which have not extended its application to all organizations have for the most part agreed to apply the provisions of the Convention to organizations operating in their territory. Such agreements concern technical assistance projects or conference agreements concluded for meetings held outside the organization's headquarters or permanent offices. In the case of the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation and the International Monetary Fund, if a member State is not a party to the 1947 Convention, reliance is placed on their respective Articles of Agreement.

40. As to the Agreement on the Privileges and Immunities of the International Atomic Energy Agency,³⁴ which is open to all 112 member States of the Agency, there were 56 States parties as of 1 June 1985.³⁵

41. Finally, no cases have been reported of the withdrawal of privileges and immunities previously granted to an international organization.

³³ Document A/CN.4/L.383 and Add.1-3 (see footnote 4 above), para. 244.

³⁴ United Nations, *Treaty Series*, vol. 374, p. 147.

³⁵ Document A/CN.4/L.383 and Add.1-3 (see footnote 4 above), para. 247.

CHECK-LIST OF DOCUMENTS OF THE THIRTY-EIGHTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/395	Provisional agenda	Mimeographed. For the agenda as adopted, see <i>Yearbook . . . 1986</i> , vol. II (Part Two), chap. I, para. 8.
A/CN.4/396 [and Corr.1]	Eighth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	Reproduced in the present volume (p. 21).
A/CN.4/397 [and Corr.1 and 2] and Add.1 [and Add.1/Corr.1]	Seventh report on State responsibility, by Mr. Willem Riphagen, Special Rapporteur	<i>Ibid.</i> (p. 1).
A/CN.4/398 [and Corr.1-3]	Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Ibid.</i> (p. 53).
A/CN.4/399 and Add.1 and 2	Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	<i>Ibid.</i> (p. 87).
A/CN.4/400	Seventh report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Ibid.</i> (p. 39).
A/CN.4/401	Third report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	<i>Ibid.</i> (p. 163).
A/CN.4/402 [and Corr.1, 2 and 4]	Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	<i>Ibid.</i> (p. 145).
A/CN.4/L.398	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly	Mimeographed.
A/CN.4/L.399 [and Corr.1]	Draft articles on jurisdictional immunities of States and their property. Titles and texts adopted by the Drafting Committee: titles of parts II and III of the draft; articles 2 to 6 and 20 to 28	Texts reproduced in <i>Yearbook . . . 1986</i> , vol. I, summary records of the 1968th meeting, 1969th meeting (paras. 68 <i>et seq.</i>), 1970th and 1971st meetings, and 1972nd meeting (paras. 1-21).
A/CN.4/L.400	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Titles and texts adopted by the Drafting Committee: titles of the four parts of the draft; articles 28 to 33	<i>Idem</i> , summary record of the 1980th meeting, paras. 52 <i>et seq.</i>
[A/CN.4/L.401]		[Not used.]
A/CN.4/L.402	Draft report of the International Law Commission on the work of its thirty-eighth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10)</i> . The final text appears in <i>Yearbook . . . 1986</i> , vol. II (Part Two).
A/CN.4/L.403 and Add.1 and 2 [and Add.2/Corr.1]	<i>Idem</i> : chapter II (Jurisdictional immunities of States and their property)	<i>Idem</i> .
A/CN.4/L.404 and Add.1	<i>Idem</i> : chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> .
A/CN.4/L.405 and Add.1	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> .
A/CN.4/L.406 and Add.1	<i>Idem</i> : chapter V (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem</i> .
A/CN.4/L.407 and Add.1	<i>Idem</i> : chapter VI (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.408 and Add.1	<i>Idem</i> : chapter VII (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.409	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/SR.1940-A/CN.4/SR.1989	Provisional summary records of the 1940th to 1989th meetings	Mimeographed. The final text appears in <i>Yearbook . . . 1986</i> , vol. I.

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