REPORT OF THE INTERNATIONAL LAW COMMISSION

on the work of its thirty-ninth session

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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.

The word Yearbook followed by suspension points and the year (e.g. Yearbook ... 1977) indicates a reference to the Yearbook of the International Law Commission.

A typeset version of the report of the Commission will be included in Part Two of volume II of the Yearbook of the International Law Commission 1987.

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CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its thirty-ninth session at its permanent seat at the United Nations Office at Geneva, from 4 May to 17 July 1987. The session was opened by the Chairman of the thirty-eighth session, Mr. Doudou Thiam.

2. The work of the Commission during this session is described in the present report. Chapter II of the report relates to the topic "Draft Code of Offences against the Peace and Security of Mankind" and sets out the five articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session. Chapter III relates to the topic "The law of the non-navigational uses of international watercourses" and sets out the six articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session. Chapter IV relates to the topic "International liability for injurious consequences arising out of acts not prohibited by international law". Chapter V of the report concerns the topic "Relations between States and international organizations (second part of the topic)". Chapter VI contains matters relating to the programme, procedures and working methods of the Commission and its documentation, as well as co-operation with other bodies, and also considers certain administrative and other matters.

A. Membership

3. At its 71st plenary meeting, on 14 November 1986, the General Assembly elected 34 members of the Commission for a five-year term of office commencing 1 January 1987. The Commission consists of the following members:

Prince Bola Adesumbo AJIBOLA (Nigeria)

Mr. Husain AL-BAHARNA (Bahrain)

Mr. Awn AL-KHASAWNEH (Jordan)

Mr. Riyadh AL-QAYSI (Iraq)

Mr. Gaetano ARANGIO-RUIZ (Italy)

Mr. Julio BARBOZA (Argentina)

Mr. Juri G. BARSEGOV (Union of Soviet Socialist Republics)

Mr. John Alan BEESLEY (Canada)

Mr. Mohamed BENNOUNA (Morocco)

Mr. Boutros BOUTROS-GHALI (Egypt)

Mr. Carlos CALERO-RODRIGUES (Brazil)

Mr. Leonardo DIAZ-GONZALEZ (Venezuela)

Mr. Gudmundur EIRIKSSON (Iceland)

Mr. Laurel B. FRANCIS (Jamaica)

Mr. Bernhard GRAEFRATH (German Democratic Republic)

Mr. Francis Mahon HAYES (Ireland)

Mr. Jorge E. ILLUECA (Panama)

Mr. Andreas J. JACOVIDES (Cyprus)

Mr. Abdul G. KOROMA (Sierra Leone)

Mr. Ahmed MAHIOU (Algeria)

Mr. Stephen C. McCAFFREY (United States of America)

Mr. Frank X. NJENGA (Kenya)

Mr. Motoo OGISO (Japan)

Mr. Stanislaw PAWLAK (Poland)

Mr. Pemmaraju SREENIVASA RAO (India)

Mr. Edilbert RAZAFINDRALAMBO (Madagascar)

Mr. Paul REUTER (France)

Mr. Emmanuel J. ROUCOUNAS (Greece)

Mr. César SEPULVEDA-GUTIERREZ (Mexico)

Mr. Jiuyong SHI (China)

Mr. Luis SOLARI TUDELA (Peru)

Mr. Doudou THIAM (Senegal)

Mr. Christian TOMUSCHAT (Federal Republic of Germany)

Mr. Alexander YANKOV (Bulgaria)

B. Officers

4. At its 1990th meeting on 4 May 1987, the Commission elected the following officers:

Chairman: Mr. Stephen C. McCaffrey

First Vice-Chairman: Mr. Leonardo Díaz-González

Second Vice-Chairman: Mr. Riyadh Al-Qaysi

Chairman of the Drafting Committee: Mr. Edilbert Razafindralambo

Rapporteur: Mr. Stanislaw Pawlak

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, those members of the Commission who had previously served as chairmen of the Commission, 1/ and the Special Rapporteurs. 2/ The Chairman of the Enlarged Bureau was the Chairman of the Commission. On the recommendation of the Enlarged Bureau, the Commission, at its 1991st meeting on 5 May 1987, set up for the present session a Planning Group to consider the programme, procedures and working methods of the Commission and its documentation and to report thereon to the Enlarged Bureau. The Planning Group was composed as follows: Mr. Leonardo Díaz-González (Chairman), Prince Bola Adesumbo Ajibola, Mr. Awn Al-Khasawneh, Mr. Riyadh Al-Qaysi, Mr. Julio Barboza, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Mohamed Bennouna, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge E. Illueca, Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Paul Reuter, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov. The Group was not restricted and other members of the Commission attended its meetings.

C. Drafting Committee

6. At its 1992nd meeting, on 6 May 1987, the Commission appointed a Drafting Committee which was composed of the following members: Mr. Edilbert Razafindralambo (Chairman), Mr. Gaetano Arangio-Ruiz, Mr. Juri G. Barsegov, Mr. Mohamed Bennouna, Mr. Carlos Calero-Rodrigues, Mr. Bernhard Graefrath, Mr. Francis Mahon Hayes, Mr. Ahmed Mahiou, Mr. Stephen C. McCaffrey, Mr. Motoo Ogiso, Mr. Pemmaraju Sreenivasa Rao, Mr. Paul Reuter, Mr. César Sepulveda-Gutierrez, Mr. Jiuyong Shi and Mr. Luis Solari Tudela. 3/ Mr. Stanislaw Pawlak also took part in the Committee's work in his capacity as Rapporteur of the Commission.

1/ Namely, Mr. Laurel B. Francis, Mr. Paul Reuter, Mr. Doudou Thiam and Mr. Alexander Yankov.

2/ Namely, Mr. Julio Barboza, Mr. Leonardo Díaz-González, Mr. Stephen C. McCaffrey, Mr. Doudou Thiam and Mr. Alexander Yankov, as well as Mr. Gaetano Arangio-Ruiz and Mr. Motoo Ogiso, both of whom were appointed Special Rapporteur during the present session.

3/ At a later stage, Mr. Luis Solari Tudela resigned from the Drafting Committee.

D. Secretariat

7. Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, attended the session and represented the Secretary-General. Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and in the absence of the Legal Counsel represented the Secretary-General. Ms. Jacqueline Dauchy, Deputy Director of the Codification Division of the Office of Legal Affairs, acted as Deputy Secretary to the Commission. Mr. Larry D. Johnson, Senior Legal Officer, served as Senior Assistant Secretary to the Commission and Ms. Mahnoush H. Arsanjani, Mr. Manuel Rama-Montaldo and Mr. Mpazi Sinjela, Legal Officers, served as Assistant Secretaries to the Commission.

E. Agenda

8. At its 1990th meeting, on 4 May 1987, the Commission adopted an agenda for its thirty-ninth session, consisting of the following items:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
5. Draft Code of Offences against the Peace and Security of Mankind.
6. The law of the non-navigational uses of international watercourses.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme, procedures and working methods of the Commission, and its documentation.
10. Co-operation with other bodies.
11. Date and place of the fortieth session.
12. Other business.

9. The Commission, in view of its practice not to hold a substantive debate on draft articles adopted in first reading until the comments and observations of Governments thereon are available, did not consider item 3, "Jurisdictional immunities of States and their property", nor item 4, "Status of the

diplomatic courier and the diplomatic bag not accompanied by diplomatic courier", pending receipt of the comments and observations which Governments have been invited to submit by 1 January 1988 on the sets of draft articles provisionally adopted by the Commission at its thirty-eighth session on the two topics in question. The Commission did not consider item 2, "State responsibility", as it felt it appropriate that the new Special Rapporteur for the topic, Mr. Gaetano Arangio-Ruiz, appointed on 17 June 1987 in replacement of Mr. William Riphagen who was no longer a member of the Commission, be given an opportunity to make his views known. The Commission held 52 public meetings (1990th to 2041st) and, in addition, the Drafting Committee of the Commission held 39 meetings, the Enlarged Bureau of the Commission held 3 meetings and the Planning Group of the Enlarged Bureau held 1 meetings.

CHAPTER II

DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

A. Introduction

10. The General Assembly in resolution 177 (II) of 21 November 1947 directed the Commission to: (a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a) above. The Commission, at its first session, in 1949, appointed Mr. Jean Spiropoulos Special Rapporteur.

11. On the basis of the reports of the Special Rapporteur, the Commission (a) at its second session in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal and submitted these principles, with commentaries, to the General Assembly; and (b) at its sixth session in 1954, submitted a draft Code of Offences against the Peace and Security of Mankind, with commentaries, to the General Assembly. 4/

12. The General Assembly, in resolution 897 (IX) of 4 December 1954, considering that the draft Code of Offences against the Peace and Security of Mankind as formulated by the Commission raised problems closely related to that of the definition of aggression, and that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft Code until the Special Committee had submitted its report.

13. The General Assembly in resolution 3314 (XXIX) of 14 December 1974 adopted by consensus the Definition of Aggression.

14. On 10 December 1981, the General Assembly in resolution 36/106 invited the Commission to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind, and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law.

4/ Yearbook of the International Law Commission, 1950, vol. II, pp. 374-378, document A/1316. Yearbook ... 1954, vol. II, pp. 150-152, document A/2673. For the text of the principles and the draft Code, see also Yearbook ... 1985, vol. II (Part Two), pp. 12 and 8, document A/40/10, paras. 45 and 18.

15. The Commission, at its thirty-fourth session in 1982, appointed Mr. Doudou Thiam Special Rapporteur for the topic. The Commission, from its thirty-fifth session in 1983 to its thirty-seventh session in 1985, received three reports from the Special Rapporteur. 5/

16. The stage reached by the Commission in its work on the topic by the end of its thirty-seventh session, in 1985, was as follows. The Commission was of the opinion that the draft Code should cover only the most serious international offences. These offences would be determined by reference to a general criterion and also to the relevant conventions and declarations pertaining to the subject. As to the subjects of law to which international criminal responsibility could be attributed, the Commission wished to have the views of the General Assembly on that point, because of the political nature of the problem of the international criminal responsibility of States. As to the implementation of the Code, since some members considered that a Code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requested the General Assembly to indicate whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals. 6/ The General Assembly was requested to indicate whether such jurisdiction should be competent with respect to States. 7/

17. Moreover, the Commission had stated that it was its intention that the content ratione personae of the draft Code should be limited at the stage to the criminal responsibility of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments. As to the first stage on the Commission's work on the draft Code, and in the light of General Assembly resolution 38/132 of 19 December 1983, the Commission intended to begin by drawing up a provisional

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5/ Yearbook ... 1983, vol. II (Part One), p. 137, document A/CN.4/364; Yearbook ... 1984, vol. II (Part One), p. 89, document A/CN.4/377; Yearbook ... 1985, vol. II (Part One), p. 63, document A/CN.4/387.

6/ On the question of an international criminal jurisdiction, see Yearbook ... 1985, vol. II (Part Two), pp. 8-9, document A/40/10, para. 19 and notes 15 and 16.

7/ Yearbook ... 1983, vol. II (Part Two), p. 16, document A/38/10, para. 69.

list of offences, while bearing in mind the drafting of an introduction summarizing the general principles of international criminal law relating to offences against the peace and security of mankind.

18. As regards the content ratione materiae of the draft Code, the Commission intended to include the offences covered by the 1954 draft Code, with appropriate modifications of form and substance to be considered by the Commission at a later stage. As of the thirty-sixth session of the Commission, in 1984, a general trend had emerged in the Commission in favour of including, in the draft Code, colonialism, apartheid, and, possibly, serious damage to the human environment and economic aggression, if appropriate legal formulations could be found. The notion of economic aggression had been further discussed at the thirty-seventh session of the Commission, in 1985, but no definite conclusions were reached. As regards the use of atomic weapons, the Commission had discussed the problem at length, but intended to examine the matter in greater depth in the light of any views expressed in the General Assembly. With regard to mercenarism, the Commission considered that, in so far as the practice was used to infringe State sovereignty, undermine the stability of Governments or oppose national liberation movements, it constituted an offence against the peace and security of mankind. The Commission considered, however, that it would be desirable to take account of the work of the Ad Hoc Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. As regards the taking of hostages, violence against persons enjoying diplomatic privileges and immunities, etc. and the hijacking of aircraft, the Commission considered that these practices had aspects which could be regarded as relating to the phenomenon of international terrorism and should be approached from that angle. With regard to piracy, the Commission recognized it as an international crime under customary international law. It none the less doubted whether, in the present international community, the offence could be such as to constitute a threat to the peace and security of mankind. 8/

19. At its thirty-seventh session, in 1985, the Commission considered the Special Rapporteur's third report, which specified the category of individuals to be covered by the draft Code and defined an offence against the peace and

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8/ Yearbook ... 1984, vol. II (Part Two), p. 17, document A/39/10, para. 65.

security of mankind. The report examined the offences mentioned in article 2, paragraphs (1) to (9), of the 1954 draft Code and possible additions to those paragraphs. The report also proposed a number of draft articles: namely, article 1 ("Scope of the present articles"); article 2 ("Persons covered by the present articles"); article 3 ("Definition of an offence against the peace and security of mankind"); and article 4 ("Acts constituting an offence against the peace and security of mankind"). 9/

20. The Commission, at its thirty-seventh session, referred draft article 1, draft article 2 (first alternative) and draft article 3 (both alternatives) to the Drafting Committee. It also referred section A of draft article 4 (both alternatives), entitled "The commission [by the authorities of a State] of an act of aggression" to the Drafting Committee, on the understanding that the Drafting Committee would consider it only if time permitted and that, if the Drafting Committee agreed on a text for draft article 4, section A, it would be for the purpose of assisting the Special Rapporteur in the preparation of his fourth report. 10/

21. At its thirty-eighth session, in 1986, the Commission had before it the Special Rapporteur's fourth report on the topic (A/CN.4/398 and Corr.1-3). The Special Rapporteur had divided his fourth report into five parts, namely: I. Crimes against humanity; II. War crimes; III. Other offences (related offences); IV. General principles; and V. Draft articles.

22. The set of draft articles submitted by the Special Rapporteur in Part V of the report contained a recasting of the draft articles submitted at the thirty-seventh session of the Commission, and a number of new draft articles. 11/

23. The Commission, after engaging in an in-depth general discussion of parts I to IV of the Special Rapporteur's fourth report, 12/ decided to defer consideration of the draft articles to future sessions. It was of the opinion

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9/ For the text, see Yearbook ... 1985, vol. II (Part Two), pp. 14-18, document A/40/10, notes 40, 46 to 50, 52 and 53.

10/ Ibid., p. 12, para. 40. Owing to lack of time, the Drafting Committee was not able to take up these articles.

11/ For the text of the draft articles, see Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10, para. 79, note 84).

12/ Ibid., paras. 80 to 182.

that, meanwhile, the Special Rapporteur could recast the draft articles in the light of the opinions expressed and proposals made that year by the members of the Commission and of the views that would be expressed in the Sixth Committee of the General Assembly at its forty-first session. 13/

24. During the same session, the Commission discussed, again, the problem of the implementation of the Code, when it considered the principles relating to the application of criminal law in space. It indicated that it would examine carefully any guidance that might be furnished on the various options set out in paragraphs 146 to 148 of its report on that session, 14/ reminding the General Assembly in that regard of the conclusions contained in paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session, in 1983. 15/

B. Consideration of the topic at the present session

25. At its present session, the Commission had before it the fifth report on the topic submitted by the Special Rapporteur (A/CN.4/404 and Corr.1 and 2 (Spanish only)). In his report, the Special Rapporteur recast some of the draft articles he had proposed at the thirty-eighth session. Those draft articles comprise the introduction to the draft Code and deal with the definition and characterization of crimes against the peace and security of mankind, as well as with the general principles. The Commission also had before it views on the topic submitted by Member States (A/41/406, A/41/537 and Add.1-2, A/42/179 and A/CN.4/407 and Add.1-2).

26. In recasting the draft articles, the Special Rapporteur took account of the discussion held at the thirty-eighth session of the International Law Commission and of the views expressed in the Sixth Committee at the forty-first session of the General Assembly. Moreover, following each of the 11 draft articles presented in his fifth report, the Special Rapporteur included a commentary briefly describing the questions raised in those provisions.

27. The Commission considered the fifth report submitted by the Special Rapporteur at its 1992nd to 2001st meetings. Having heard the

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13/ Ibid., para. 185.

14/ Ibid.

15/ Ibid. See also para. 16, above.

introduction by the Special Rapporteur, the Commission considered the text of draft articles 1 to 11, as contained in the report, and decided to refer them to the Drafting Committee.

28. At its 2031st to 2033rd meetings, the Commission, after having considered the report of the Drafting Committee, provisionally adopted articles 1 (Definition), 2 (Characterization), 3 (Responsibility and punishment), 5 (Non-applicability of statutory limitations) and 6 (Judicial guarantees). Views expressed by members on those articles are reflected in the commentaries thereto, which appear in Section C below together with the texts of the articles. Owing to lack of time, the Drafting Committee was unable to formulate texts for articles 4 and 7 (see para. 63, below) to 11.

29. In introducing draft article 4 16/ on the "aut dedere aut punire" principle, the Special Rapporteur pointed out that, although many proposals for the establishment of an international criminal jurisdiction had already been made, they had not yielded any fruitful results. The 1937 Convention for the Prevention and Punishment of Terrorism had been signed by 24 States, but had never been ratified. On 18 August 1953, moreover, a draft text had been adopted at the 22nd meeting of the United Nations Committee on International Criminal Jurisdiction, but it had never become the subject of a convention.

30. The Special Rapporteur noted that the purpose of draft article 4 was to fill the existing gap with regard to jurisdiction, since there would be no point in drawing up a list of offences unless it had been determined which courts were competent. So far, the most prominent conventions containing specific provisions on jurisdiction were the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (article VI) and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (article V). Those articles embodied the principle of territorial jurisdiction or that of an international penal tribunal having jurisdiction

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16/ The text of article 4 proposed by the Special Rapporteur read as follows:

"Article 4. Aut dedere aut punire

1. 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 establishment of an international criminal jurisdiction."

with respect to those parties "which shall have accepted its jurisdiction". In other words, if an international court was established, there would be dual competence, since States would have the faculty either to apply territorial jurisdiction or to have recourse to the international court. The two jurisdictions were not exclusive, but, rather, existed at the same time. The difference between the provisions of the two above-mentioned Conventions relating to jurisdiction and draft article 4 was that the latter broadened the scope of jurisdiction to include that of any State in the territory of which the alleged perpetrator of the offence was found. That State had the duty to arrest and try the alleged perpetrator or to extradite him.

31. Draft article 4 gave rise to comments and suggestions in the Commission. Some members made proposals designed to improve the wording of the draft article. With regard to the title, the following proposals were made by various members: to replace the word "punire" by the word "judicare"; to give the draft article a title that could be used in all United Nations languages; and to entitle the draft article "Duty to try or extradite".

32. With regard to paragraph 1, suggestions were made to replace: (a) the words "arrested in its territory" by the words "found in its jurisdiction"; (b) the word "arrested" by the word "found"; and (c) the word "perpetrator" by the words "alleged perpetrator". One member indicated that it should be stated at the beginning of the draft article that the provision did not "prejudge the establishment of an international criminal jurisdiction". Another member was of the opinion that it would be preferable to deal with international jurisdiction in paragraph 1 and with national jurisdiction in paragraph 2. It was also suggested that the idea of "universal offence" or "universal jurisdiction" should be included in the draft article and that it should establish a system of priorities to prevent conflicts of jurisdiction and competing applications for extradition. In the opinion of some members, in principle, individuals charged with a crime against humanity should be extradited to the country where the crime had been committed or to the country which had suffered by it.

33. Some members took the view that the draft article should clearly indicate that the concept of a political offence could not be invoked as a defence in connection with the crimes covered by the draft Code and, in particular, could not prevent the extradition of the alleged perpetrator. With regard to the right of asylum, attention was drawn to the Declaration on Territorial Asylum (General Assembly resolution 2312 (XXII) of 14 December 1967), which excludes

asylum for persons suspected of having committed crimes against the peace and security of mankind. It was suggested that the Commission should adopt the compromise solution embodied in a number of recent conventions, such as those dealing with certain offences relating to air travel, the taking of hostages and crimes against internationally protected persons.

34. Some members of the Commission submitted redrafts of the text of the draft article that incorporated one or more of the above-mentioned proposals. In particular, one of those redrafts proposed that, in the event of extradition, the following order of priority should be established: (a) the State in the territory of which the crime was committed; (b) the State whose interests or those of its nationals were jeopardized; and (c) the State of which the perpetrator was a national.

35. With regard to the question of an international criminal court, there were several trends of opinion in the Commission. Some members were of the opinion that such a court was the only system that could guarantee full implementation of the Code. Other members were in favour of such a court, but were sceptical about the idea of establishing one at the current stage in international relations. Still others were opposed to that idea. It was also suggested that an international criminal court ad hoc might be established on the basis of a special agreement. Other members expressed doubts about a punitive system which was based on universal jurisdiction and which might establish very different judicial precedents in respect of crimes against the peace and security of mankind. One member of the Commission proposed that consideration should be given to the possibility of enforcing the Code through national courts to which would be added a judge from the jurisdiction of the accused and/or one or more judges from jurisdictions whose jurisprudence differed from that of both the accused and the national court in question.

36. In his summing up, the Special Rapporteur said that he was willing to add a new provision incorporating some of the suggestions made during the discussion. He also pointed out that, contrary to what might be thought, the existence of an international criminal court would not preclude the jurisdiction of States. Such a court would have only optional jurisdiction. That was the spirit of the Conventions on Genocide and Apartheid. Draft article 4 also contained a new element. As a general rule, States did not consider that they were bound to try an offender in the case where an application for extradition was rejected. The same was true where no application for extradition was made. That obligation did, of course, exist

in some conventions which had a specific purpose, but it did not exist in all conventions. It was thus not provided for in the Conventions on Genocide and Apartheid and had no general effect. If the provision of article 4 was adopted, it would be the first provision of universal effect in the matter. Lastly, the Special Rapporteur pointed out that universal jurisdiction and the obligation of States to try the offender were the only means of ensuring the effective enforcement of penalties. Moreover, universal jurisdiction corresponded to the nature of the crime, which was a crime under jus gentium and one that consequently jeopardized the interests of the international community.

37. With regard to draft article 7, 17/ the Special Rapporteur noted that the place of the "non bis in idem" rule in the draft Code would depend on whether the Commission decided to establish an international criminal court. If it did so decide, it would be difficult to invoke that rule, since, by virtue of the primacy of international criminal law, an international criminal court would, in principle, be competent to try international crimes. However, the inclusion of that rule appeared to be necessary in the case of universal jurisdiction, since a plurality of courts or intervention by several courts in trying one and the same offence might make the offender liable to several penalties.

38. During the discussion, some members of the Commission made suggestions concerning the wording of the draft article. It was thus proposed that the Latin title should be replaced by another title; that the word "alleged" should be added before the word "offence"; and that the words "penal procedure of a State" should be replaced by the words "penal procedure provided for in this Code". Some members proposed reformulations of the draft article. For example, it was suggested that the word "offence" should be replaced by the words "crime against the peace and security of mankind" and that the words "in accordance with the law and penal procedure of a State" should be deleted. Other members suggested that the text should be redrafted

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17/ The text of article 7 proposed by the Special Rapporteur read as follows:

"Article 7. Non bis in idem

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a State."

to make it clear that it did not preclude the possibility of a second trial and that only the imposition of the same penalty was prohibited. In that connection, it was noted that it would be justified to provide for the possibility, in the case where new evidence was discovered that would constitute a fresh charge or in the case where a new characterization would be possible for the same acts, of reopening a case that had already been tried in order to prevent an international crime from going unpunished. Another member proposed the insertion of a second sentence which would state that "This non bis in idem rule shall apply only as between States pending the establishment of an international criminal jurisdiction". During the discussion, it was stressed that the problem of non bis in idem would arise not only within the framework of a system of universal jurisdiction, but also in the case where an international court of criminal jurisdiction is established covering totally or in part the scope of the Code.

39. In reply to the comments on draft article 7, the Special Rapporteur proposed, in his summing up of the discussion, that the draft article should include a second paragraph, which would read:

> "The foregoing rule cannot be pleaded before an international criminal court, but may be taken into consideration in sentencing if the court finds that justice so requires".

40. With regard to draft article 8, [18] the Special Rapporteur noted that non-retroactivity was a basic guarantee. It was embodied in article 11 of the Universal Declaration of Human Rights; article 15 of the International Covenant on Civil and Political Rights; article 7 of the European Convention

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18/ The text of article 8 proposed by the Special Rapporteur read as follows:

"Article 8. Non-retroactivity

1. No person may be convicted of an action or omission which, at the time of commission, did not constitute an offence against the peace and security of mankind.

2. Nothing in this article shall 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 the community of nations."

for the Protection of Human Rights and Fundamental Freedoms; article 9 of the American Convention on Human Rights; and article 7, paragraph 2, of the African Charter on Human and Peoples' Rights.

41. Some members of the Commission said that paragraph 1 of the draft article should be drafted in a more precise manner.

42. With regard to paragraph 2, several members pointed out that the reference to the "general principles of international law" or the "general principles of law recognized by the community of nations" might pave the way for unwarranted extensions in an area where offences had to be defined and listed exhaustively. That wording was imprecise and ambiguous and might bring non-legal considerations into play in the application of a basic rule of criminal law. Those members were in favour of the deletion of paragraph 2. Other members of the Commission, on the basis of existing practice and, in particular, the Nürnberg Charter and human rights conventions, urged that the paragraph should be retained.

43. In the light of the reservations expressed by members of the Commission, the Special Rapporteur proposed that paragraph 2 should be deleted, although he pointed out that that would not be in keeping with the spirit of conventions such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights, which did contain such a provision.

44. The Special Rapporteur said that draft article 9, 19/ concerning exceptions to the principle of responsibility, was the counterpart of

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19/ The text of article 9 proposed by the Special Rapporteur read as follows:

"Article 9. Exceptions to the principle of responsibility

The following consititute exceptions to criminal responsibility:

(a) Self-defence;

(b) Coercion, state of necessity or force majeure;

(c) An error of law or of fact, provided, in the circumstances in which it was committed, it was unavoidable for the perpetrator;

(d) The order of a Government or of a superior, provided a moral choice was in fact not possible to the perpetrator."

draft article 3, setting out the principle of responsibility (see section C, below). He also noted that, in some circumstances, the act committed lost its character as an offence. That was so, for example, in the case of self-defence, which erased the offence. In other instances, the offence existed and remained, but could not give rise to responsibility, by virtue either of the status of its perpetrator (for example, in the event of incapacity) or of the circumstances surrounding its commission (for example, coercion, force majeure, state of necessity, error).

45. With regard to subparagraph (a) of the draft article, the Special Rapporteur said that the exception of self-defence was applicable only in the event of aggression, when it could be invoked by physical persons governing a State in respect of acts whose performance was ordered by them or which they carried out in response to an act of aggression against their State.

46. Some members of the Commission expressed the view that self-defence should not be included as an exception to criminal responsibility. Other members considered that, if self-defence, as recognized under Article 51 of the Charter, relieved States of criminal responsibility, it should also relieve individuals having exercised it on behalf of the State of criminal responsibility.

47. The Special Rapporteur said that the means of defence provided for in subparagraph (b), namely, coercion, state of necessity or force majeure, would appear difficult to invoke in cases of crimes against humanity. He described the judicial precedents on which that distinction was founded and which included those of the military tribunals established in application of Law No. 10 of the Allied Control Council on the punishment of war crimes and crimes against humanity. He also described the terminological problems to which those concepts gave rise in international law. Some jurists regarded the concepts as different, while others saw no clear dividing line between them. Their common feature was that they represented a grave peril, the only escape from which was the commission of the offending act. Moreover, their basic conditions were the same in that the perpetrator must have committed no wrongful act and that there should be no disproportionality between the interest protected and the interest sacrificed.

48. Some members of the Commission commented on the exceptions provided for in subparagraph (b). Some members had strong reservations about the acceptance of coercion as an exception. Other members pointed out that, for coercion to be considered as an exception, the perpetrator of the incriminating act must be able to show that he would have placed himself in "grave, imminent and irremediable peril" if he had offered any resistance. Some members were of the opinion that the exceptions in subparagraph (b) should be limited to certain very specific cases of coercion and force majeure and that state of necessity should be omitted. Another member expressed the view that the exceptions provided for in subparagraph (b) required clarification.

49. With regard to subparagraph (c) of the draft article concerning error, some members of the Commission took the view that only an error of fact, in some circumstances, could be considered as an exception, but that an error of law could not.

50. The Special Rapporteur stressed the need to include error of fact in the draft article and, in reply to various comments to the contrary, referred to the example of the recent attack made on United States vessels in the Persian Gulf. If an error of fact had not been admitted in that instance, the act committed would have constituted aggression. Consequently, error of fact could not be ruled out in some circumstances.

51. Several members maintained that the exception of the order of a superior, as provided for in subparagraph (d) of the draft article, should not be included unless it constituted a case of coercion or error of fact. One member recommended, in particular, that the phrase relating to moral choice should be deleted. Certain members were of the view that this exception should be included as formulated in the Nürnberg Charter.

52. The Special Rapporteur said that that means of defence did not appear to represent an independent concept. In some circumstances, the order was executed under coercion, in which case, it was the coercion, rather than the order, which was the exception. In other cases, execution of the order was the result of an error as to its lawfulness, in which case it was the error which formed the basis of the exception. Finally, where the unlawfulness of the order was manifest, anyone executing it without coercion would be committing an act of complicity.

53. Some members of the Commission expressed the view that certain incapacities, such as minority age and mental incapacity, should be incorporated in the draft article as exceptions to criminal responsibility.

54. The Special Rapporteur pointed out that, while such exceptions could be invoked in internal law, the issue was less clear-cut when it came to crimes against the peace and security of mankind. The age at which majority was attained varied according to national legislation and it was difficult to conceive of anyone with the capacity to govern a State, and to do so effectively, being able to invoke mental incapacity. Similarly, the fact that an individual was recruited into the army of a State should constitute sufficient proof of mental health. In general, it would be unwise to transpose, without discussion, some concepts of internal law to a field like that of crimes against the peace and security of mankind, which was subject to a régime outside the scope of ordinary law.

55. Finally, some members made proposals for the recasting of draft article 9 as a whole. Some members preferred the former wording of the draft article, as contained in the Special Rapporteur's fourth report. Others considered that the draft article should be formulated from the point of view of exceptions to intent, rather than of exceptions to responsibility. Another member said that it would be preferable to leave the competent court to determine the circumstances attenuating or extinguishing responsibility. One member said that two separate provisions should be drafted, one entitled "causes of responsibility" and the other, "justifying circumstances".

56. The Special Rapporteur said that the provision in draft article 10 20/ on the responsibility of the superior had been reproduced from article 86, paragraph 2, of Additional Protocol I to the Geneva Conventions. He had

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20/ The text of article 10 proposed by the Special Rapporteur read as follows:

"Article 10. 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 going 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."

considered that it would be better to devote a special article to the question, rather than leave the act to be qualified on the basis of judicial precedent, by application of the theory of complicity, as in the Yamashita case. 21/

57. Some members were of the opinion that draft article 10 should be linked with the question of complicity. Another member took the view that the provision should also refer to the well-known concepts of "actual knowledge", "constructive knowledge" and "contributory negligence". In formulating the provisions on complicity, it will be necessary to take account of the provisions of Law No. 10, in which certain kinds of participation in the commission of such crimes are defined.

58. The Special Rapporteur said that the provision contained in draft article 11 22/ on the official position of the perpetrator corresponded to article 7 of the Charter of the Nürnberg Tribunal and to article 6 of the Charter of the International Military Tribunal for the Far East. The International Law Commission had also embodied the rule set forth in article 11 in principle III of the "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal".

59. Several members expressed their agreement with the draft article. One member was of the view that the provision relating to exceptions should be included in the early articles, since it formed part of the general principles.

60. Several members also maintained that complicity did not constitute a separate offence, but should be dealt with under the general principles.

61. The Special Rapporteur said that the question could be considered later.

21/ Law Reports of Trials of War Criminals, vol. II, p. 70.

22/ The text of article 11 proposed by the Special Rapporteur read as follows:

"Article 11. Official position of the perpetrator

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."

62. As indicated above (para. 28), the Commission at its 2031st to 2033rd meetings examined the report of the Drafting Committee submitted by its Chairman. After discussing the report, it provisionally adopted draft articles 1 to 3, 5 and 6, with commentaries thereto, reproduced below in Section C of this chapter.

63. With regard to draft article 7, on the "non bis in idem" rule, the Chairman of the Drafting Committee reported that the Committee had discussed that draft article at length. For while some members considered the principle laid down in the draft article to be indispensable, others could only accept it subject to conditions intended to prevent abuses. The Drafting Committee was unable to arrive at a new formulation owing to a lack of time.

64. As regards the title of the topic, the Commission wishes to point out that the word "crimes" has been used in some language versions, whereas others have used the word "offences" - a difference which derives from resolutions adopted by the General Assembly towards the end of the 1940s. After discussing the matter in plenary and in the Drafting Committee, with a view to harmonizing the substance and the form of all the language versions, the Commission decided that the word "crimes" should be used in all versions of the draft articles provisionally adopted. Thus, while the title of the topic remains for the time being as it appears on the Commission's agenda and in the General Assembly resolutions on the subject, the title and texts of the draft articles now use the term "crimes" in all languages.

65. In view of what has been said in the foregoing paragraph the Commission wishes to recommend to the General Assembly that it amend the title of the topic in English, in order to achieve greater uniformity and equivalence between the different versions. If the General Assembly decides to accept this recommendation the English title of the topic would read: "Draft Code of crimes against the peace and security of mankind".

C. Draft articles on the draft Code of crimes against the peace and security of mankind

66. The texts of draft articles 1 to 3, 5 and 6, with commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session are reproduced below.

CHAPTER I

INTRODUCTION

PART I Definition and characterization

Article 1

Definition

The crimes [under international law] defined in this draft Code constitute crimes against the peace and security of mankind.

Commentary

(1) Having to choose between a conceptual definition establishing the essential elements of the concept of a "crime against the peace and security of mankind" and a definition by an enumeration referring to a list of crimes individually defined in the draft Code, the Commission provisionally opted for the second solution. However, the Commission decided to return, at an appropriate future stage of its work, to the question of the conceptual definition of crimes against the peace and security of mankind.

(2) It was generally agreed, however, that crimes against the peace and security of mankind had certain specific characteristics. In particular, there seemed to be unanimity on the criterion of seriousness. These are crimes which affect the very foundations of human society. Seriousness can be deduced either from the nature of the act in question (cruelty, monstrousness, barbarity, etc.) or from the extent of its effects (massiveness, the victims being peoples, populations or ethnic groups) or from the motive of the perpetrator (for example, genocide), or from several of these elements. Whichever factor makes it possible to determine the seriousness of the act, it is this seriousness which constitutes the essential element of a crime against the peace and security of mankind, which is characterized by its degree of horror and barbarity, and undermines the foundations of human society.

(3) Some members of the Commission expressed the opinion that the definition of a crime against the peace and security of mankind should include the element of "intent". It should be noted that there are two schools of thought on this point. According to one school represented in the Commission, intent is deduced from the massive and systematic nature of a crime, and when these elements are present a guilty intent must be presumed. Thus in the case of genocide or apartheid, for example, the intention to commit these crimes need not be proved; it follows objectively from the acts themselves and there is no need to inquire whether the perpetrator was conscious of a criminal

intent. His intent is presumed if the act has certain characteristics. In such a case, liability is strict. According to another school of thought, intent may not be presumed, but must always be established. The difference between these two views is much more a difference of procedure than of substance. In both cases, guilty intent is a condition for the crime. The difference lies in whether it is necessary or unnecessary to prove its existence.

(4) The reasons which inclined the Commission to prefer an enumerative definition of the kind adopted in article 1 are both theoretical and practical. On the one hand, several members of the Commission expressed the fear that a conceptual definition might lead to a wide and subjective interpretation of the list of crimes against humanity, contrary to the fundamental principle of criminal law that every offence must be precisely characterized as to all its constituent elements. Any danger of a characterization by analogy of a crime against the peace and security of mankind should therefore be avoided. On the other hand, if this fundamental principle is observed and each crime against the peace and security of mankind is carefully defined as to each of its constituent elements, the practical value of a general definition that would be the common denominator of these crimes, becomes rather doubtful. The enumeration of crimes in the present draft Code could be supplemented at any time by new instruments of the same legal nature.

(5) The expression "under international law" is in square brackets because the Commission did not reach agreement on whether it was necessary or useful to include it. Some members considered that this expression might weaken the effect of the text and introduce some confusion into the interpretation of the article, and that it would raise the question of the relationship between international law and internal law. The expression might also give the impression that the Code dealt with crimes committed by States, thus raising the delicate question of the possible criminal responsibility of a State, whereas the intention of the Commission at the present stage was to limit the content of the Code ratione personae to individuals (see below para. (3) of the commentary to article 3). Other members strongly supported the inclusion of the expression "under international law". They pointed out that that expression had been included in article 1 of the draft Code adopted by the Commission in 1954. Moreover, the Commission had already sanctioned the

expression by using it in Principles I, II, III, V, VI and VII of the document entitled "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal". Finally, some members of the Commission thought that its inclusion would make it necessary to add to the draft Code a provision regulating the incorporation of international obligations into the internal law of States. It was also pointed out that the inclusion of such an expression raised the question whether crimes against the peace and security of mankind are governed by rules of general international law, even outside the draft Code. Some members also wondered whether such rules did not have a jus cogens character. Finally, it was maintained that the inclusion of this expression was premature and that it was necessary, before deciding the matter, to wait until the list of crimes in question was known in detail. One member suggested that if the phrase "[under international law]" is retained, it should be inserted in the second line of the draft article, after the words "constitute crimes".

Article 2

Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

Commentary

(1) This draft article concerns relations between the draft Code and internal law as regards a concrete matter, namely, the characterization of an act or omission as a crime against the peace and security of mankind. The characterization or determination by the draft Code of what constitutes a crime of this kind is treated by this draft article as being entirely independent of internal law. It is useful to recall that in 1950, when the Commission adopted the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", it already laid down in Principle II of that document that "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law".

(2) It must be pointed out that the scope of draft article 2 is limited to the characterization of a crime against the peace and security of mankind. It is without prejudice to internal competence in regard to other matters such as criminal procedure, the extent of the penalty, etc., particularly if it is assumed that the implementation of the draft articles is to depend on the principle of universal jurisdiction or that of territoriality.

(3) While the first sentence of draft article 2 establishes the principle of the autonomy of characterization by the draft Code, the second sentence excludes any effect which a possible characterization or absence of characterization of an act or omission under internal law might have on the characterization made under the draft Code. It may indeed be imagined that the same act may be characterized by a State simply as a crime, and not as a crime against the peace and security of mankind. And the two concepts are not subject to the same réqime, in particular as regards statutory limitations, substantive rules, etc. Such a characterization cannot be invoked against the characterization of the same act under the draft Code. Some members of the Commission considered that the second sentence of the draft article was not strictly necessary.

PART II General principles

Article 3

Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime irrespective of any motives invoked by the accused that are not covered by the definition of the offence and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

Commentary

Paragraph 1

(1) Paragraph 1 limits to the "individual who commits a crime" the principle of responsibility and punishment for a crime against the peace and security of mankind. The act for which an individual is responsible may also be attributable to a State (whether the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or in a simple de facto relationship).

(2) The phrase "irrespective of any motives invoked ... that are not covered by the definition of the offence", contained in paragraph 1, requires explanation. The Commission considered this provision necessary, to show that the offender could not resort to any subterfuge. He cannot invoke any motive as an excuse if the offence has the characteristics defined in the Code. The purpose is to exclude any defence based on another motive, when the real motive of the act is within the definition of the crimes covered by the draft Code. The word "motive" is used to mean the impulse which led the perpetrator to act, or the feeling which animated him (racism, religious feeling, political opinion, etc.). No motive of any kind can justify a crime against the peace and security of mankind. The motive answers the question of what were the reasons animating a perpetrator. Motives generally characterizing a crime against humanity are based on racial or national hatred, religion or political opinion. By reason of their motives, therefore, the crimes to which the present draft Code relates are the most serious crimes. Motive must be distinguished from intent, i.e. the deliberate will to commit the crime, which is a necessary condition for the offences covered by the draft Code. This is discussed in paragraph (3) of the commentary to article 1, above.

(3) During the discussion of the draft Code in plenary meeting, some members of the Commission supported the proposition that not only an individual, but also a State could be held criminally responsible. At its thirty-sixth session, however, the Commission decided to limit the draft Code, at that stage, "to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility in the light of the opinions expressed by Governments". 23/ It should be pointed out that, assuming that the criminal responsibility of the State can be codified, the rules applicable to it cannot be the same, as regards either investigation, appearance in court or punishment. The two régimes of criminal responsibility would be

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23/ Yearbook ... 1984 vol. II (Part Two), p. 17, document A/39/10, para. 65 (a).

different. When adopting the commentary to article 19 of the draft articles on State responsibility the Commission already warned against the tendency to derive from the expression "international crime" used in that article, a criminal content as understood in criminal law. It sounded a warning against "any confusion between the expression 'international crime' as used in this article and similar expressions, such as 'crime under international law', 'war crime', 'crime against peace', 'crime against humanity', which are used in a number of conventions and international instruments to designate certain heinous individual crimes, for which those instruments require States to punish the guilty persons adequately in accordance with the rules of their internal law". 24/ It emphasized that "The obligation to punish personally individuals who are organs of the State and are guilty of crimes against the peace, against humanity, and so on does not, in the Commission's view, constitute a form of international responsibility of the State ...". 25/

Paragraph 2

(4) Whereas paragraph 1 of article 3 refers to the criminal responsibility of the individual, paragraph 2 leaves intact the international responsibility of the State in the traditional sense of that expression as it derives from general international law, for acts or omissions attributable to the State by reason of offences of which individuals are accused. As the Commission has already emphasized in its commentary to article 19 of the draft articles on State responsibility, the punishment of individuals who are organs of the State "certainly does not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which are attributed to it in such cases by reason of the conduct of its organs". 26/ The State may thus remain responsible, and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. For example, a State could be obliged to make reparation for injury (damages, compensation, etc.).

(5) The word "sanction" in the French version of the title has been used as equivalent to the word "punishment" in the English version.

24/ Yearbook ... 1976, vol. II (Part Two) p. 119, document A/31/10, para. (59) of the commentary to article 19.

25/ Ibid., p. 104, para. (21).

26 Ibid.

Article 5

Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

Commentary

(1) In adopting the rule of the non-applicability of statutory limitations laid down in this article, the Commission took account of the fact that in internal law, statutory limitation for crimes or other offences is neither a general law nor an absolute rule, as is shown by a detailed study of comparative law. Unknown to certain systems of law (e.g. Anglo-American law), it is not an absolute rule in other systems. In France, for instance, it is not applicable to serious military offences or to offences against the security of the State. Moreover, doctrine is not unanimous on the nature or scope of the rule of statutory limitation, especially on the question whether it is a substantive or a procedural rule.

(2) At first, international law relating to crimes against the peace and security of mankind took no account of the rule of statutory limitation for crimes. Thus the London Agreement of 1945 establishing the Nürnburg Tribunal, did not mention this question. No declaration made during the Second World War (that of St. James, that of Moscow) referred to statutory limitation.

(3) It was more recently, owing to subsequent circumstances, that the international community and international law were led to concern themselves with the rule of statutory limitation as applied to crimes against the peace and security of mankind. The need to prosecute the perpetrators of odious crimes during the Second World War, and the obstacle placed in the way of such prosecution by the rule of statutory limitation known to certain systems of national law, led to the recognition of the rule of non-applicability of statutory limitations in international law, by the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Some States acceded to the Convention without reservation; others limited non-applicability to crimes against humanity, excluding war crimes. However, the objections to such limitations became quite clear very recently on the occasion of the trial of Klaus Barbie. The rule of non-applicability of statutory limitations to

certain war crimes having provoked a strongly emotional reaction by public opinion, the French Cour de cassation, in its judgment of 20 December 1985, had recourse to a broad interpretation of the notion of a crime against humanity, including in it crimes committed by an occupation régime against its political opponents, "whatever the form of their opposition", which includes armed opposition.

(4) In view of the foregoing considerations, the Commission provisionally adopted draft article 5, reserving the possibility of re-examining it in the light of the offences enumerated as crimes against the peace and security of mankind. In particular, it may be necessary to provide for statutory limitations with regard to war crimes although it is not always easy to distinguish between war crimes and crimes against humanity. These notions sometimes overlap when crimes against humanity are committed in wartime. The Charter of the Nürnberg Tribunal distinguished between crimes committed against a "civilian population of or in occupied territory", which were classed as war crimes, and crimes committed against "any civilian population on ... racial or religious grounds", which were classed as crimes against humanity. But that distinction is defective. Crimes committed against populations in occupied territory are obviously war crimes, but they can also be crimes against humanity by reason of their cruelty and irrespective of any racial or religious element. Thus the distinction between war crimes and crimes against humanity is neither systematic nor absolute.

Article 6

Judicial guarantees

Any individual charged with a crime against the peace and security of mankind shall be entitled without discrimination to the minimum guarantees due to all human beings with regard to the law and the facts. In particular:

1. He shall have the right to be presumed innocent until proved guilty;

2. He shall have the right:

(a) In the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

(b) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(d) To be tried without undue delay;

(e) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

(f) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(g) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(h) Not to be compelled to testify against himself or to confess guilt.

Commentary

(1) Draft article 6 relates to the judicial guarantees to be enjoyed, as a human being, by the alleged perpetrator of a crime against the peace and security of mankind. Several international instruments have established the principles relating to the treatment to which any person accused of a crime is entitled, and to the procedural conditions under which his guilt or innocence can be objectively established. Provisions of this kind are to be found in international instruments relating not only to human rights, but also to certain aspects of crimes against the peace and security of mankind. Mention may be made of the Charter of the International Military Tribunal of Nürnberg (article 16) and the Charter of the International Military Tribunal for the Far East (article 9 et seq.); the International Covenant on Civil and Political Rights (article 14); the European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 6 and 7); the American Convention on Human Rights (articles 5, 7 and 8); the African Charter of Human and Peoples' Rights (article 7); the Geneva Conventions of 1949 (article 3, common to the four Conventions); Additional Protocols I (article 75) and II (article 6) to the Geneva Conventions.

(2) The Commission considered that at the present stage in international relations an instrument of a universal character, such as the present draft Code, should rely on the International Covenant on Civil and Political Rights for guidance as to its provisions on judicial guarantees. Draft article 6 therefore reproduces the essential provisions of article 14 of the Covenant. Only certain expressions have been modified or omitted.

(3) The expression "minimum guarantees", in the opening sentence of the draft article, has been used to show that the list of guarantees in the provision is not exhaustive. The words "with regard to the law and the facts", also in the opening sentence, are to be understood as relating to "the applicable law" and "the establishment of the facts".

(4) The expression "established by law" in article 14, paragraph 1, of the Covenant has been replaced in draft article 6 by the expression "established by law or by treaty". Indeed, if an international criminal court or a court for several States was to be established, it could only be established by treaty.

(5) The expression "in any case where the interests of justice so require" which appears in article 14, paragraph 3 (d), of the Covenant, has not been reproduced in the draft article, as the Commission considered that the appointment of counsel for the defence, either by the accused or ex officio by the court, was necessary in all cases, by reason of the extreme seriousness of the crimes covered by the draft Code and the probable severity of the punishment.

(6) It was emphasized in the Commission that the freedom of the accused to communicate with his counsel, provided for in paragraph 2 (c) of the draft article, also extends to the counsel who may be assigned to him by the court under paragraph 2 (e).

(7) In regard to paragraph 2 (g) it was pointed out that the right of the accused to the assistance of an interpreter applies not only to the hearing in court, but to all phases of the proceedings.

(8) It was explained in the Commission that the words "Not to be compelled" in paragraph 2 (h) of the draft article should be interpreted as prohibiting the use of threats, torture or other means of coercion to obtain a confession.

D. Points on which comments are invited

67. The Commission would attach great importance to the views of Governments regarding the following:

(a) Draft articles 1 to 3, 5 and 6 provisionally adopted by the Commission at its present session (see paragraph 66 above); 27/

(b) The scope and conditions of application of the "non bis in idem" principle contained in draft article 7, proposed by the Special Rapporteur (see paragraphs 37 to 39 and 63 above);

(c) The conclusions contained in paragraph 69 (c) (i) of the report of the Commission on the work of its thirty-fifth session in 1983. 28/

27/ Attention is drawn to the fact that the expression "under international law" is found between square brackets in article 1.

28/ Paragraph 69 (c) (i) of the Commission's report on the work of its thirty-fifth session in 1983 reads as follows:

"(c) With regard to the implementation of the Code:

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

Yearbook ... 1983, vol. II (Part Two), p. 16, document A/38/10.

CHAPTER III

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 29/

68. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session, in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report on legal problems relating to the non-navigational uses of international watercourses prepared by the Secretariat. 30/ At that session, the Commission adopted the report of a Sub-Committee set up on the topic during the same session and appointed Mr. Richard D. Kearney as Special Rapporteur for the topic.

69. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States 31/ to a questionnaire 32/ which had been formulated by the Sub-Committee and circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur. 33/ 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. 34/

29/ For a fuller statement of the historical background of this topic, see Yearbook ... 1985, vol. II (Part Two), pp. 68-71, document A/40/10, paras. 268-290.

30/ Yearbook ... 1974, vol. II (Part Two), p. 265, document A/CN.4/274.

31/ Yearbook ... 1976, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1. At subsequent sessions, the Commission had before it replies submitted from the Governments of an additional 11 Member States, Yearbook ... 1978, vol. II (Part One), p. 253, document A/CN.4/314, Yearbook ... 1979 vol. II (Part One), p. 178, document A/CN.4/324, Yearbook ... 1980, vol. II (Part One), p. 153, document A/CN.4/329 and Add.1, and Yearbook ... 1982, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

32/ The final text of the questionnaire as communicated to Member States, is set forth in Yearbook ... 1976, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6.

33/ Ibid., p. 184, document A/CN.4/295.

34/ Ibid., vol. II (Part Two), p. 162, document A/31/10, para. 164.

70. 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. The Special Rapporteur, Mr. Schwebel, at the thirty-first session of the Commission in 1979 presented his first report. 35/

71. The Special Rapporteur submitted a second report containing six draft articles at the Commission's thirty-second session in 1980. 36/ 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 the following six draft articles: article 1 (Scope of the present articles); article 2 (System States); article 3 (System agreements); article 4 (Parties to the negotiation and conclusion of system agreements); article 5 (Use of the waters which constitute a shared natural resource); and article X (Relationship between the present articles and other treaties in force). 37/

72. As further recommended by the Drafting Committee, the Commission, at its thirty-second session in 1980, accepted 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."

35/ Yearbook ... 1979, vol. II (Part One), p. 143, document A/CN.4/320.

36/ Yearbook ... 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

37/ Ibid., vol. II (Part Two), pp. 110-136, document A/35/10, chap. V.B.

73. Following the resignation from the Commission of the Special Rapporteur, Mr. Schwebel, upon his election to the International Court of Justice in 1981, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic at its thirty-fourth session in 1982. Also at that session the third report 38/ of the former Special Rapporteur, Mr. Schwebel, was circulated.

74. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by the Special Rapporteur, Mr. Evensen. 39/ It contained a tentative draft convention, the purpose of which was to serve as a basis of 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 that of an international watercourse system as a shared natural resource.

75. At the thirty-sixth session, in 1984, the Commission had before it the second report submitted by the Special Rapporteur. 40/ It contained a revised draft of a convention consisting of 41 draft articles arranged in six chapters. The Commission focused its discussion on draft articles 1 to 9 41/ and questions related thereto. The Commission decided

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38/ Yearbook ... 1982, vol. II (Part One) and corrigendum, p. 65, document A/CN.4/348.

39/ Yearbook ... 1983, vol. II (Part One), p. 155, document A/CN.4/367.

40/ Yearbook ... 1984, vol. II (Part One), p. 101, document A/CN.4/381.

41/ Those nine articles were as follows: Chapter I. Introductory articles: article 1 (Explanation (definition) of the term "international watercourse" as applied by the present (draft) convention); article 2 (Scope of the present articles); 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 against activities with regard to an international watercourse causing appreciable harm to other watercourse States). Ibid.

to refer to the Drafting Committee draft articles 1 to 9, for consideration in the light of the debate. 42/ Due to lack of time, the Drafting Committee was unable to consider those articles at the 1984 through 1986 sessions.

76. At the thirty-seventh session, in 1985, the Commission appointed Mr. Stephen C. McCaffrey as Special Rapporteur for the topic following the resignation from the Commission of Mr. Evensen upon his election to the International Court of Justice.

77. The Special Rapporteur submitted a preliminary report to the Commission at that session, 43/ which reviewed the Commission's work on the topic to date and indicated his preliminary views as to the general lines along which the Commission's work on the topic could proceed. The Special Rapporteur's recommendations in relation to further work on the topic were: first, that draft articles 1 to 9 which had been referred to the Drafting Committee in 1984, and which the Drafting Committee had been unable to consider at the 1985 session, be taken up by that Committee at the 1986 session and not be subject to another general debate in plenary session; and second that the Special Rapporteur follow the general organizational structure provided by the outline proposed by the previous Special Rapporteur in elaborating further draft articles on the topic. There was general agreement with the Special Rapporteur's proposals concerning the manner in which the Commission might proceed.

78. At the thirty-eighth session, in 1986, the Commission had before it the second report on the topic submitted by the Special Rapporteur (A/CN.4/399 and Adds.1 and 2). In that report the Special Rapporteur, after reviewing the status of the Commission's work on the topic, provided a statement of his views on articles 1 to 9 as proposed by the previous Special Rapporteur, 44/ as well as a review of the legal authority supporting those views. The report also contained a set of five draft articles concerning procedural rules

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42/ It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its 1960 session (see para. 72, above), the text of articles 1 to 5 and X provisionally adopted by the Commission at the same session as well as the text of articles 1 to 9 proposed by the Special Rapporteur in his first report.

43/ Yearbook ... 1985, vol. II (Part One), p. 87, document A/CN.4/393.

44/ See note 41, above.

applicable in cases involving proposed new uses. 45/ In presenting his second report to the Commission, the Special Rapporteur drew attention to four points concerning articles 1 to 9 that he had raised in the report, and on which he considered the Commission could profitably focus, namely whether the Commission could, for the time being at least, defer the matter of attempting to define the term "international watercourse" and base its work on the provisional working hypothesis accepted by the Commission in 1980 (see para. 72 above); whether the term "shared natural resource" should be employed in the text of the draft articles; whether an article concerning the determination of reasonable and equitable use should contain a list of factors, or whether the factors to be taken into account in making such a determination should be referred to in the commentary; and whether the relationship between the obligation to refrain from causing appreciable harm to other States using the international watercourse, on the one hand, and the principle of equitable utilization, on the other, should be made clear in the text of an article. In addition, the Special Rapporteur invited the Commission's general comments on the draft articles contained in his second report, recognizing that there was insufficient time for them to be given thorough consideration at that session.

79. With regard to the question of defining the term "international watercourse", most members who addressed the issue favoured deferring such a definition until a later stage of the work on the topic.

80. Members of the Commission who addressed the issue were divided on whether the term "shared natural resource" should be utilized in the text of the draft articles. Many members or both sides of the issue recognized, however, that effect could be given to the legal principles underlying the concept without using the term itself in the text of the draft articles.

81. There was also a division of views on the question of whether there should be set forth, in the text of a draft article, a list of factors to be taken into consideration in determining what amounts to a reasonable and equitable use of an international watercourse. The Special Rapporteur

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45/ Those five articles were as follows: article 10 (Notification concerning proposed uses); article 11 (Period for reply to notification); article 12 (Reply to notification, consultation and negotiation concerning proposed uses); article 13 (Effect of failure to comply with articles 10 to 12); article 14 (Proposed uses of utmost urgency).

supported the suggestions of some members that the Commission should strive for a flexible solution, which might take the form of confining the factors to a limited, indicative, list of more general criteria.

82. The final point concerned the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other. Members of the Commission who addressed this point recognized the relationship between the two principles in question, but were divided on how to express it in the draft articles. The Special Rapporteur concluded that, as the Commission seemed to be in basic agreement on the manner in which the two principles were interrelated, the task of the Drafting Committee would be to find an appropriate and generally acceptable means of expressing that interrelationship.

83. Finally, those members of the Commission who spoke on the topic commented generally on the five draft articles contained in the second report of the Special Rapporteur. The Special Rapporteur indicated his intention to give the articles further consideration in the light of the constructive comments made by members of the Commission.

B. Consideration of the topic at the present session

84. At the present session the Commission had before it the third report on the topic submitted by the Special Rapporteur (A/CN.4/406 and Corr.1, Add.1 and Corr.1 and Add.2 and Corr.1).

85. In his third report, the Special Rapporteur briefly reviewed the status of work on the topic (Chapter I), set forth general considerations on procedural rules relating to the utilization of international watercourses (Chapter II) proposed six draft articles concerning general principles of co-operation and notification (Chapter III) 46/ and addressed the question of exchange of data and information (Chapter IV).

86. The Commission, at the present session, considered the third report of the Special Rapporteur at its 2001st to 2014th meetings.

87. In introducing his report, the Special Rapporteur indicated that the first two chapters of his report had been included largely as background information for members. Chapter III, which contained the draft articles he was proposing, formed the core of the report and was submitted for discussion

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46/ For the text of these proposed articles, see notes 48 and 49 below.

and action at the present session. Chapter IV constituted an introduction to the sub-topic of exchange of data and information on which he intended to submit draft articles in his next report.

88. Focusing on Chapter III of his report, the Special Rapporteur explained that the purpose of the procedural rules contained in the draft articles in the chapter was to ensure that information and data on the uses of a watercourse by other States were available to the State planning its own uses, thereby enabling it to take such data and information into account and to avoid any breach of the equitable utilization principle. He stated that the draft articles to be included in Chapter III of the draft, which he had suggested be entitled "General principles of co-operation, notification and provision for data and information", fell into two categories. The first, consisting only of article 10, covered the general obligation to co-operate. The second categ comprising draft articles 11 to 15, set out rules on notification and consultation concerning proposed uses, which could best be considered together.

89. On the proposal of the Special Rapporteur, the Commission first discussed draft article 10 and then proceeded to take up draft articles 11 to 15 together. It was understood that members would be free to make general comments, especially during the discussion of draft article 10.

90. At its 2008th meeting, the Commission decided to refer draft article 10 to the Drafting Committee for consideration in the light of the discussion and the summing up by the Special Rapporteur. Similarly, at its 2014th meeting, the Commission agreed to refer draft articles 11 to 15 to the Drafting Committee, for consideration in light of the debate and summing up. It was understood that the Committee would take into account all proposals made in the plenary, including the suggestions made by the Special Rapporteur himself, as well as any written comments by members who did not sit on the Drafting Committee.

91. At its 2028th to 2030th and 2033rd meetings, the Commission, after having considered the report of the Drafting Committee on the draft articles referred to it on this topic, approved the method followed by the Committee with regard to article 1 and the question of the use of the term "system", and provisionally adopted articles 2 (Scope of the present articles), 3 (Watercourse States), 4 ([Watercourse] [System] agreements), 5 (Parties to [watercourse] [system] agreements), 6 (Equitable and reasonable utilization

and participation) and 7 (Factors relevant to equitable and reasonable utilization). These draft articles, with commentaries thereto, are set out in Section C below. The draft articles adopted at the present session are based upon articles 2 to 8 referred to the Drafting Committee at the 1984 session of the Commission, as well as articles 1 to 5 provisionally adopted by the Commission in 1980 (see paras. 75 and 71, above). For lack of time, the Drafting Committee was unable to complete its consideration of article 9 (Prohibition against activities with regard to an international watercourse causing appreciable harm to other watercourse States) proposed by the previous Special Rapporteur and referred to the Committee in 1984, nor was it able to take up articles 10 to 15 referred to the Committee in the course of the present session. Thus, the Drafting Committee remains seized of articles 9 to 15 which will be examined by it in the course of a future session.

92. With regard to the discussions held at the present session on articles 10 to 15 still pending in the Drafting Committee, the following paragraphs attempt to set out briefly the major trends of that debate as related to those articles, including the conclusions drawn by the Special Rapporteur following the debate. 47/

93. Concerning the general question of the Commission's approach in formulating draft articles on this topic, i.e. preparing articles for inclusion in a "framework agreement" (see article 4 in Section C, below), most members who addressed the question were in general agreement with the approach followed by the Commission since 1980, of preparing general, residual rules on the topic, applicable to all international watercourses, designed to be complemented by other agreements which, when the States concerned choose to conclude them, would enable States of a particular watercourse to establish more detailed arrangements governing its use. A "framework agreement" could

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47/ It should be noted that the summary records of the 2001st to 2014th meetings contain an extensive reflection of the views expressed during the debate, including remarks of a general character, and comments made on the prior work of the Commission on the topic and previous reports of the Special Rapporteur. It should also be noted that the texts of the articles proposed by the Special Rapporteur in his third report and set forth in the following footnotes are still pending before the Drafting Committee. The Special Rapporteur has indicated his intention to review those articles with a view to proposing revised versions to the Committee, in the light of the debate.

also be viewed as an "umbrella agreement". These members believed that State practice and arbitral awards showed that rules of international law concerning the topic had been developed and recognized by States and could form the basis for formulating articles setting out binding rules, albeit of a general and residual nature. The framework instrument might also include, in non-binding provisions to be proposed at a later stage, recommendations or guidelines for certain matters, such as for the administration and management of international watercourses, to be used by States as models in the negotiation of future watercourse or system agreements and, particularly, in making their own co-operative arrangements for joint endeavours.

94. On the other hand, some members expressed doubts or reservations concerning the framework agreement approach which, it was said, was vague and subject to varying interpretations. According to the view of some members of the Commission, neither State practice nor arbitral decisions provided sufficient bases upon which to elaborate binding rules of international law applicable to all international watercourses. Furthermore, the Commission's work would only be effective and acceptable to States if it were based on objective realities and fundamental principles of international law, such as the sovereignty of States, and in particular the permanent sovereignty of States over their natural resources, and if it consisted of recommendations or guidelines aimed at assisting States in the conclusion of relevant watercourse agreements which they might choose to conclude; attempts to formulate binding rules would be fruitless and contrary to those fundamental principles.

95. As to draft article 10 48/ proposed by the Special Rapporteur in his third report, members focused on the existence and nature of a general obligation under international law to co-operate. Several members believed such an obligation - an obligation of conduct - did exist in international law, as evidenced by various international instruments and State practice. The legal principle of international co-operation was viewed as a necessary

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48/ The text of article 10 proposed by the Special Rapporteur read as follows:

Article 10

General obligation to co-operate

States shall co-operate in good faith with other concerned States in their relations concerning international watercourses and in the fulfilment of their respective obligation under the present draft articles.

element of the principle of the sovereign equality of States. Some members considered it to be an "umbrella" term which covered a number of other more specific obligations. Co-operation served to help States themselves to find the means for reconciling their own interests; it enabled the sovereignties involved to coexist positively while preventing possible abuses. Concerning the manner in which that general obligation should be reflected in the draft articles, several members stressed that article 10 should be cast in a more precise manner, indicating the scope and main objectives of such co-operation, the manner in which it interacted with other fundamental principles of international law and the modalities of implementation. It was suggested, for example, that the article could provide that States sharing an international watercourse shall co-operate in their relations concerning the uses of the watercourse in order to achieve optimum utilization and protection of the watercourse, based on the equality, sovereignty and territorial integrity of the watercourse States concerned. Other possible matters which were mentioned for reflection in the draft article included good faith, good-neighbourly relations, the permanent sovereignty of States over their natural resources and the notion of reciprocity. On the other hand, some members said it was necessary to avoid expanding the text unduly by including references to a number of bases for the obligation, for such a course might dilute the expression of the essential rule embodied in the article. It was also suggested that a new additional provision could be prepared on possible forms of co-operation among States.

96. However, some members were of the view that co-operation was a vague and all-encompassing concept and that under international law there existed no general obligation on States to co-operate. It was considered unrealistic with regard to this topic to attempt to impose a mandatory obligation on States to co-operate, even though there might exist a need for watercourse States to co-operate. Co-operation represented a means to obtain a desirable end but not a legal obligation. A cautious formula was suggested, such as States being invited to engage in mutual relations in a spirit of co-operation. It was, however, noted that even if the obligation to co-operate had no established legal foundation, the Commission could decide, but only with caution, to engage in the progressive development of international law and propose such an obligation de lege ferenda.

97. A number of members suggested that an article on co-operation, appropriately drafted, should be placed among the articles contained in

Chapter II of the draft on "General principles", as long as that did not detract from the significance of the article.

98. In summing up the debate on article 10, the Special Rapporteur stated that while there was a difference of views on the existence of a duty to co-operate under general international law, there had been no objection to the idea of including a draft article on co-operation, provided it was appropriately drafted. In his view, co-operation within the meaning of article 10 denoted a general obligation to act in good faith with regard to other States in the utilization of an international watercourse. Co-operation was necessary to the fulfilment of certain specific obligations; there was no intention to refer to an abstract obligation to co-operate. He said that the duty to co-operate was quite clearly an obligation of conduct. What it involved was not a duty to take part with other States in collective action, but, rather, a duty to work towards a common goal. The relevant international instruments, as well as State practice and decisions in disputes relating to watercourses, clearly showed that States recognized co-operation as a basis for such important obligations as those relating to equitable utilization and the avoidance of appreciable harm. In fact, most agreements on watercourse uses referred to co-operation for a specific purpose and many of them indicated the legal basis for co-operation. He therefore agreed that draft article 10 needed further refinement including references to the specific purposes and objectives of co-operation, as well as to the principles of international law on which co-operation was based. He believed that, in the light of the constructive comments made, a formulation could be achieved to make it clear that the obligation of co-operation was a fundamental obligation designed to facilitate the fulfilment of more specific obligations under the draft articles. Such a new formulation could, for example, provide that watercourse States shall co-operate in good faith in the utilization and development of an international watercourse [system] and its waters in an equitable and reasonable manner, and in order to achieve optimum utilization and protection thereof, on the basis of the equality, sovereignty and territorial integrity of the watercourse States concerned.

99. The Special Rapporteur also believed that a reformulation of article 10 did not preclude the consideration of a new provision on specific types of co-operation. Finally, he agreed that article 10 should be included in Chapter II of the draft dealing with general principles.

100. Commenting generally on draft articles 11 to 15 49/ which he had proposed in his third report, the Special Rapporteur stated that procedural rules were necessary in order to give effect to the substantive provisions in the draft. Otherwise, it would be difficult for a State to detect whether it was

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49/ The text of articles 11 to 15 proposed by the Special Rapporteur read as follows:

"Article 11

Notification concerning proposed uses

If a State contemplates a new use of an international watercourse which may cause appreciable harm to other States, it shall provide those States with timely notice thereof. Such notices 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.

Article 12

Period for reply to notification

1. [Alternative A] A State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

[Alternative B] Unless otherwise agreed, a State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time, which shall not be less than six months, within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

2. During the period referred to in paragraph 1 of this article, 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 without the consent of the notified States.

3. 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

complying with general provisions such as the rules on equitable utilization and the prevention of appreciable harm. Some members expressed the view that these draft articles were, on the whole, too narrowly drawn, unbalanced in

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not unduly delay the initiation of the contemplated use or the attainment of an agreed resolution under paragraph 3 of article 13.

Article 13

Reply to notification: consultation and negotiation concerning proposed uses

1. If a State notified under article 11 of a contemplated 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 12.

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 satisfactorily the determinations 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 contemplated 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.

5. If the notifying and notified States are unable to resolve any differences arising out of the application of this article through consultations or negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute settlement provisions of these draft articles.

Article 14

Effect of failure to comply with articles 11 to 13

1. If a State contemplating a new use fails to provide notice thereof to other States as required by article 11, any of those other States believing that the contemplated use may cause them appreciable harm may invoke the obligations of the former State under article 11. In the

favour of the notified State and placed unduly heavy burdens on the State contemplating the new use. It was said that the procedures should be more flexible in order to leave more freedom for the States involved. Also, it was maintained that articles 11 to 15 failed to provide an instrument for co-operation but instead concentrated on imposing rigid procedures leading to compulsory settlement of disputes. One member wondered whether provisions concerning procedural rules should be drafted in a recommendatory manner by using "should" instead of "shall". Other members found the system of

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event that the States concerned do not agree upon whether the contemplated new use may cause appreciable harm to other States within the meaning of article 11, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 13, with a view to resolving their differences. If the States concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute settlement provisions of these draft articles.

2. If a notified State fails to reply to the notification within a reasonable period, as required by article 13, the notifying State may, subject to its obligations under article [9], proceed with the initiation of the contemplated use, in accordance with the notification and any other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 11 and 12.

3. If a State fails to provide notification of a contemplated use as required by article 11, or otherwise fails to comply with articles 11 to 13, 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].

Article 15

Proposed uses of utmost urgency

1. Subject to paragraphs 2 and 3 of this article, a State providing notice of a contemplated use under article 11 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 13, proceed with the initiation of the contemplated use if the notifying State determines in good faith that the contemplated 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 contemplated use and of its intention to proceed with the initiation of that use.

2. The right of the notifying State to proceed with a contemplated new use of utmost urgency pursuant to paragraph 1 of this article is subject to the obligation of that State to comply fully with the requirements of

procedural rules contained in the articles acceptable on the whole, while expressing reservations on certain details. The wide gap between the very general nature of the obligation to co-operate in article 10 and the technical, not to say restrictive, nature of the procedures provided for in draft articles 11 to 15 was, it was said, understandable; the paradox was explained by the fact that a very general rule required precise procedures for its practical application. Most members agreed that co-operation between watercourse States should be encouraged and must be given concrete form as it applies to the context of reconciling the needs and interests of watercourse States.

101. It was generally recognized that the general rule of co-operation requires specific rules for its implementation, including procedural rules. In the view of most members, these procedures should be designed to assure in so far as possible that one State, in its utilization of an international watercourse, does not act to the detriment of another, and that the latter State is not given a veto, actual or effective, over the activities or plans of the first State. A number of members emphasized that the right of one State to exercise its competence within its territory is limited by the duty not to cause injury to other States, and that it was only in this way that the sovereignty of all States could be respected.

102. Some members noted that procedures were necessary not only with regard to new uses, but also in order to maintain equitable utilization and to deal with so-called "structural" or "creeping" pollution. The Special Rapporteur pointed out that while new uses 50/ were dealt with in articles 11 to 15, the

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article 11, and to engage in consultations and negotiations with the notified State, in accordance with article 13, concurrently with the implementation of its plans.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the contemplated use under paragraph 1 of this article, except such as may be allowable under article [9]."

50/ The Special Rapporteur explained that, as noted in his commentary to article 11, the expression "new use" is intended to comprehend an addition to or alteration of an existing use, as well as new projects and programmes. He stated that the article was, in short, intended to require notification of any contemplated alteration in the régime of the watercourse that might entail adverse effects with regard to another State.

latter questions would be covered by paragraph 2 of article 8 as proposed by the former Special Rapporteur in 1984. That provision would require States to negotiate with a view to maintaining an equitable balance of the uses and benefits of the international watercourse. The Special Rapporteur indicated that "structural" or "creeping" pollution could also be dealt with specifically in the article on pollution which he intended to propose in a forthcoming report.

103. Some members commented on the relationship between draft article 9, 51/ as proposed by the previous Special Rapporteur, and draft articles 11 to 15. They noted that the "triggering mechanism" for the duty to notify under article 11 was "a new use ... which may cause appreciable harm" to other watercourse States, and that article 9 required watercourse States not to cause appreciable harm to other watercourse States. In the view of these members, the "triggering mechanism" of article 11 would, in effect, oblige States to admit in advance that they planned to commit an internationally wrongful act. They pointed out that it could not be assumed that States would intentionally commit such an act. The Special Rapporteur explained that, under his approach to draft article 9, causing appreciable harm would not always be wrongful. In the case of a "conflict of uses", the doctrine of equitable utilization could only minimize the harm to each State; it could not eliminate it entirely. The harm would thus be wrongful only if it was not consistent with the equitable utilization of the watercourse by the watercourse States concerned. 52/ The Special Rapporteur noted that, as

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51/ Article 9 as proposed by the previous Special Rapporteur in his second report read as follows:

"Article 9

Prohibition against 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."

52/ See the second report of the Special Rapporteur, document A/CN.4/399/Add.2, paras. 179 et seq.

explained in his report (para. 5 of the comments to article 11), the "triggering mechanism" was intended as a factual, not a legal, criterion, and was designed to allow a notified State to determine whether a project would result in a deprivation of its equitable share of the uses and benefits of the international watercourse. He suggested that, in view of the fact that the term "appreciable harm" has caused some confusion, article 11 could instead refer to new uses which "may have an appreciable adverse effect upon other watercourse States". Use of the term "adverse effect" did not have the same connotation as "harm", had received support in the debate, and thus might be a more suitable criterion. Some members also commented on the necessity of reconciling the principles expressed in articles 6 and 9, and of taking this relationship into account with regard to article 9.

104. The Special Rapporteur was of the view that the reference in article 13, paragraph 1 to "depriving the notified State of its equitable share ..." should be retained, however, since the fundamental objective of the set of draft articles is to protect against such a deprivation. Thus, while the criterion for giving notice would be that the proposed new use would have an "appreciable adverse effect", the test for whether the new use could lawfully be implemented would be whether it would deprive the notified State of its equitable share of the uses and benefits of the international watercourse.

105. With regard to draft article 11, some members were of the view that the term "contemplates" was too vague, in that it did not specify with precision the point in time at which the State proposing the new use must provide notification. It was suggested that notification should be given when the State has sufficient technical data to permit both it and the notified State to determine the potential effects of the new use, but before initiation of the legal procedure to implement the project. Notification should thus be given as soon as practicable, but in any event before a watercourse State undertakes, authorizes or permits a project or programme. It was also pointed out that there would have to be an initial decision in principle by the proposing State to begin the process of planning, feasibility studies, or the like, that usually precedes the actual authorization or initiation of a new use.

106. The Special Rapporteur agreed with these observations. He stated that notification should be given early enough in planning stages to allow meaningful consultations concerning the design of the project and late enough

so that sufficient technical data would be available for the notified State to determine whether the new use would be likely to result in appreciable harm (or an adverse effect).

107. The question was also raised whether the term "State" in the first line of the article included private activities within a State. The Special Rapporteur answered that the term was intended to include such activities, and that this could be clarified in the context of fixing the time at which notification was required, e.g., "before a watercourse State undertakes, authorizes or permits" the new use in question.

108. With regard to draft article 12, concern was expressed in relation to the "stand-still" or "suspensive" effect of that article. Some members expressed doubts concerning the precedent for such a provision. While some members approved of the general approach of the article other members believed that it was unbalanced in favour of the notified State. These latter members feared that the article as proposed might have the effect of giving a veto to the notified State. It was proposed that the article be reformulated to provide for a "suspensive effect" of a fixed maximum period, which could be extended at the request of the notified State.

109. The Special Rapporteur stated that there was ample precedent for requiring the proposing State not to proceed with a project until potentially affected States had been given an opportunity to discuss it with the proposing State, and cited illustrations. He noted that most projects that are likely to entail appreciable adverse effects will take a number of years to plan and implement, so that even a nine-month period did not seem unreasonably long in many cases. He further stated that a fixed period would encourage the proposing State to provide early notification in order to allow it to start the period running so that it could proceed with its plans as soon as possible. The Special Rapporteur therefore proposed reformulating the article to provide for a "suspensive effect" of a fixed maximum period, which could be extended at the request of the notified State. He indicated that such a modification would eliminate the necessity for paragraph 3 of article 12.

110. Draft article 13 was viewed by some members as placing too little emphasis on the obligations of the notified State. It was suggested that the notified State should be required to indicate the reasons for which it considered that the proposed new use would result in the notifying State's exceeding its equitable share. The Special Rapporteur agreed, and suggested that the notified State could be required to provide a reasoned and documented

explanation of such a position. He noted that whether that State should also be required to determine that the new use would cause it appreciable harm would depend largely on the Commission's disposition of article 9, which was before the Drafting Committee.

111. The reference in paragraph 5 of article 13 to "the dispute settlement provisions of [the present] draft articles" was the subject of comment by a number of members. There was general agreement that such provisions should not form a part of the draft articles themselves. In the view of some members, nowever, a set of procedures on the peaceful settlement of disputes could usefully be contained in an annex to the draft. The Special Rapporteur suggested that the Commission could postpone a decision on the question of whether the draft should contain such an annex until a later stage of its work on the topic. He consequently recommended replacing the phrase in question with a reference to the other means for peaceful settlement provided for in Article 33 of the Charter. The same would be true of the reference to the dispute settlement procedures in article 14, paragraph 1.

112. Some members suggested that a time-limit should be provided for in article 13 so that consultations, negotiations or other procedures could not unduly delay the initiation of the proposed new use. The Special Rapporteur, noting that what was really involved was prevention of abuse of the consultation/negotiation process, indicated that paragraph 4 had been intended to address this point, but agreed that it might indeed be a good idea to provide for this problem more specifically. He stated that this might be done, for example, by providing that the process of confirming or adjusting the determinations in question may not unduly delay the initiation of the proposed new use; or by providing for a specific time frame within which these consultations and negotiations must take place. The Special Rapporteur pointed out that abuse would be possible whether the Commission adopted the approach in the present article (which may favour the notified State) or made provision for cutting off negotiations (which may favour the notifying State), and that at some point, it must be presumed that the parties will act in good faith, within the meaning of the award in the Lake Lanoux arbitration. 53/

53/ See the discussion of this arbitration in the second report of the Special Rapporteur, document A/CN.4/399/Add.1, paras. 111-124.

113. Draft article 14 was criticized as being unbalanced, as it appeared to favour the notified State, which on the vague basis of a "belief" could invoke the obligations set out in article 11, with all its ensuing consequences. Paragraph 1 was said to be based on the assumption that the State contemplating a new use had failed to make a notification because of an erroneous assessment of its effects, when in fact the "proposing" State may well have been in full compliance with article 11 in the sense of having made a good faith assessment that its proposed new use would not cause appreciable harm to other States. In addition, the application and duration of a "suspension" of the proposed new use was unclear. Paragraph 2 raised the question of the relationship between these draft articles and the principle of equitable and reasonable utilization. It was suggested that paragraph 3 be deleted as it purported to impose a harsh punishment which would hardly be acceptable to States. It was also seen as unnecessary in view of the application of the general principles in the draft as well as of the general rules of international law governing State responsibility.

114. The Special Rapporteur proposed that a number of steps could be taken to redress the balance in article 14. He suggested that paragraph 1 make clear that failure to notify did not necessarily signify that the State contemplating a new use had failed to comply with article 11. The article should also include a new provision corresponding to the one he had suggested in connection with article 13, requiring a State which believed it might be adversely affected by the new use to provide a reasoned and documented explanation of its grounds for considering that the proposed new use would result in the notifying State exceeding its equitable share, to the extent that the State claiming to be adversely affected possessed adequate information concerning the proposed use. The subsequent procedures would then parallel those in article 13: consultation and, if necessary, negotiation and further procedures aimed at adjusting the notified State's determination or the notifying State's plans, so as to preserve an equitable balance in the uses and benefits of the watercourse. The Special Rapporteur also suggested that the reference in paragraph 2 to article 9, an article which required the avoidance of appreciable harm, should perhaps be replaced by a reference to article 6, which laid down the obligation of equitable utilization. It had been rightly pointed out that the proviso at the end of the paragraph should

be amended so as to refer to article 11 and to only paragraphs 1 and 2 of article 12. As for paragraph 3, the Special Rapporteur concluded that the Commission seemed to be generally agreed that paragraph 3 was not necessary, since the notifying State would, in any event, be responsible for a breach of its international obligations. The paragraph could therefore be eliminated without loss to the system of procedural rules as a whole.

115. While some members who referred to draft article 15 viewed it as a positive provision, other members believed it required careful consideration and greater precision. Certain language in the article was criticized for vagueness. The seriousness of the considerations mentioned in paragraph 1 should be highlighted, it was suggested. Also, it was questioned how it would be possible, in the event of an emergency project, for a State to comply with requirements of articles 11 and 13; paragraph 3 required closer examination since a State could not properly be penalized for appreciable harm in cases involving what was, in effect, force majeure. The article was considered unacceptable to certain members, who believed it could provide a convenient escape from the obligations set out in articles 11 to 14; it was said that a proposed use could be of the utmost urgency only in the case where a disaster had occurred.

116. The Special Rapporteur believed that some provision should be made for the kind of situation envisaged in article 15. What was needed was greater clarification of the criterion of "utmost urgency", or possibly of what kinds of situations would permit a State to proceed with a new use without waiting for a reply. That task could conveniently be left to the Drafting Committee. Paragraph 3 could be deleted for the same reasons as the corresponding paragraph of article 14.

C. Draft articles on the law of the non-navigational uses of international watercourses

117. The texts of draft articles 2 to 7, with commentaries thereto, provisionally adopted by the Commission at its thirty-ninth session are reproduced below.

PART I

INTRODUCTION

Article 1

[Use of terms] 54/

Article 2 55/

Scope of the present articles

1. The present articles apply to uses of international watercourse[s] [systems] and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse[s] [systems] and their waters.

2. The use of international watercourse[s] [systems] for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Commentary

(1) Paragraph 1. The term "uses" as employed in the present article derives from the title of the topic. It is intended to be interpreted in its broad sense, to cover all but navigational uses of an international watercourse, as indicated by the phrase "for purposes other than navigation".

(2) Brackets have been employed in the expression "international watercourse[s] [systems]" throughout the articles provisionally adopted at the present session as a result of the Commission's decision to postpone consideration of the definition of the term "international watercourses" and thus of the use of the term "system". The brackets are intended to indicate

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54/ The Drafting Committee agreed to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second (1980) session. Thus, the word "system" appears in square brackets throughout the text.

55/ This article is based upon article 1 as provisionally adopted by the Commission in 1980 and on article 2 as proposed by the previous Special Rapporteur in 1984.

the two alternative expressions currently envisaged by the Commission, namely, "international watercourses" and "international watercourse systems". The expression ultimately decided upon will depend in large part upon the manner in which the Commission decides to define the term "international watercourses" in article 1. The source of the term "system" is the provisional working hypothesis accepted by the Commission in 1980. 56/

(3) Questions have been raised from time to time as to whether the term "international watercourse" refers only to the channel itself or includes also the waters contained in that channel. In order to remove any doubt, paragraph 1 adds the phrase "and of their waters" to the expression "international watercourse[s] [systems]". It may be convenient at a later stage of the Commission's work to define "international watercourse" as including the waters thereof so that it would not be necessary to refer to the waters each time the term "international watercourse [system]" is used. In any event, the phrase "international watercourse[s] [systems] nd of their waters" is used in paragraph 1 to indicate that the articles apply both to uses of the watercourse itself and to uses of its waters, to the extent that there may be any difference between the two. References in subsequent articles to an international watercourse [system] should be read as including the waters thereof. Finally, the present articles would apply to uses not only of waters actually contained in the watercourse, but also of those diverted therefrom.

(4) The reference to "measures of conservation related to the uses of" international watercourse [systems] is meant to embrace not only measures taken to deal with degradation of water quality, notably uses resulting in pollution, but also those aimed at solving other watercourse problems, such as those relating to living resources, flood control, erosion, sedimentation and salt water intrusion. It will be recalled that the questionnaire addressed to States on this topic inquired whether problems such as these should be considered and that the responses on the whole held that they should be, naming the specific problems just noted. Also included in the phrase

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56/ See Yearbook ... 1980, vol. II (Part Two), p. 108 document A/35/10, para. 90. See also para. 72, above.

"measures of conservation" are the various forms of co-operation, whether or not institutionalized, concerning the utilization, development and conservation of international watercourses, and promotion of the optimal utilization thereof.

(5) Paragraph 2 of article 1 recognizes that the exclusion of navigational uses from the scope of the present articles cannot be complete. As both the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the present articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so many that on any watercourse where navigation takes place, or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators charged with development of the watercourse. Paragraph 2 of article 1 has been drafted accordingly. It has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation.

Article 3 57/

Watercourse States

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

Commentary

(1) Article 3 defines the term "watercourse States", an expression that will be used throughout the present articles. The fact that the term "system" is not included in this term, in brackets or otherwise, is without prejudice to its eventual use in the draft articles.

57/ This article is based upon article 2 as provisionally adopted by the Commission in 1980 and article 3 as proposed by the previous Special Rapporteur in 1984.

(2) The definition set forth in article 3 is one which relies on a geographic criterion, namely, whether "part of an international watercourse [system]", as that term will be defined in article 1, is situated in the State in question. Whether this criterion is satisfied depends upon physical factors, whose existence can be established by simple observation in the vast majority of cases.

Article 4 58/

[Watercourse] [System] agreements

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

Commentary

(1) The diversity characterizing individual watercourses and the consequent difficulty in drafting general principles that will apply universally to various watercourses throughout the world has been recognized by the Commission from the early stages of its consideration of the topic. Some States and scholars have viewed this pervasive diversity as an effective barrier to codification and progressive development of the subject on a universal plane. But it is clear that the General Assembly, aware of the diversity of watercourses, has nevertheless assumed that the subject is one suitable for the Commission's mandate.

58/ This article is based upon article 3 as provisionally adopted by the Commission in 1980 and on article 4 as proposed by the previous Special Rapporteur in 1984.

(2) During the course of its work on the present topic, the Commission has developed a promising solution to the problem of the diversity of international watercourses and the human needs they serve: that of a framework agreement, which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and will provide guidelines for the negotiation of future agreements. This approach recognizes that optimum utilization, protection and development of a specific international watercourse is best achieved through an agreement which is tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by the historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the uses of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission and in the Sixth Committee. 59/

(3) There is precedent for such framework agreements in the sphere of international watercourses. An early illustration is the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 9 December 1923). While setting forth a number of general principles concerning the development of hydraulic power, article 4 of that Convention provides:

> "If a Contracting State desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other Contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed." 60/

59/ See the conclusions to this effect in paras. (2) and (4) of the commentary to article 3 as provisionally adopted by the Commission in 1980, Yearbook ... 1980, vol. II (Part Two) p. 112, document A/35/10, chap. V.B; in para. 285 of the Commission's report to the General Assembly on the work of its thirty-sixth session, Yearbook ... 1984, vol. II (Part Two), p. 88, document A/39/10, para. 285 and in para. 242 of the Commission's report to the General Assembly on the work of its thirty-eighth session, Official Records of the General Assembly, Forty-first Session Supplement No. 10 (A/41/10).

60/ League of Nations, Treaty Series, vol. XXXVI, p. 81.

A more recent illustration is the Treaty on the River Plate Basin (Brasilia, 23 April 1969), by which the parties agree to combine their efforts to promote the harmonious development and physical integration of the River Plate Basin. Given the immensity of the basin involved and the generality of the principles which the treaty contains, it may be viewed as a kind of framework or umbrella treaty, to be supplemented by system agreements concluded pursuant to article VI of the treaty. Article VI provides:

> "The stipulations of the present Treaty shall not inhibit the Contracting Parties from entering into specific or partial agreements, bilateral or multilateral, tending towards the attainment of the general objectives of the Basin development." 61/

(4) The fact that the words "watercourse" and "system" are both placed in brackets throughout the article is intended to indicate that one of the two terms will be deleted when a decision is made as to whether to use the term "system" in the present articles.

(5) Paragraph 1 of article 4 makes specific provision for the framework agreement approach, under which the present articles may be tailored to fit the requirements of specific international watercourses. This paragraph thus defines the term "[watercourse] [system] agreements" as those which "apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof". The phrase "apply and adjust" is intended to indicate that, while the Commission contemplates that agreements relating to specific international watercourses will take due account of the provisions of the present draft articles, the latter are essentially residual in character. The States whose territories embrace a particular international watercourse will thus remain free not only to apply the provisions of the present articles, but to adjust them to the special characteristics and uses of that watercourse or of part thereof.

(6) Paragraph 2 of article 4 further clarifies the nature and subject matter of "[watercourse] [system] agreements", as that expression is used in the present articles, as well as the conditions under which such agreements may be entered into. The first sentence of the paragraph, in providing that such an agreement "shall define the waters to which it applies", emphasizes the

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61/ United Nations, Treaty Series, vol. 875, p. 3. See also Yearbook ... 1974, vol. II (Part Two), p. 291, document A/CN.4/274, para. 60. The States parties are: Argentina, Bolivia, Brazil, Paraguay and Uruguay.

unquestioned freedom of watercourse States to define the scope of the agreements into which they enter. It recognizes that watercourse States may confine their agreement to the main stem of a river forming or traversing an international boundary, include within it the waters of an entire drainage basin, or take some intermediate approach. The requirement of a definition also serves the purpose of affording other potentially concerned States notice of the precise subject matter of the agreement. The opening phrase of the paragraph emphasizes that there is no obligation to enter into such specific agreements.

(7) The second sentence of paragraph 2 deals with the subject matter of watercourse or system agreements. The language is permissive, affording watercourse States a wide degree of latitude, but a proviso is included to protect the rights of watercourse States that are not parties to the agreement in question. The sentence begins by providing that such an agreement "may be entered into with respect to an entire international watercourse [system]". Indeed, technical experts consider that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, including all watercourse States as parties to the agreement. Examples of treaties following this approach are those relating to the Amazon, the Plate, the Niger and the Chad basins. 62/ Further, some issues arising out of the pollution of international watercourses necessitate co-operative action throughout an entire watercourse. An example of a response to the need for unified treatment of such problems is the Convention for the protection of the Rhine against chemical pollution (Bonn, 1976). 63/

(8) However, system States must be free to conclude system agreements "with respect to any part" of an international watercourse or a 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.

(9) Of the 200 largest international river basins, 52 are multi-State basins, among which are many of the world's most important river basins - the Amazon, the Chad, the Congo, the Danube, the Elbe, the Ganges, the Mekong, the Niger,

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62/ See the discussion of these agreements in the first report of Mr. Stephen M. Schwebel, Yearbook ... 1979, vol. II (Part One), pp. 168-169, document A/CN.4/320, paras. 98-100.

63/ Ibid.

the Nile, the Rhine, the Volta and the Zambezi. 64/ In dealing with multi-State systems, States have often resorted to agreements regulating only a portion of the watercourse, which are effective between only some of the States situated on it.

(10) The Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases by Basin, published by FAO 65/ indicates that a very large number of watercourse treaties in force are limited to a part of the watercourse system. For example, for the decade 1960-1969, the Index lists 12 agreements that came into force for the Rhine system. Of these 12 agreements, only one includes all the Rhine States as parties; several others, while not localized, are effective only within a determined area; and the remainder deal with subsystems of the Rhine and with limited areas of the Rhine system.

(11) There is often a need for subsystem agreements and for agreements covering limited areas. The differences between the subsystems of some international watercourses, such as the Indus, the Plate and the Niger, are as marked as those between separate drainage basins. Agreements concerning subsystems are likely to be more readily attainable than agreements covering the entire international watercourse, particularly if a considerable number of States is involved. Moreover, there will always be problems whose solution is of interest only to some of the States whose territories are bordered or traversed by a particular international watercourse.

(12) There does not appear to be any sound reason for excluding either subsystem or localized agreements from the application of the framework agreement. A major purpose of the present articles is to facilitate the negotiation of agreements concerning international watercourses, and this purpose encompasses all agreements, whether basin-wide or localized, whether general in nature or dealing with a specific problem. The framework agreement, it is to be hoped, will provide watercourse States with firm common ground as a basis for negotiations - which is the great lack in watercourse negotiations at the present time. No advantage is seen in confining the application of the present articles to a single agreement embracing an entire international watercourse.

64/ See ibid., p. 170, para. 108.

65/ FAO, Legislative Study No. 15 (Rome), 1978.

(13) At the same time, if a watercourse agreement is concerned with only part of the watercourse or only a particular project, programme or use relating thereto, it must be subject to the proviso that the use, by one or more other watercourse States not party to that agreement, of the waters of that watercourse is not, to an appreciable extent, affected adversely by that agreement. Otherwise, a few States of a multi-State international watercourse could appropriate a disportionate amount of its benefits for themselves or unduly and adversely prejudice the use of its waters by watercourse States not party to the agreement in question. Such results would run counter to fundamental principles which will be shown to govern the non-navigational uses of international watercourses, such as the right of all watercourse States to utilize an international watercourse in an equitable and reasonable manner and the obligation not to use a watercourse in such a way as to injure other watercourse States. 66/

(14) In order to fall within the proviso, however, the adverse effect of a watercourse agreement upon watercourse States not parties to the agreement must be "appreciable"; if they are not adversely affected "to an appreciable extent", other watercourse States may freely enter into such a limited watercourse agreement.

(15) By the expression "an appreciable extent" is meant one which can be established by objective evidence (provided that the evidence can be secured). There must be a real impairment of use. What is intended to be excluded is situations of the kind involved in the Lake Lanoux case discussed at paragraph (20) below, in which Spain insisted upon delivery of Lake Lanoux water through the original system. The Tribunal found that, "thanks to the restitution effected by the devices described above, none of the guaranteed users will suffer in his enjoyment of the waters ...; at the lowest water level, the volume of the surplus of the Carol, at the boundary, will at no

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66/ The second sentence of para. 2 is based upon the assumption, well founded in logic as well as in State practice, that less than all watercourse States would not conclude an agreement that purported to apply to an entire international watercourse. If such an agreement were concluded, however, its implementation would have to be consistent with para. 2 of article 4 for the reasons stated in para. (13).

time suffer a diminution". 67/ The Tribunal continued by pointing out that Spain might have claimed that the proposed diversionary works:

> "would bring about an ultimate pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests ... Neither in the dossier nor in the pleadings in this case is there any trace of such an allegation." 68/

In the absence of any assertion that Spanish interests were affected in a tangible way, the Tribunal held that Spain could not require maintenance of the original unrestored flowage. It should be noted that the French proposal which was relied on by the Court was reached only after a long drawn-out series of negotiations beginning in 1917, which entailed the establishment, inter alia, of a mixed engineering commission in 1949 and a French proposal in 1950 - later supplanted by the plan on which the Tribunal passed - that would have appreciably affected the use and enjoyment of the waters by Spain. 69/

(16) At the same time, "appreciable" is not used in the sense of "substantial". What are to be avoided are localized agreements, or those concerning a particular project, programme or use, which have an adverse effect upon third watercourse States; while such an effect must be capable of being established by objective evidence, it need not rise to the level of being substantial.

(17) Paragraph 3 of article 4 addresses the situation in which one or more watercourse States consider that adjustment or application of the provisions of the present articles to a particular international watercourse is required because of the characteristics and uses of that international watercourse. In that event, it requires that other watercourse States enter into consultations with the State or States in question with a view to negotiating, in good

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67/ International Law Reports 1957 (London, Butterworth, 1961), p. 123. See also United Nations, Reports of International Arbitral Awards, vol. XII, p. 303.

68/ Ibid.

69/ Ibid. pp. 106-108. See the discussion of this arbitration in the second report of the Special Rapporteur, document A/CN.4/399/Add.1, paras. 111-124.

faith, an agreement or agreements concerning the international watercourse in question. It should be noted that because of the "relative" character of an international watercourse [system] as envisaged by the provisional working hypothesis, 70/ all watercourse States would not always be under this obligation.

(18) Moreover, watercourse States are not under an obligation to conclude an agreement before using the waters of the international watercourse. To require conclusion of an agreement as a precondition of use would be to afford watercourse States the power to veto a use by other watercourse States of the waters of the international watercourse, by simply refusing to reach agreement. Such a result is not supported by the terms or the intent of draft article 4. Nor does it find support in State practice or international judicial decisions (indeed, the Lake Lanoux arbitral award negates it).

(19) Even with these qualifications, the Commission is of the view that the considerations set forth in the preceding paragraphs, especially paragraph (13), import the necessity of the obligation contained in paragraph 3. Furthermore, the existence of a principle of law requiring consultations among States in dealing with freshwater resources is explicitly supported by the arbitral award in the Lake Lanoux case. 71/

(20) That case involved a proposal by the French Government to carry out certain works for the utilization of the waters of the lake, waters which flowed into the Carol River and on to the territory of Spain. Consultations and negotiations over the proposed diversion of waters from Lake Lanoux took place between the Governments of France and Spain intermittently from 1917 until 1956. Finally France decided upon a plan of diversion which entailed the full restoration of the diverted waters before the Spanish frontier. Spain nevertheless feared that the proposed works would adversely affect Spanish rights and interests, contrary to the Treaty of Bayonne of 26 May 1866 between France and Spain and an Additional Act of the same date. Spain

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70/ See para. 3 of the provisional working hypothesis as set out in para. 72, above.

71/ International Law Reports 1957 (op.cit.) p .101 (see also United Nations, Reports of International Arbitral Awards, vol. XII, p. 281 and Yearbook ... 1974, vol. II (Part Two), pp. 194-199, document A/5409, paras. 1055-1068).

claimed that, under that Treaty and Additional Act, such works could not be undertaken without the previous agreement of France and Spain. Spain asked the arbitral tribunal to declare that France would be in breach of the Treaty of Bayonne and of the Additional Act if it implemented the diversion scheme without Spain's agreement, while France maintained that it could legally proceed without such agreement.

(21) It is important to note that that obligation of States to negotiate the apportionment of the waters of an international watercourse was uncontested, and was acknowledged by France not merely by reason of the terms of the Treaty of Bayonne and its Additional Act, but as a principle to be derived from authorities. 72/ Moreover, while the arbitral tribunal based certain of its holdings relating to the obligation to negotiate on the terms of the Treaty and the Act, 73/ it by no means confined itself to the interpretation of their terms. In holding against the Spanish contention that Spain's agreement was a pre-condition of France's proceeding, the tribunal addressed the question of the obligation to negotiate as follows.

> "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 paralyses another State's exercise of its territorial competence.
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> "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. Thus reference is made, although often incorrectly, to 'an obligation to negotiate an agreement'. In reality, the commitments thus assumed by States take very diverse forms, and their scope varies according to the way in which they are defined and according to the procedures for their execution; but the reality of the obligations thus assumed cannot be questioned, and they may be enforced, for example, in the case of an unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith.
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> ...

72/ International Law Reports 1957 (op. cit.), pp. 111-112.

73/ Ibid., pp. 139, 141.

"In fact, States today are well aware of the importance of the conflicting interests involved in the industrial use of international rivers and of the necessity of reconciling some of these interests with others through mutual concessions. The only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis. International practice reflects the conviction that States should seek to conclude such agreements; there would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements." 74/

(22) For these reasons, paragraph 3 of article 4 requires watercourse States to enter into consultations, at the insistence of one or more of them, with a view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question.

Article 5 75/

Parties to [watercourse] [system] agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any [watercourse] [system] agreement that applies to the entire international watercourse [system], as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse [system] may be affected to an appreciable extent by the implementation of a proposed [watercourse] [system] agreement that applies only to a part of the watercourse [system] or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

74/ See Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, paras. 1065-1066. The obligation to negotiate has also been addressed by the International Court of Justice in cases concerning fisheries and maritime delimitation. See, e.g., the Fisheries Jurisdiction cases (I.C.J. Reports 1974, pp. 3 and 175); the North Sea Continental Shelf cases (I.C.J. Reports 1969, p. 3); the case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), I.C.J. Reports 1982, pp. 18, 59, para. 70 and 60, para. 71 and the case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States), I.C.J. Reports 1984, Judgement of 12 October 1984, at p. 246, para. 230.

75/ This article is based upon article 4 as provisionally adopted by the Commission in 1980 and article 5 as proposed by the previous Special Rapporteur in 1984.

Commentary

(1) The purpose of article 5 is to identify the watercourse States that are entitled to participate in consultations and negotiations relating to agreements concerning part or all of an international watercourse, and to become parties to such agreements.

(2) Paragraph 1 of the article is self-explanatory. With regard to an agreement that deals with the entirety of the international watercourse, there is no reasonable basis for excluding a watercourse State from participation in its negotiation, from becoming a party thereto, or from participating in any relevant consultations. It is true that there may be basin-wide agreements that are of little interest to one or more of the watercourse States. But since the provisions of the agreements dealt with in paragraph 1 are intended to be applicable throughout the watercourse, the purpose of such agreements would be stultified if every watercourse State were not given the opportunity to participate.

(3) Paragraph 2 of article 5 is concerned with agreements that deal with only part of the watercourse. It provides that any watercourse State whose use of the watercourse may be appreciably affected by the implementation of an agreement applying to only a part of the watercourse or to a particular project, programme or use, is entitled to participate in consultations and negotiations relating to such a prospective agreement, to the extent that its use is affected thereby, and is further entitled to become a party to the agreement. The rationale is that 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.

(4) Because water in a watercourse is in continuous movement, the consequences of action taken under an agreement with respect to water in a particular territory may produce effects beyond that territory. For example, 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 consumption, 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.

(5) The question is not whether States A and B are legally entitled to enter into such an agreement. It is whether a set of draft articles that is to provide general principles for the guidance of States in concluding agreements on the use of fresh water should ensure that State C has the opportunity to join in consultations and 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.

(6) The right is cast as a qualified one. It must appear that there will be an appreciable effect upon the use of water by a State in order for it to be entitled to participate in consultations and negotiations relating to the agreement, and to become a party thereto. If a watercourse State would not be affected by an agreement regarding a part or aspect of the watercourse, the physical unity of the watercourse does not of itself require that the State have these rights. The introduction of one or more watercourse States whose interests were not directly concerned in the matters under discussion would mean the introduction of unrelated interests into the process of consultation and negotiation.

(7) The meaning of the term "appreciable" is explained in the commentary to paragraph 2 of article 4. As there indicated, it is not used in the sense of "substantial". A requirement that a State's use be substantially affected before it would be entitled to participate in consultations and negotiations would impose too heavy a burden upon the third State. The exact extent to which the use of water may be affected by proposed actions is likely to be far from clear at the outset of negotiations. The Lake Lanoux decision illustrates the extent to which plans may be varied as a result of negotiations and to which such variance may favour or harm a third State. That State should only be required to establish that its use may be affected to some appreciable extent.

(8) The right of a watercourse State to participate in consultations and negotiations concerning a limited watercourse agreement is further qualified. The State is so entitled only "to the extent that its use is thereby affected" - that is, to the extent that implementation of the agreement will affect its use of the watercourse. The watercourse State is not entitled to participate in consultations or negotiations concerning elements of the agreement whose implementation will not affect its use of the waters, for the reasons given in paragraph (6). The right of the watercourse State to become a party to the agreement is not similarly qualified because of the technical

problem of a State becoming a party to a part of an agreement. This matter would most appropriately be dealt with on a case-by-case basis: in some instances, the State concerned may become party to the elements of the agreement affecting it via a protocol; in others, it may be appropriate for it to become a full party to the agreement proper. The most suitable solution in the individual case will depend entirely upon the nature of the agreement, the elements of it that affect the State in question, and the nature of the effects involved.

(9) Paragraph 2 should not, however, be taken to suggest that an agreement dealing with an entire watercourse or with a part or aspect thereof should exclude decision-making with regard to some or all aspects of the use of the watercourse through procedures in which all the watercourse States participate. For most, if not all watercourses, the establishment of procedures for co-ordinating activities throughout the system is highly desirable and perhaps necessary, and those procedures may well include requirements for full participation by all watercourse States in decisions that deal with only a part of the watercourse. However, such procedures must be adopted for each watercourse by the watercourse States, on the basis of the special needs and circumstances of the watercourse. Paragraph 2 is confined to providing that, as a matter of general principle, a watercourse State does have the right to participate in consultations and negotiations concerning a limited agreement which may affect that State's interests in the watercourse, and to become a party to such an agreement.

PART II

GENERAL PRINCIPLES

Article 6 76/

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse [system] in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and

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76/ This article is based upon articles 6 and 7 as proposed by the previous Special Rapporteur in 1984.

protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article ... .

Commentary

(1) Article 6 sets forth the fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization, which is laid down and elaborated upon in paragraph 1. The principle of equitable participation, which complements the rule of equitable utilization, is set forth in paragraph 2. Before turning to the authority supporting the article, several points should be made by way of explaining its provisions.

(2) Paragraph 1 begins by stating the basic rule of equitable utilization. Although cast in terms of obligation, the rule also expresses the correlative entitlement: namely, that a watercourse State has the right, within its territory, to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse. Thus, a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner, and the obligation not to exceed its right to equitable utilization or, to phrase it somewhat differently, not to deprive other watercourse States of their right to equitable utilization.

(3) The second sentence of paragraph 1 elaborates upon the concept of equitable utilization, providing that watercourse States shall use and develop an international watercourse with a view to attaining optimum utilization thereof and benefits therefrom, consistent with adequate protection of the watercourse. The phrase "with a view to" indicates that the attainment of optimum utilization and benefits is the objective to be sought by watercourse States in utilizing an international watercourse. Attaining optimum utilization and benefits does not mean achieving the "maximum" use, the most technologically efficient use, or the most monetarily valuable use. Nor does it imply that the State capable of making the most efficient use of a watercourse - whether economically, in terms of avoiding waste, or in any other sense - should have a superior claim to the use thereof. It rather implies attaining maximum possible benefits for all watercourse States, and achieving the greatest possible satisfaction of all of their needs, while minimizing the detriment to, or unmet needs of, each.

(4) This goal may not be pursued blindly, however. The concluding phrase of the second sentence emphasizes that efforts to attain optimum utilization and benefits must be "consistent with adequate protection" of the international watercourse. The expression "adequate protection" is meant to cover not only measures such as those relating to conservation, security, and water-related disease. It is also meant to include measures of "control" in the technical, hydrological sense of the term, such as those taken to regulate flow; to control floods, pollution and erosion; to mitigate drought; and to control saline intrusion. In view of the fact that any of these measures or works may limit to some degree the uses that otherwise might be made of the waters by one or more of the watercourse States, the second sentence speaks of attaining optimum utilization and benefits "consistent with" adequate protection. It should be added that while primarily referring to such measures as are undertaken by individual States, the expression "adequate protection" does not exclude co-operative measures, works or activities undertaken by States jointly.

(5) Paragraph 2 embodies the concept of equitable participation. The core of this concept is co-operation with other watercourse States through participation, on an equitable and reasonable basis, in measures, works and activities aimed at attaining optimum utilization of an international watercourse, consistent with adequate protection thereof. Thus the principle of equitable participation flows from, and is bound up with, the rule of equitable utilization contained in paragraph 1. It recognizes that, as concluded by technical experts in the field, co-operative action by watercourse States is necessary to produce maximum benefits for each of them, while helping to maintain an equitable allocation of uses and affording adequate protection to the watercourse States and the international watercourse itself. In short, the attainment of optimum utilization and benefits entails co-operation between watercourse States through their participation in the protection and development of an international watercourse. Thus, watercourse States have a right to the co-operation of other watercourse States with regard to such matters as flood control measures, pollution abatement programmes, drought mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works, and environmental protection, as appropriate under the circumstances. Of course, for greatest effectiveness, the details of such

co-operative efforts should be provided for in one or more watercourse agreements. But the obligation and correlative right provided for in paragraph 2 are not dependent upon a specific agreement for their implementation.

(6) The second sentence of paragraph 2 emphasizes the affirmative nature of equitable participation by providing that it includes not only "the right to utilize the international watercourse [system] as provided in paragraph 1", but also the duty to co-operate actively with other watercourse States "in the protection and development" of the watercourse. This duty to co-operate is linked to the future article, as yet unnumbered, to be prepared on the basis of an article proposed by the Special Rapporteur dealing with the general duty to co-operate in relation to the use, development and protection of international watercourses. 77/ While not stated expressly in paragraph 2, the right to utilize an international watercourse referred to in the second sentence carries with it an implicit right to the co-operation of other watercourse States in maintaining an equitable allocation of uses and benefits of the watercourse. The latter right will be elaborated in greater detail in the forthcoming article on co-operation.

(7) In light of the foregoing explanations of the provisions of the article, the following paragraphs will provide a brief discussion of the concept of equitable utilization and a summary of representative examples of support for the doctrine.

(8) There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty, and is enjoyed by each State whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of States results in all watercourse States having rights to the use of the watercourse that are qualitatively equal to, and are correlative with, those of other watercourse States. 78/ This fundamental

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77/ See the third report of the Special Rapporteur, document A/CN.4/406, para. 58 and paras. 95 to 99, above.

78 See, e.g., comment (a) to article IV of the Helsinki Rules on the Uses of the Waters of International Rivers (hereafter referred to as "Helsinki Rules"), adopted by the International Law Association (ILA) at the Fifty-second Conference held in Helsinki, 20 August 1966, ILA, Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 486, 487.

principle of "equality of right" does not, however, mean that each watercourse State is entitled to an equal share of the uses and benefits of a watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The scope of a State's rights of equitable utilization depends upon the facts and circumstances of each individual case, and specifically upon a weighing of all relevant factors, as provided in article 7.

(9) In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all of the reasonable and beneficial uses of all watercourse States cannot be fully realized, what is termed a "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, 79/ and can best be achieved on the basis of specific watercourse agreements.

(10) A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses - evidence including treaty provisions, positions taken by States in concrete 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 - reveals that there is overwhelming support for the doctrine of

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79/ See, e.g., article 3 of the resolution adopted by the Institute of International Law at its session held in Salzburg in 1961, entitled "Utilization of non-maritime international waters (except for navigation)":

> "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."

Annuaire de l'Institute de droit international, Salzburg session, September 1961 (Basle, 1961), vol. 49, tome II, p. 382, reproduced in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field. 80/

(11) The basic principles underlying the doctrine of equitable utilization are reflected, explicitly or implicitly, in numerous international agreements between States located in all parts of the world. 81/ While the language and approaches of these agreements vary considerably, 82/ their unifying theme is the recognition of the rights of the parties to the use and benefits of the international watercourse or watercourses in question which are equal in principle and correlative in their application. This is true of treaty provisions relating to both contiguous 83/ and successive 84/ watercourses.

80/ See, e.g., the authorities surveyed in the second report of the Special Rapporteur, document A/CN.4/399, paras. 75-168.

81/ See, e.g., the agreements surveyed in the third report of Mr. Stephen M. Schwebel, Yearbook ... 1982, vol. II (Part One), document A/CN.4/438, paras. 49-72; the agreements listed in annexes I and II of the second report of the present Special Rapporteur, document A/CN.4/399 and the authorities discussed in that report.

82/ See the examples referred to in the second report of the Special Rapporteur, document A/CN.4/399, para. 76, footnote 76.

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 second report of the Special Rapporteur, document A/CN.4/399, 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". (Lipper, "Equitable Utilization", in A. Garretson, R. Hayton and C. Olmstead, eds., The Law of International Drainage Basins (Dobbs Ferry, N.Y., Oceana, 1967), p. 33). Annex II of the second report of the Special Rapporteur, document A/CN.4/399, contains an illustrative list of provisions of treaties relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of benefits, or in some other way equitably apportion the benefits of the waters or recognize the correlative rights of the States involved.

(12) A number of modern agreements, rather than stating a general, guiding principle or specifying the respective rights of the parties, go beyond the principle of equitable utilization by providing for integrated river basin management. 85/ These instruments reflect a determination to achieve optimum utilization and benefits through organizations competent to deal with an entire international watercourse.

(13) A review of the manner in which States have resolved actual controversies pertaining to the non-navigational uses of international watercourses reveals a general acceptance of the entitlement of every watercourse State to utilize and benefit from an international watercourse in a reasonable and equitable manner. 86/ While some States have, on occasion, asserted a doctrine of absolute sovereignty, these same States have generally resolved the controversies in the context of which such claims were asserted by entering

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85/ See especially the recent agreements concerning African river basins, including the following: the Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin, 24 August 1977, United Nations Treaty Registration No. 16695; the Convention relative au statut du fleuve Sénégal and Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal, both signed at Nouakchott, 11 March 1972, reprinted in Treaties concerning the utilization of international watercourses for other purposes than navigation: Africa, Natural Resources Water Ser. No. 13, ST/ESA/141 (United Nations publication, Sales No. E/F.84/II.A.7), pp. 16 and 21, respectively, discussed in the third report of the Special Rapporteur, document A/CN.4/406, paras. 21, et seq.; the 1963 Act of Niamey regarding navigation and economic co-operation between the States of the Niger Basin, United Nations, Treaty Series, vol. 587, p. 11, and the 1964 Agreement concerning the Niger River Commission and navigation and transport on the River Niger, ibid., p. 21; the 1965 Convention between Gambia and Senegal for the integrated development of the Gambia River Basin, Cahiers de l'Afrique équatoriale (Paris), 6 March 1965 (see also the 1968 and 1973 agreements concerning the Gambia river basin); and the 1964 Convention and Statute relating to the development of the Chad Basin, Journal officiel de la République fédérale du Cameroun (Yaoundé), 4th year, No. 18, 15 September 1964, p. 1003.

See also the Treaty on the River Plate Basin, 23 April 1969, United Nations, Treaty Series, vol. 875, p. 3.

86/ See generally the survey contained in the second report of the Special Rapporteur, document A/CN.4/399, paras. 78-99.

into agreements that actually apportioned the water or recognized rights in other watercourse States. 87/

(14) A number of intergovernmental and non-governmental bodies have adopted declarations, statements of principles, and recommendations concerning the non-navigational uses of international watercourses. These instruments provide additional support for the rules contained in article 6. Only a few representative examples will be referred to here. 88/

(15) An early example of such an instrument is the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, approved by the Seventh Inter-American Conference at its fifth plenary session, 24 December 1933, includes the following provisions:

87/ A well-known example is the controversy, between the United States and Mexico over the waters of the Rio Grande. This dispute produced the "Harmon Doctrine" of absolute sovereignty but was ultimately resolved by the Convention between the United States and Mexico concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes of 1906. (See Yearbook ... 1974, vol. II (Part Two), pp. 78-79, document A/5409, paras. 201-205). See the discussion of this dispute and its resolution in the second report of the Special Rapporteur, document A/CN.4/399, paras. 79-87. The Special Rapporteur there concludes that "the 'Harmon Doctrine' is not, and probably never has been, actually followed by the State that announced it [i.e., the United States]". Ibid., para. 87 (footnote omitted).

See also the examples of the practice of other States discussed in the second report of the Special Rapporteur, ibid., paras. 88-91.

88/ See generally the collection of these instruments in the report of the Secretary-General on legal problems relating to the utilization and use of international rivers and the supplement thereto, reprinted in Yearbook ... 1974, vol. II (Part Two), p. 33, document A/5409, and ibid., p. 265, document A/CN.4/274. See also the representative examples of these instruments reviewed in the second report of the Special Rapporteur, document A/CN.4/399/Add.1, paras. 134-155.

"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 on 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." 89/

(16) Another Latin American instrument, the Act of Asunción on the use of international rivers of June 1971, 90/ signed by the Ministers for Foreign Affairs of the River Plate Basin (Argentina, Bolivia, Brazil, Paraguay, and Uruguay), contains the Declaration of Asunción on the use of international rivers, paragraphs 1 and 2 of which provide as follows:

"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 [River Plate] Basin."

(17) The United Nations Conference on the Human Environment of 1972 adopted the Declaration on the Human Environment, Principle 21 of which provides as follows:

"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 resource pursuant to their own environmental policies, and the responsibility to ensure that the 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." 91/

89/ Pan-American Union, Seventh International Conference of American States, Plenary Session, Minutes and Antecedents (Montevideo, 1933), p. 114. See the reservations by Venezuela and Mexico and the declaration by the United States, set forth in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, Annex I.A.

90/ Act of Asunción on the use of international rivers, signed by the Ministers for Foreign Affairs of the States of the River Plate Basin at their Fourth Meeting held from 1 to 3 June 1971, Ríos y Lagos Internacionales, 4th Ed., Rev. OEA/SER I/VI, CIJ.75 Rev. 2, p. 183.

91/ Report of the United Nations Conference on the Human Environment (United Nations publication, Sales No. E.73.II.A.14), pp. 4-5.

The Conference also adopted an "Action Plan for the Human Environment", Recommendation 51 of which provides as follows:

"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 ...". 92/

(18) The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held in Mar del Plata in 1977, 93/ 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". 94/ With regard to "international co-operation", the Action Plan provides in recommendations 90 and 91 that:

"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 interdepen[den]cies 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.

92/ Ibid., p. 17.

93/ Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977 (United Nations publication, Sales No. E.77.II.A.12), document E/CONF.70/29.

94/ Ibid., p. 11.

"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." 95/

(19) The Secretary-General submitted a report to the Committee on Natural Resources of the Economic and Social Council which recognized that "[m]ultiple, 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". 96/ The report continued by noting that international water resources, which were defined as water in a natural hydrological system shared by two or more countries, offer "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action." 97/

(20) The Asian-African Legal Consultative Committee in 1972 created a Standing Sub-Committee on International Rivers. In 1973, the Sub-Committee recommended to the plenary 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, 98/ discussed 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.

95/ Ibid., p. 53.

96/ E/C.7/2/Add.6, para. 1.

97/ Ibid., para. 3.

98/ "Helsinki Rules on the Uses of the Waters of International Rivers", in International Law Association, Report of the fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 482-532.

"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." 99/

(21) International non-governmental organizations have reached similar conclusions. In 1961, the Institute of International Law adopted a resolution concerning the non-navigational uses of international watercourses. 100/ This resolution, entitled "Utilization of non-maritime international waters (except for navigation)", provides in part as follows:

"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.

"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.

99/ Asian-African Legal Consultative Committee, Report of the Fourteenth Session held at New Delhi (10-18 January 1973) (New Delhi), pp. 7-14, reprinted in Yearbook ... 1974, vol. II (Part Two), pp. 338 et seq., document A/5409, para. 367. The next paragraph of Proposition III sets forth a non-exclusive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. The work of the AALCC on the topic was suspended in 1973, following the Commission's decision to take up the topic. At its Tokyo session in 1983, however, in response to urgent requests, the topic was again placed on the agenda of AALCC to monitor progress made in the Commission. See Yearbook ... 1984, vol. I, 1869th meeting, para. 42, and Yearbook ... 1985, vol. I, 1903rd meeting, para. 21.

100/ Annuaire de l'Institute de droit international, Salzburg session, September 1961 (Basle, 1961), vol. 49, tome II, pp. 381-384. The resolution, which was based upon the final report of the Rapporteur, Mr. Juraj Andrassy, was adopted by a vote of 50 to none, with 1 abstention. The report is contained in ibid., Neuchâtel session, September 1959 (Basle, 1959), p. 319.

"Article 5. Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States."

(22) The International Law Association (ILA) has produced a number of drafts relating to the topic of the non-navigational uses of international watercourses. 101/ Perhaps the most notable of these for present purposes is "The Helsinki Rules on the Uses of Waters of International Rivers", adopted by the Association at its fifty-second Conference held in Helsinki in 1966. 102/ Chapter 2 of the Helsinki Rules is entitled "Equitable Utilization of the Waters of an International Drainage Basin", and contains the following relevant provision:

"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."

(23) Decisions of international courts and tribunals lend further support to the principle that a State may not allow its territory to be used in such a manner as to cause injury to other States. 103/ In the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse States have equal and correlative rights to the uses and benefits of the watercourse. An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States. 104/

101/ These drafts begin with the resolution adopted by the forty-seventh Conference of the ILA, held in Dubrovnik in 1956, and include the resolution on the law of international ground-water resources recently adopted at the ILA's conference held in Seoul. See the Report of the Committee on International Water Resources Law adopted at the 1986 Conference of the ILA in Seoul, particularly Part II, "The Law of International Ground-water Resources", at p. 8 of the Report.

102/ For the text of the Helsinki Rules with commentary, see International Law Association, Report of the fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 484-532.

103/ See the discussion in the second report of the Special Rapporteur of international judicial decisions and arbitral awards, including the River Oder case, the case concerning the diversion of water from the Meuse, the Corfu Channel case, the Lake Lanoux arbitration, the Trail Smelter arbitration, and other arbitrations involving international watercourses. Document A/CN.4/399/Add.1, paras. 100-133.

104/ See the decisions of municipal courts discussed in the second report of the Special Rapporteur, ibid., paras. 164-168.

(24) The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all sources referred to are not of the same legal value. However, the survey does provide an indication of the wide-ranging and consistent support for the rules contained in article 6. Indeed, the rule of equitable and reasonable utilization rests on sound foundations, and provides a basis for the duty of States to participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Article 7 105/

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of an international watercourse [system] in one watercourse State on other watercourse States;

(d) existing and potential uses of the international watercourse [system];

(e) conservation, protection, development and economy of use of the water resources of the international watercourse [system] and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 6 or paragraph 1 of the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

105/ This article is based on article 8 as proposed by the previous Special Rapporteur in 1984.

Commentary

(1) The purpose of article 7 is to provide for the manner in which States are to implement the rule of equitable and reasonable utilization contained in article 6. The latter rule is necessarily general and flexible, and requires for its proper application that States take into account concrete factors pertaining to the international watercourse in question, as well as to the needs and uses of the watercourse States concerned. What is an equitable and reasonable utilization in an individual case will therefore depend upon a weighing of all relevant factors and circumstances. This process of assessment is to be performed, in the first instance at least, by each watercourse State, in order to assure compliance with the rule of equitable and reasonable utilization laid down in article 6.

(2) Paragraph 1 of article 7 provides that "utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances", and sets forth an indicative list of such factors and circumstances. This provision means that, in order to assure that their conduct is in conformity with the obligation of equitable utilization contained in article 6, watercourse States must take into account, in an ongoing manner, all factors that are relevant to assuring that the equal and correlative rights of other watercourse States are respected. However, the article does not exclude the possibility of technical commissions, joint bodies or third parties also being involved in such assessments in accordance with any arrangements or agreements accepted by the States concerned.

(3) The list of factors contained in paragraph 1 is indicative, not exhaustive. The wide diversity of international watercourses and of the human needs they serve makes it impossible to compile an exhaustive list of factors that may be relevant in individual cases. Some of the factors listed may be relevant in a particular case while others may not be, and still other factors may be relevant which are not contained in the list. No priority, or weight is assigned to the factors and circumstances listed, since certain of them may be more important in some cases while others may deserve to be accorded greater weight in other cases.

(4) Subparagraph 1 (a) contains a list of natural or physical factors. These factors are likely to influence certain important characteristics of the international watercourse itself, such as quantity and quality of water, rate of flow, and periodic fluctuations in flow. They also determine the physical relation of the watercourse to each watercourse State. "Geographic" factors include the extent of the international watercourse in the territory of each watercourse State; "hydrographic" factors relate generally to the measurement, description and mapping of the waters of a watercourse; and "hydrological" factors relate, inter alia, to the properties of water, including water flow, and to its distribution, including the contribution of water to the international watercourse by each watercourse State. Subparagraph 1 (b) concerns the water-related social and economic needs of watercourse States. Subparagraph 1 (c) concerns whether uses of an international watercourse by one watercourse State will have effects upon other watercourse States, and in particular whether such uses interfere with uses of other watercourse States. Subparagraph 1 (d) refers to both existing and potential uses of an international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case. Subparagraph 1 (e) contains a number of factors relating to measures that may be taken by watercourse States with regard to an international watercourse. The term "conservation" is used in the same sense as in article 2; the term "protection" is used in the same sense as in article 6; the term "development" refers generally to projects or programmes undertaken by watercourse States to obtain benefits from a watercourse or to increase the benefits that may be obtained therefrom; and the expression "economy of use" refers to the avoidance of unnecessary waste of water. Finally, subparagraph 1 (f) concerns whether there are available alternatives to a particular planned or existing use, and whether these alternatives are of a value that corresponds to that of the planned or existing use in question. The subparagraph calls for an inquiry as to whether there exist alternative means of satisfying the needs that are or would be met by an existing or planned use. The alternatives may thus take the form not only of other sources of water supply, but also of other means - not involving the use of water - of meeting the needs in question, such as alternative sources of

energy or means of transport. The term "corresponding" is used in its broad sense to indicate general equivalence in value. The expression "corresponding value" is thus intended to convey the idea of generally comparable feasibility, practicability and cost-effectiveness.

(5) Paragraph 2 anticipates the possibility that, for a variety of reasons, the need may arise for watercourse States to consult with each other with regard to the application of article 6 or article 7. Examples of situations giving rise to such a need include natural conditions such as a reduction in the quantity of water, as well as those relating to the needs of watercourse States, such as increased domestic, agricultural or industrial needs. The paragraph provides that watercourse States are under an obligation to "enter into consultations in a spirit of co-operation". As indicated in the commentary to article 6, a forthcoming article will spell out in greater detail the nature of the general obligation of watercourse States to co-operate. This paragraph enjoins States to enter into consultations, in a co-operative spirit, concerning the use, development or protection of an international watercourse, in order to respond to the conditions that have given rise to the need for consultations. Under the terms of the paragraph, the obligation to enter into consultations is triggered by the fact that a need for such consultations has arisen. While this implies an objective standard, the requirement that watercourse States enter into consultations "in a spirit of co-operation" indicates that a request by one watercourse State to enter into consultations may not be ignored by other watercourse States.

(6) Several efforts have been made on the international level to compile lists of factors to be used in giving the principle of equitable utilization concrete meaning in individual cases. In 1966, the International Law Association adopted the "Helsinki Rules on the Uses of the Waters of International Rivers". Article IV of the Helsinki Rules, dealing with equitable utilization, is set forth in paragraph (22) of the commentary to article 6. Article V concerns the manner in which "a reasonable and equitable share" is to be determined. That article provides as follows:

"Article V

(1) What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

(2) Relevant factors which are to be considered include, but are not limited to:

(a) the geography of the basin, including in particular the extent of the drainage basin in the territory of each basin State;

(b) the hydrology of the basin, including in particular the contribution of water by each basin State;

(c) the climate affecting the basin;

(d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin State;

(f) the population dependent on the waters of the basin in each basin State;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State.

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole." 106/

(7) In 1958 the United States Department of State issued a memorandum on "Legal aspects of the use of systems of international waters". The memorandum, which was prepared in connection with discussions between the United States and Canada concerning proposed diversions by Canada from certain boundary rivers, contains the following conclusions:

106/ ILA, Report of the Fifty-second Conference ... p. 488. (The text of the Helsinki Rules is reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 357-358, document A/CN.4/274, para. 405).

"(a) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

(b) In determining what is just and reasonable account is to be taken of rights arising out of:

(1) Agreements,

(2) Judgments and awards, and

(3) Established lawful and beneficial uses;

and of other considerations such as:

(4) The development of the system that has already taken place and the possible future development, in the light of what is a reasonable use of the water by each riparian;

(5) The extent of the dependence of each riparian upon the waters in question; and

(6) Comparison of the economic and social gains accruing, from the various possible uses of the waters in question, to each riparian and to the entire area dependent upon the waters in question." 107/

(8) Finally, in 1973 the Sub-Committee on International Rivers of the Asian-African Legal Consultative Committee submitted a set of revised draft propositions to the Committee. The first two paragraphs of proposition III, concerning equitable utilization, are set forth in paragraph (20) of the commentary to article 6. The third paragraph of that proposition concerns the matter of relevant factors, and provides as follows:

"3. Relevant factors which are to be considered include in particular:

(a) the economic and social needs of each basin State, and the comparative costs of alternative means of satisfying such needs;

(b) the degree to which the needs of a basin State may be satisfied without causing substantial injury to a co-basin State;

(c) the past and existing utilization of the waters;

107/ Griffin, "Legal Aspects of the Use of Systems of International Waters", United States Department of State Memorandum, 21 April 1958, United States Senate Doc. 118, 85th Congress, Second Session, p. 90.

(d) the population dependent on the waters of the basin in each basin State;

(e) the availability of other water resources;

(f) the avoidance of unnecessary waste in the utilization of waters of the basin;

(g) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among users;

(h) the geography of the basin;

(i) the hydrology of the basin;

(j) the climate affecting the basin." 108/

(9) The Commission is of the view that an indicative list of factors is necessary to provide guidance to States in the application of the rule of equitable and reasonable utilization set forth in article 6. An attempt has been made to confine the factors to a limited, non-exhaustive list of general considerations that will be applicable in many specific cases. None the less, it perhaps bears repeating that the weight to be ascribed to individual factors, as well as their very relevance, will vary with the circumstances.

D. Points on which comments are invited

118. The Commission would welcome the views of Governments in particular on the draft articles provisionally adopted during the present session on the law of the non-navigational uses of international watercourses.

108/ The report of the AALCC containing the revised draft propositions is cited in note 99, above.

CHAPTER IV

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

A. Introduction

119. The Commission, at its thirtieth session in 1978, included the topic "International liability for injurious consequences arising out of acts not prohibited by international law" in its programme of work and appointed Mr. Robert Q. Quentin-Baxter Special Rapporteur for the topic.

120. The Commission, from its thirty-second to its thirty-sixth session in 1984, received and considered five reports from the Special Rapporteur. 109/ The reports sought to develop a conceptual basis and schematic outline for the topic and contained proposals for five draft articles. The schematic outline was set out in the Special Rapporteur's third report to the thirty-fourth session of the Commission in 1982. The five draft articles were proposed in the Special Rapporteur's fifth report to the thirty-sixth session of the Commission in 1984. They were considered by the Commission, but no decision was taken to refer them to the Drafting Committee.

121. The Commission, at its thirty-sixth session, in 1984, also had before it the following materials: the replies to a questionnaire addressed in 1983 by the Legal Counsel of the United Nations to 16 selected international organizations to ascertain whether, amongst other matters, obligations which States owe to each other and discharge as members of international organizations may, to that extent, fulfil or replace some of the procedures referred to in the schematic outline 110/ and a study prepared by the Secretariat entitled "Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law". 111/

109/ For the five reports of the Special Rapporteur, see Yearbook ... 1980, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2, Yearbook ... 1981, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2, Yearbook ... 1982, vol. II (Part One), p. 51, document A/CN.4/360, Yearbook ... 1983, vol. II (Part One), p. 201, document A/CN.4/373, Yearbook ... 1984, vol. II (Part One), p. 155, document A/CN.4/383 and Add.1.

110/ Yearbook ... 1984, vol. II (Part One), p. 129, document A/CN.4/378.

111/ ST/LEG/15, later issued as document A/CN.4/384.

122. The Commission, at its thirty-seventh session, in 1985, appointed Mr. Julio Barboza Special Rapporteur following the death of Mr. Quentin-Baxter. The Commission received two reports from the Special Rapporteur, a preliminary report 112/ and a second report (A/CN.4/402 and Corr.1, Corr.2 (English only), Corr.3 (Spanish only) and Corr.4) at its thirty-seventh and thirty-eighth sessions, respectively.

B. Consideration of the topic at the present session

123. At the present session, the documents before the Commission were the Special Rapporteur's second report (A/CN.4/402 and Corr.1, Corr.2 (English only), Corr.3 (Spanish only) and Corr.4), held over from the Commission's previous session for further consideration, and the Special Rapporteur's third report (A/CN.4/405 and Corr.1 (English only) and Corr.2 (English and French only)). The topic was considered by the Commission at its 2015th to 2023rd meetings.

124. In his third report, the Special Rapporteur submitted the following six draft articles, broadly corresponding to section 1 of the schematic outline. 113/

"Article 1

Scope of the present articles

The present articles shall apply with respect to activities or situations which occur within the territory or control of a State and which do or may give rise to a physical consequence adversely affecting persons or objects and the use or enjoyment of areas within the territory or control of another State.

"Article 2

Use of terms

For the purposes of the present articles:

(1) 'Situation' means a situation arising as a consequence of a human activity which does or may give rise to transboundary injury:

(2) The expression 'within the territory or control':

112/ Yearbook ... 1985, vol. II (Part One), p. 97, document A/CN.4/394.

113/ For the schematic outline of the topic see Yearbook ... 1983, Vol. II (Part One), p. 223, document A/CN.4/373.

(a) In relation to a coastal State, extends to maritime areas whose legal régime vests jurisdiction in that State in respect of any matter;

(b) In relation to a flag State, State of registry or State of registration of any ship, aircraft or space object, respectively, extends to the ships, aircraft and space objects of that State even when they exercise rights of passage or overflight through a maritime area or airspace constituting the territory of or within the control of any other State;

(c) Applies beyond national jurisdictions, with the same effects as above, thus extending to any matter in respect of which a right is exercised or an interest is asserted;

(3) 'State of origin' means a State within the territory or control of which an activity or situation such as those specified in article 1 occurs;

(4) 'Affected State' means a State within the territory or control of which persons or objects or the use or enjoyment of areas are or may be affected;

(5) 'Transboundary effects' means effects which arise as a physical consequence of an activity or situation within the territory or control of a State of origin and which affect persons or objects or the use or enjoyment of an area within the territory or control of an affected State;

(6) 'Transboundary injury' means the effects defined above which constitute such injury.

"Article 3

Various cases of transboundary effect

The requirement laid down in article 1 shall be met even where:

(1) The State of origin and the affected State have no common borders;

(2) The activity carried out within the territory or control of the State of origin produces effects in areas beyond national jurisdictions, in so far as such effects are in turn detrimental to persons or objects or the use or enjoyment of areas within the territory or control of the affected State.

"Article 4

Liability

The State of origin shall have the obligations imposed on it by the present articles, provided that it knew or had means of knowing that the activity in question is carried out within its territory or in areas within its control and that it creates an appreciable risk of causing transboundary injury.

"Article 5

Relationship between the present articles and other international agreements

Where States Parties to the present article are also parties to another international agreement concerning activities or situations within the scope of the present articles, in relations between such States the present articles shall apply subject to that other international agreement.

"Article 6

Absence of effect upon other rules of international law

The fact that the present articles do not specify circumstances in which the occurrence of transboundary injury arises from a wrongful act or omission of the State of origin shall be without prejudice to the operation of any other rule of international law."

125. Introducing the report, the Special Rapporteur stated that the six draft articles were primarily concerned with the question of scope. Draft articles 1, 2, 5 and 6 were roughly the same as draft articles 1 to 4 which had been proposed by the former Special Rapporteur. 114/

126. The Special Rapporteur pointed out that draft article 1 was the key provision. It set out three distinct limitations or conditions, which functioned as criteria, and had to be fulfilled for a given circumstance to fall within the scope of the draft articles. First, there was the transboundary element: the effects felt within the territory or control of one State had to have their origin in an activity or situation which took place within the territory or control of another State. Second, the activity had to give rise to a physical consequence, which involved a connection of a specific type, i.e., the consequence had to stem from the activity as a result of a natural law. Thus, the causal relationship between the activity and the harmful effect had to be established through a chain of physical events. Third, these physical events must have social repercussions, in keeping with the Lake Lanoux decision. 115/ It had then to be shown that the physical consequences "adversely" affected persons, things or the use or enjoyment of areas within the territory or control of another State. The inclusion of the

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114/ Yearbook ... 1984, vol. II (Part One), pp. 155-156, document A/CN.4/383 and Add.1, para. 1.

115/ See note 71, above.

word "adversely" was necessary, for without it a State might argue that, although the effect was beneficial, it was not to its liking and it would rather have an unchanged status quo ante.

127. Draft article 2 defined key terms so as to avoid the need for lengthy explanations and paraphrases in later articles and in commentaries. This article included a definition of "territory or control", as used in the draft, which extended the conception to include designated maritime areas of coastal States, vessels or objects of flag States and planes or space objects of States of registry. Draft article 2 also defined "injury". Injury was an important concept in this topic and had to be conceived in terms of its nature and extent. Thus, injury in this topic was not the same as in State responsibility for wrongful acts. In the latter, the law attempted to restore, as far as possible, the situation which existed prior to the failure to fulfil the obligation in question. In this topic, injury was the consequence of lawful activities and had to be determined by reference to a number of factors. When building a régime, States might negotiate the extent of the injury flowing from the activities contemplated in the agreement and thus resolve, for themselves, the question of threshold of injury above which the liability of a State would be engaged. In case of injury caused in the absence of such a régime, the State of origin and the affected State would negotiate the amount of the compensation, taking into account factors such as those of Section 6 of the schematic outline. The injury being a disruption of the balance of those various factors and interests at stake, the amount of the compensation would be calculated so as to redress the balance. That explained why, in some cases, it would be lower than the actual cost of the injury.

128. Draft article 3 dealt with certain specific cases of transboundary effect. The purpose of the article was to expand the term of "transboundary" beyond reference to political boundaries between contiguous States. Even though the article may appear redundant in view of article 1, two considerations militated in favour of its inclusion. First, the scope article of any set of rules or of a convention was traditionally interpreted narrowly, in case of any ambiguity in the text. Second, even if the issue was treated expansively in the travaux préparatoires, they might be of limited value in interpretation. Therefore it was felt that it would be prudent to spell out in the text of the articles important concepts, in more detail, so as to minimize any ambiguities. Paragraph 2 was an attempt at giving an answer to the concern expressed in the Commission and in the Sixth Committee about

harmful effects occurring in areas beyond national jurisdiction. It gives the affected State a limited right of action when its territory or an area beyond national jurisdiction in which it had a specific interest was affected by transboundary injury originating within the territory or the control of another State.

129. Draft article 4 served to introduce the rest of the articles. In addition, it set out two important conditions, both of which had to be fulfilled to engage the liability which the articles imposed on States: first, the State of origin had to have knowledge or the means of knowing that the activity in question was taking place or was about to take place in its territory, and, second, the activity created an appreciable risk of transboundary injury. The question of liability for prevention or reparation of harm would be subject to special review in cases of those developing countries with large territories or vast spaces such as the Exclusive Economic Zone, where the means for effective monitoring might be lacking. In the view of the Special Rapporteur, the conditions were compatible with those embodied in the judgement of the International Court of Justice in the Corfu Channel 116/ case and the arbitration award in the Trail Smelter, 117/ notwithstanding the opinion that these two decisions applied to cases of State responsibility for wrongful acts. In the Trail Smelter case, the State of origin could be declared liable even though all the precautions imposed by the régime established by the Court had been taken if by accident the level of pollution passed over a certain limit; in the Corfu Channel case there was no reason why the presumption that a State had knowledge of everything that was happening in its territory should be limited to responsibility for wrongful acts. The Special Rapporteur stated that, depending upon the goal pursued and, of course, the context in which the activity occurred, there were two ways of applying the principle embodied in article 4. One was through specific norms of prohibition, the breach of which would give rise to wrongfulness. The other was through norms of liability for risk or "strict liability". The concept of "strict liability" was a legal technique for achieving outcomes compatible with the specific goals sought; namely to prevent harm and to repair injuries, without prohibiting activities.

116/ I.C.J. Reports 1949, p. 4.

117/ United Nations, Reports of International Arbitral Awards, vol. III, pp. 1905 et seq.

130. The term "appreciable risk" in article 4 was important, for it imported that the risk involved must be of some magnitude and must be clearly visible or easy to deduce from the properties of the things or materials used. Bearing in mind that article 1 was broad and covered any type of risk, the additional requirement of "appreciable risk" was necessary to clarify further the scope of the article.

131. Draft articles 5 and 6 were saving clauses which clarified the relation of this topic to conventions and other rules of international law. Draft article 5 precluded these articles from interfering with the conventions drafted specifically to deal with certain activities which would have otherwise come within the scope of this topic. Draft article 6 stated an important though not always obvious point. States, in building régimes regarding activities with potential extraterritorial injurious consequences did not do so in a vacuum. They operated against a background of existing rules of international law, which might ultimately be relevant to the question of whether they had acted wrongfully. Hence the importance of emphasizing that these articles did not prejudice the application of other rules of international law.

132. Finally, the Special Rapporteur requested the members of the Commission, while debating the subject, to address: (1) whether the draft articles should ensure for States as much freedom of activities within their territory as was compatible with the rights and interests of other States; (2) whether the protection of rights and interests of other States required the adoption of measures of prevention of harm; (3) whether, if injury nevertheless occurred, there should be compensation; and (4) whether the view that an innocent victim should not be left to bear his or her loss should have a firm place in this topic. He also asked the Commission members to state their views on the concept of strict liability; the possibility of establishing certain mechanisms to condition the functioning of strict liability in order to render it less rigorous; the obligation of prevention under the régime of strict liability; and third party fact-finding or compulsory settlement procedures.

133. During the Commission's debate of the second and the third reports of the Special Rapporteur, a number of issues were raised and discussed. For convenience, they are organized under separate headings in the following paragraphs.

1. General considerations

(a) Development of science and technology

134. Many members of the Commission pointed out that our civilization was characterized by continuous growth of population, reduction of resources and increasing demand for a better life by development. Progress in science and technology opened a way to deal with these problems, by finding ways for more efficient use of limited resources, creating substitute resources and devising ways to improve the quality of human life. At the same time, the application and utilization of some science and technology posed risks of serious injury, sometimes with long-term and catastrophic effects.

135. It was agreed that there should be some means in international law for dealing with certain types of transboundary injuries arising from use of modern technology. It was, of course, pointed out that transboundary harm was not always the result of the application or utilization of complex technology. Some were the result of continuous utilization of a particular resource, such as air, until it became injurious to other States.

136. Some members observed that the threat of transboundary injuries in the contemporary world may be equivalent to the threat of aggression in the nineteenth century. Today and in the future, State sovereignty might have more to fear from this new menace than from the use of force. The territorial integrity and sometimes even the very existence of a small State might be at stake when a dangerous activity took place close to its border.

137. It was stressed by some members of the Commission that in developing substantive and procedural rules for dealing with extraterritorial injuries arising from uses of modern technology, we should not discourage further scientific development. The issue of international liability for injurious consequences arising out of lawful acts should not turn into a kind of punishment for pioneer activities and should not hamper scientific and technological progress.

(b) Underlying basis of the topic

138. Some members questioned the existence of the basis of the topic in international law. They agreed that there were a number of bilateral and some multilateral treaties regulating certain activities which also entailed liability. However, they expressed doubt that the concept of liability for acts not prohibited existed in general international law. In the absence of

established, scientifically-substantiated international standards for the determination of adverse transboundary effects in various spheres, the elaboration of general principles could contribute to the emergence of disputes, while the lack of such standards would impede their settlement. In the opinion of some members, the concept of liability did not exist in customary international law, for it could not be established outside treaty régimes relating to specific subjects. In accordance with this view, they found it of course difficult to draft a general régime of liability in the absence of a solid basis in general international law. It might therefore be better for States to focus on particular types of activity and to avoid drafting a general treaty.

139. It was contended by some members that a general régime of liability would amount to absolute liability for any activity. That, it was suggested, would not be acceptable by States. It was said that the treatment of the topic consisted in drawing logical conclusions from certain premises, but a line of reasoning, however logical, could not substitute for agreement between States or constitute binding rules.

140. Some other members of the Commission agreed that the topic was not a traditional subject of international law, but in their view there were solid bases which justified drafting a general treaty on the subject. They referred to a number of multilateral treaties which dealt with similar questions in more limited contexts. These conventions were drawn on the assumption that there was an obligation on States not to damage the territory, environment or interests of other States. Not all States were bound by such conventions but it would be an exaggeration to say that there was no basis on which to begin building norms of law on the topic. In addition to multilateral treaties, there was a vast network of bilateral agreements whose apparent objective was to prevent injury by one State to the environment of another State. There were also declarations and resolutions of international organizations which pointed to the same objective.

141. Some members were less concerned about whether or not there was a solid basis for the topic in general international law. For them, such emphasis did not properly take account of an important function of the Commission, namely, to make proposals for the progressive development of international law. They

believed that it would be improper for the Commission to wait for more disasters and catastrophic accidents with tremendous human suffering and environmental damages so that certain customary norms could be created which could be then codified many years later. An important task of the Commission was also to look into the future and, taking into account the needs of the international community and projecting possible future conflicts, try to design rules which would prevent those conflicts or at least minimize their disruptive impacts. They believed that if the Commission decided to shy away from this task, the topic would probably be given to another international organization for codification.

142. A few members referred to various other concepts of law, some in domestic systems, to find a basis for this topic. It was suggested that the concept of abuse of rights, nuisance, etc., might be used to find a solid basis for the development of the topic.

143. The Special Rapporteur did not find it particularly useful to grapple on the theoretical level with the question of whether the foundations of the topic could be found in customary international law, as he was proposing some principles as a matter of progressive development of the law, not of its codification. He believed there were sufficient treaty and other forms of State practice to provide an appropriate conceptual basis for the topic. He agreed with some members that the principle sic utere tuo ut alienum non-laedas provided adequate conceptual foundations for the development of the topic. He recalled the observation made by the World Commission on Environment and Development in the book Our Common Future that:

> "National and international law has traditionally lagged behind events. Today, legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature." 118/

144. It was suggested that the Commission should fulfil the mandate assigned to it by the General Assembly on the development of rules on this topic. Considering the urgent need for having coherent and practical rules regarding activities with extraterritorial injurious consequences, the Commission should

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118/ World Commission on the Environment and Development. Our Common Future (1987), p. 330.

accelerate its work on this topic. However, one member suggested that in view of the wide divergence of views on basic theoretical issues among members, the Commission should either request the General Assembly to defer the consideration of the topic or to adopt the three principles mentioned in subparagraph (d) of paragraph 194 below as a working hypothesis, leaving aside theoretical issues.

(c) Relation between the topic and State responsibility

145. Some members still saw difficulties in separating this topic from State responsibility. They found the two topics conceptually identical, even though they agreed that, for practical purposes, it might be useful to keep them apart. A few, however, were still uncertain about the wisdom of maintaining the two topics independent of each other. For them, any attempt to keep the topics apart was artificial. In particular, one member noted that, by dealing simultaneously with prevention and compensation, the topic necessarily concerns the injurious consequences of failure to observe obligations in respect of prevention, and hence wrongful acts. Consequently, he took the view that, in the circumstances, the present title of the topic is inappropriate and that it will have to be reformulated so as to cover simply the injurious transboundary consequences of dangerous activities.

146. Other members agreed with the Special Rapporteur that there were practical policy reasons, as well as objective criteria for separating the topic of State responsibility from international liability. A reference was made to a similar debate held in the Commission at the outset of its examination of the State responsibility topic. The Commission, then, took the view that "owing to the entirely different basis of the so-called responsibility for risk and the different nature of the rules governing it, as well as its content and the forms it may assume, a joint examination of the two subjects could only make both of them more difficult to grasp". 119/ Contrary to State responsibility, international liability rules were of a primary nature, for they established an obligation and came into play, not when the obligation had been breached, but when the condition that triggered that same obligation had taken place. They also agreed with the Special Rapporteur's views that aside from differences in the nature of the rules of

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119/ Yearbook ... 1973, vol. II, p. 169, document A/9010/Rev.1, para. 38.

the two topics, there were other differences. In State responsibility, the harmful event which triggered the effect, was breach of an obligation. In the present topic, on the other hand, the harmful event, while perhaps a foreseeable event, did not constitute a breach of an obligation. In the case of State responsibility, responsibility was discharged if the respondent State proved that it had used all reasonable means at its disposal to prevent the event but had none the less failed. In the view of these members, however, under the régime of this topic the liable State would have to compensate as a general rule. The other difference between the two topics related to harm. In State responsibility, as Part One was drafted, violation of an obligation and not actual harm was sufficient for a cause of action against the author State. In the liability topic, the existence of actual harm was essential. While the purpose of reparation in State responsibility was in principle to restore the legal condition that existed prior to the commitment of the wrongful act, compensation in the present topic was determined by reference to a number of factors and might or might not be equivalent to the actual damage suffered. The rules of attribution were also different in the two topics. In liability without a wrongful act, the place at which the activity was carried out determined the State that was in principle liable. In the case of responsibility for a wrongful act, that criterion was, on the contrary, inadequate.

147. It was also pointed out that there were relations between the present topic, State responsibility and the law of the non-navigational uses of international watercourses. Such a relation did not justify combining the three topics, but only required attention and care to make certain that they were compatible.

(d) Protection of innocent victims

148. It was stated by some members that the primary beneficiaries of activities with possible transboundary injuries were the States in whose territory the activities were conducted and their populations. The primary victims of such injuries were innocent human beings who happened to be living on the other side of the political boundary. Their injuries might take many forms, including financial or health deprivations. Looked at from a logical,

legal, practical, social or humanitarian angle, one could only conclude that innocent victims should not be left to bear the loss for such serious and substantial deprivations. Any other conclusion would be inconsistent with the principles of justice.

149. It was, of course, recognized that there were certain injuries which were not directly and immediately felt by human beings. For example, the gradual degradation of the quality of the environment might not always immediately affect human beings. Therefore, while recognizing the urgent need for prevention and reparation of injuries suffered immediately and directly as a result of a particular activity, the long-term and gradual injuries to the environment should not be ignored.

(e) Protection of the interests of the State of origin

150. An opinion was expressed that the topic must also cover the issue of moral, political and economic damage unduly and wrongfully inflicted on the pretext of protection against injurious consequences arising out of lawful acts. A balanced approach required taking into account the fact that the injurious consequences of accidents and other similar acts affect the countries where they occur.

151. Other members stated that multinational corporations were at the forefront of the development and utilization of science and complex technology. These corporations often operated, beyond State control, as the result of financial power and the sole custody of knowledge on advanced science and technology. The developing countries were in a particularly disadvantageous position. They needed the multinational corporations to operate within their territory in order to generate some economic development; at the same time, they lacked the expertise to appreciate the magnitude of risk that the work of these corporations could cause and the power to compel the companies to disclose such risks. In this context, these developing countries were also victims. Their legitimate interest should therefore be taken into account.

2. Scope of the topic

(a) Activities with physical consequences

152. Many members welcomed the use of the expression "physical consequences" in the definition of the scope of the topic. This requirement properly limited the scope of the topic to the use of the environment, an area which

had become of utmost importance in inter-State relations and to the international community as a whole. Furthermore, this requirement again quite properly excluded from the immediate scope of the topic other activities which did not necessarily produce physical consequences beyond territorial boundaries. Such activities included those of a monetary, economic, political and social character. Application of the provision of this topic to such vast areas of activities within State territories and control were found inappropriate, undesirable and politically unacceptable to most States.

153. Some members found it, on the contrary, regrettable that the criteria introduced by the Special Rapporteur for defining the scope of the topic, in fact, precluded economic and social activities. Most of the adverse consequences that affected millions of people in the modern world were of an economic or social nature. In their view, the former Special Rapporteur had recognized the importance of these sorts of activities. These members did not believe that economic and social activities could be precluded while liability was established for the rest.

154. Some questions were raised as to the technical meaning of "physical consequences". It was pointed out that certain genetic experiments may have physical extraterritorial consequences. Also extensive deforestation of tropical forests would lead to climatic changes all over the world. These extraterritorial effects could also be classified as "physical". Was the scope cast so as to include these sorts of activities? Another point raised was whether radio waves could be considered "physical consequences". If so, was the topic intended to include broadcasting across territorial boundaries?

155. The Special Rapporteur stated that these questions touched upon the cornerstone of the topic. He reminded the members that the Commission from the beginning of the topic had grappled with this question, namely, what sort of activities with injurious extraterritorial consequences were to be covered. The former Special Rapporteur, Professor Quentin-Baxter, ultimately came up with an answer, which did not satisfy everyone, he said, but had received general support. Professor Quentin-Baxter introduced the criterion of "physical consequences", and in the Special Rapporteur's opinion this criterion was sound. He pointed out that an important element in establishing liability under this topic was proof of a cause-and-effect relationship between the activity and the injury. Such a causal relationship, in his

opinion, could be established with certainty only in the physical world. Economic and social interactions involved, in high degree, human psychology, which was much harder to measure and predict. It would be very difficult to establish causal relationship in those areas with certainty. He understood the concern of those members who wanted to expand the scope of the topic to economic and social activities. But he did not find such a move prudent, for it would take the topic into a field with so many factual variations and divergent conceptions of action and injury as to render it unmanageable.

(b) Dangerous activities

156. It was pointed out by some members that the Commission could not possibly draft articles for every single activity with transboundary injurious consequences. One way of limiting the scope of the topic was to draw up a list of activities intended to be covered. Drawing up such a list in the opinion of some members was also compatible with State practice, where separate conventions were drafted for specific types of dangerous but lawful activities. Such a list of activities, in their view, would make the scope clearer, and politically more acceptable to States. With such a list, States would have more understanding of the types of activities which needed special care to avoid engaging their liability. One member suggested that such a list could be updated at intervals in a simplified procedure, in consultation with a group of experts.

157. Some other members, on the other hand, agreed with the Special Rapporteur that the concept of "danger" was relative. Activities considered dangerous now may not be so in the near future with the advance of technology and forecasting techniques. Besides, listing activities could end up duplicating many activities for which there were already special conventions. Therefore, the whole exercise of listing activities would be futile. Even if the list were to be updated periodically, it would still be impractical. It would therefore be better to define the concept of "dangerous activities" for the purposes of this topic. While such a definition might be susceptible to constant and unpredictable interpretation, it was still a more viable alternative. At the same time, a general definition of dangerous activities secured the relevance and the applicability of the topic to future activities.

158. The Special Rapporteur stated that since the members appeared to find a definition useful, he would try to develop one, and, in the commentary, he might try to identify activities in terms of their nature, as guidance. Such a listing, of course, could not be exhaustive.

(c) Concepts of "territory", "control" and "jurisdiction"

159. A number of members drew attention to the ambiguities inherent in the concepts of "territory", "control" and "jurisdiction". It was pointed out that the words in article 2 "within the territory or control" appeared to apply beyond national jurisdiction and could include activities carried out anywhere with repercussions on persons and objects in the territory or under the control of an affected State.

160. The term "jurisdiction" should be looked at carefully. In the context of the United Nations Convention on the Law of the Sea, the jurisdiction of a State may not always be complete and exclusive over certain waters, such as the Exclusive Economic Zone. In that respect, jurisdiction was not always synonymous with "territory". As to the concept of "control", questions were raised as to whether "control" referred to control over an activity or over the territory in which an activity was conducted. The question was also raised as to how these concepts were to apply to activities on the high seas or in outer space.

161. In reply to the queries raised in relation to these concepts, the Special Rapporteur explained that the purpose of these terms was to identify the entity to which liability should be attributed for the events covered under this topic. In his opinion, and in the opinion of many members of the Commission, such liability should be attributed, at the international level, to the State with whose territory or control an activity with injurious transboundary effects occurred. He recalled Max Huber's statement in the Island of Palmas that:

> "Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State ... [That] [t]erritorial sovereignty cannot limit itself to its negative side, i.e., to excluding the activities of other States ... This right has a corollary duty: the obligation to protect within the territory the rights of other States." 120/

120/ United Nations, Reports of International Arbitral Awards, vol. II, p. 839.

162. In the opinion of the Special Rapporteur, territoriality was, therefore, a key international legal basis for the exercise of jurisdiction and the attribution of liability for its extraterritorial injurious consequences. In this topic, most activities of concern occurred within State territory. Territory, as Max Huber defined it, was "a portion of the globe". A State with sovereignty over a portion of the globe exercised, subject to international law, exclusive jurisdiction therein. Subject to international law, a State was entitled to allow or prohibit activities within its territory, but remained liable to other members of the international community for certain consequences of activities therein. He stressed that it was in this sense that the word "territory" was intended to be used in the draft articles.

163. The Special Rapporteur explained that the term "control" was considered in the light of international law, including the situation referred to by the International Court of Justice in the Namibia case. 121/ In his view, a State effectively exercising exclusive jurisdiction over a territory should be held liable for certain extraterritorial injurious consequences of activities conducted therein. But, he said, for reasons of principle the international community did not, in certain circumstances, want to legitimize the presence of such a State in that territory by acknowledging, even incrementally, that it had, or was acquiring, a right to jurisdiction. Yet, according to the Special Rapporteur, it still wanted to hold it liable, for to do otherwise would be to reward it for its illegal presence. The word "control" was used, inter alia, to refer to this type of situation.

164. There were two more situations to be covered. One concerned activities conducted beyond areas under exclusive jurisdiction of any State. In those areas, the common areas of the planet, all States were entitled to user, subject to international law and the rights of other States. Where such user

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121/ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971, p. 16.

caused injury to others, the party causing injury should remain liable. Hence, the draft articles contemplated activities on the high seas, on the sea-bed beyond national jurisdiction or in outer space.

165. The second situation concerned activities conducted within those parts of the globe which were neither a territory of a State nor a common area. These were portions of the globe in which international law allocated certain sovereign rights and jurisdiction to one State while reserving other rights to other States. The exercise of such sovereign rights and jurisdiction by that State engaged its liability. Where other States were allocated other rights in that space, they were liable for the consequences of their activities. An example of such an area was the Exclusive Economic Zone where the coastal States exercise such sovereign rights and jurisdiction, while other States had been given rights such as freedom of navigation and overflight and freedom to lay submarine cables and pipelines.

166. In areas such as the high seas, the sea-bed beyond national jurisdiction and outer space, the ascription of liability was more complicated. But the Special Rapporteur observed that one may draw once again, analogically, from Max Huber and general international law. In much the same manner in which the exclusive exercise of jurisdiction over territory engaged liability for injurious consequences emanating from it, exclusive jurisdiction over a vessel, symbolized by the flag, also engaged liability for injurious acts of the vessel. Exclusive Economic Zones manifested both phenomena. The coastal State, to which international law assigned certain exclusive rights, would bear liability for injurious consequences caused by their exercise, by analogy to exclusive territorial rights. Third States would bear responsibility for injurious consequences of the exercise of their rights in the zone, on the flag principle.

(d) Concepts of "risk" and "injury"

167. Many members agreed with the Special Rapporteur that the concepts of "risk" and "injury", by themselves, did not include criteria for determining the question of threshold - a degree of risk or injury above which the provisions of this topic would come into play. They wondered if the adjective "appreciable" could make the term "risk" any clearer.

168. The wisdom of the requirement of foreseeability of injury was also questioned. For some members, it was inconceivable that liability, in terms of an obligation to compensate, should be excluded when injury occurred simply

because the possibility of such injury could not be foreseen. The basis for liability, or for an obligation to compensate, they agreed, should be injury, whether or not foreseeable. Foreseeability, though a useful basis for prevention, should not be transformed into a basis for liability. It was generally understood that the purpose of the Special Rapporteur in introducing a modification to the terms "risk" and "injury" was to narrow the scope of the topic as defined in article 1, but they were not certain that those additional modifications were particularly helpful.

169. Some members stated that, in their opinion, the threshold question of injury was not yet satisfactorily resolved. Appreciable injury did not seem to add to the clarity. It suffered from the same shortcomings as appreciable risk - it helped a little, but not enough. The concept of shared expectation introduced in the schematic outline was new and if possible, should not be used now. If the Special Rapporteur found it necessary to use this concept, he should spell out its meaning in article 2 on the use of terms.

170. It was also stated by some members that a more coherent and identifiable criterion should be established for determining the degree of risk and the extent of injury. Conventions were drafted primarily to be implemented by the parties themselves, without having to resort to third party decision-makers. It was therefore essential that States would not have to constantly ask third parties to determine whether a particular activity carried "appreciable" risk or injury. The criterion should be clear and easily identifiable.

171. The Special Rapporteur stated that he believed it necessary to introduce the concept of risk and its predictability in order to limit the scope of the topic. The topic was not dealing with every activity that might produce transboundary injury. As he saw it, "appreciable risk" meant visible risk which could be deduced from special properties of the activity, or, if hidden, known to the State of origin. He believed that if such criteria were not introduced, the liability of a State would amount to absolute liability for any transboundary injury and this might not be acceptable. He agreed that the criteria introduced in the provisions of this topic should be, to the extent possible, scientific, coherent and identifiable by the parties themselves, but he believed that the role of third party decision-makers, particularly in the form of fact-finding commissions, could not be ignored.

(e) Knowledge or means of knowing

172. An additional criterion for limiting the scope of the topic was the requirement that the State of origin "knew or had means of knowing" that the activity in question was carried out within its territory or control (article 4). It was pointed out that, in this formulation, knowledge and means of knowing were put on the same footing. There were two possible consequences of that approach. On the one hand, if a State had the means of knowing, liability would be incurred even if the State did not know what it should have known. In this case, the requirement of foreseeability of risk would have an aggravating effect. On the other hand, if a State did not have the means of knowing and so could not have known of the activity, the foreseeability requirement would have an exonerating effect and State liability would be ruled out.

173. It was suggested that developing countries often did not have the means of knowing whether an activity was likely to entail appreciable risk, for they frequently lacked the skilled labour, technology and equipment necessary to monitor the modern chemical and other industries managed and controlled by foreign corporations. The requirement of knowledge or means of knowing, together with the requirement of foreseeability of risk, did not seem to cover this situation properly.

174. Other members expressed their appreciation for the efforts of the Special Rapporteur to take into account the special needs of the developing countries. However, they could not accept the proposals that lack of knowledge or means of knowing could by itself exonerate a State that had authorized the activity. The principle of sovereignty had its corresponding duty of protection of rights and interests of other States. Such a duty should not be minimized.

3. Prevention and reparation

(a) Relative degrees of emphasis on prevention and reparation

175. It was suggested by some members that the Commission had moved away from the basic concept of liability and compensation to the duty of care and rules of prevention, with the emphasis on procedures. Procedures had become the main and indeed the exclusive concern of the topic. It was advisable to deal with prevention, but not at the expense of substantive rules of liability. The result of this approach was that the concept of liability for injurious consequences arising from acts not prohibited by international law would fade away. Damage would be compensated not on the basis of mere causality but

because the State, in failing to fulfil its obligation of prevention, committed a wrongful act. Under the schematic outline, the failure to comply with procedural rules of prevention did not give rise to any right of action. 122/ However, the Special Rapporteur proposed to eliminate this proposal. The effect would be to place prevention in a more prominent position. This approach would bring the topic even more within the scope of State responsibility.

176. It was also stated that liability rules, in principle, did not deal with prevention rules. They had different emphases. The topic, at least from its title, was related only to the liability issues. Therefore, preventive rules were misplaced in the topic.

177. Some members, on the other hand, believed that the question of liability and reparation should be properly dealt with either under a conventional framework or through international co-operation and negotiation among interested States. In their view, this topic should instead concentrate at this stage on preventive rules, as supported by current State practice.

178. Some other members found any attempt to limit the topic to either preventive rules or reparation rules unproductive. They agreed with the Special Rapporteur that the contribution of the topic was to establish rules of prevention and reparation with a reasonable and effective link between the two. It would be unfair and illogical to allow activities with extraterritorial injurious consequences to occur and only then find a way to repair them. At the same time any rule of prevention which was not strengthened by some legal consequences would be ineffective since there would be no incentive for the State of origin to respect it.

179. The Special Rapporteur stated that in his view the duty to carry out preventive measures should not be reduced to an option to take measures entirely at the discretion of the State of origin. This was why he suggested eliminating the proposal in paragraph 8 of Section 2 of the schematic outline, which stated that failure to comply with preventive rules did not give rise to any right of action. By dropping that proposal, he did not suggest that failure to comply with preventive rules gave rise to a right of action. He simply removed the discretionary and voluntary nature of compliance with

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122/ Paragraph 8 of Section 2 of the schematic outline, see note 113, above.

preventive rules. Under international law, some preventive measures may have reached the point of becoming obligatory and some were probably still voluntary. His view was that the question as to whether a particular preventive measure was an obligation or not should be left to international law. What he was concerned about and thought was extremely important to this topic was the creation of some reasonable, logical and effective linkage between prevention and reparation. This linkage was necessary to the unity of the substance of the topic and would enhance its usefulness. Some such linkage already existed in terms of rules of evidence. Where a State refused to negotiate or take preventive measures, it would shift the presumption to its own disadvantage, such as in the Corfu Channel 123/ case, in which it was presumed that the State of origin knew or should have known that a harmful activity was conducted on its territory. There may be other ways of linking the rules of prevention and reparation. In any case, it was important to bridge the legal vacuum between prevention and reparation rules, by either procedural or substantive provisions.

(b) Private law remedies

180. It was pointed out by some members that so far as the duty of reparation was concerned, State practice showed that there were forms for allocating damages for lawful activities which did not always entail the liability of the State of origin alone. Under many treaties, an operator engaging in certain dangerous activities was primarily liable for damage caused by such activities, with the State being the guarantor for the operator's liability. One example was the 1963 Vienna Convention on Civil Liability for Nuclear Damage. 124/ Similar mixed liability rules were also to be found in treaties governing the operation of nuclear ships and the carriage by sea of nuclear material. The extent of such liability was, however, still open to debate. The direct liability of the State for damage caused by lawful activities, on the other hand, had been recognized in only one convention, the 1972 Convention on International Liability for Damage Caused by Space Objects. 125/

123/ See note 116, above.

124/ United Nations, Treaty Series, vol. 1063, p. 265.

125/ Ibid., Vol. 961, p. 187.

181. The Special Rapporteur stated that by proposing that liability be attributed to States in international law, he was not in any way altering or withholding private law remedies available to the internationally liable State against the entity that may have actually caused the injury. Private law remedies included those available to the State under its domestic law or under private international law. He admitted that most existing conventions imposed primary liability on the operator of the entities that caused injury and some held the State liable only as guarantor for payment. But this type of remedy was one of many available to parties when negotiating a régime. They could even agree to limit or to allocate liability as between themselves, or only to provide equal access to courts and other domestic law remedies. But he was not persuaded that these private law remedies were sufficient to exonerate State liability in the absence of any régime. In his view, private law remedies, while useful in giving various choices to the parties, failed to guarantee prompt and effective compensation to innocent victims who, after suffering such serious injuries, would have to pursue foreign entities in courts of other States. In addition, private law remedies by themselves would not encourage a State to take preventive measures in relation to activities conducted within its territory with a potential for injurious transboundary consequences.

182. A few members, while they did not oppose the Special Rapporteur's conclusion of attribution of primary liability to the State, hoped that the Special Rapporteur, in an appropriate place in the topic, would indicate that in the final analysis compensation should be paid by the actual entity which caused the injury. Such recognition, in accordance with this view, was necessary to enable the liable developing State to seek compensation from the operator.

4. Concept of strict liability

183. It was stated by some members that "strict liability" which was suggested by the Special Rapporteur as the main underlying concept of this topic did not exist in international law. This concept was one of domestic law familiar, moreover, only to "common law" systems. There was, therefore, no basis for asserting strict liability as a general rule of international law applicable to all transboundary injury; that would be tantamount to adopting the concept of "absolute" liability. It should be remembered that the Commission was

attempting to develop rules of international law which States could use in their mutual relations in certain cases of transboundary injury caused by lawful activities. that connection, attention was drawn to the conclusion reached by the former Special Rapporteur, Professor Quentin-Baxter, that there were two boundary lines for the subject, and that one cannot establish on the one side the principle of strict liability for lawful activites and exclude on the other side economic activities. 126/

184. It was also stated that the concept of strict liability as it existed in domestic law did not deal with prevention. The application of this concept, therefore, would be inconsistent with the substance of the topic which included both prevention and reparation.

185. Some members disagreed with the assertion that the concept of strict liability was non-existent in international law. It was incorporated, as a concept if not as a term, in a number of multilateral treaties. The principle was recognized in the Trail Smelter 127/ arbitration, the Gut Dam Claims, 128/ and in many other forms of State practice found in the Secretariat study on the topic. 129/ Strict liability was the basis on which a solution to the fundamental problems under this topic should be approached. The schematic outline had followed a modified version of strict liability and it was a reasonable approach. The schematic outline with this approach encouraged States to establish a régime for hazardous activities. Only in the absence of such a régime could reparation be determined in the manner proposed in the outline. Even then the matter would be settled through negotiations which would take account not only of the extent of injury but of many other factors, including the efforts of the State of origin to comply with its duty of care - a significant modification of strict liability - and other factors.

126/ See Yearbook ... 1983, pp. 204-205, document A/CN.4/373, paras. 12-13.

127/ See note 117, above.

128/ Gut Dam Claims, International Legal Materials, vol. 8, p. 118.

129/ Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, document A/CN.4/384.

186. The Special Rapporteur stated that the concept of strict liability was known in most domestic legal systems, whether they belonged to the civil law or common law tradition. By using the term strict liability, he therefore was relying on a common legal concept that held that for certain activities or under certain circumstances, if a causal relationship was established between an activity and an injury there was liability. Nor was this principle entirely alien to international law. He saw no contradiction between the principle of strict liability and prevention. One of the latent purposes of strict liability was prevention, to discourage the doer from conducting certain activities or doing them in certain ways by imposing a direct and strict liability for compensation. He believed that this concept constituted an important principle of this topic. Strict liability did not need to be incorporated in this topic to the same degree as was known in domestic law or some conventional régimes of international law. What was important in this topic was the notion that the establishment of a causal relationship between certain activities and certain injuries was sufficient to entail liability. Strict liability provided that basis. At the same time, it did not preclude modifications the Commission might wish to introduce, such as a number of factors which could be taken into account for determination of the extent of liability and measure of damages.

5. Relation between the draft articles on this topic and other international agreements

187. It was pointed out by some members that there were a number of bilateral and multilateral agreements which dealt with activities with injurious extraterritorial consequences. These agreements established, through careful and long negotiations, a delicate balance between the rules of prevention and reparation, which made them acceptable to the States parties. It would not be prudent to alter that delicate balance by imposing the draft articles of this topic on those agreements. Any such interference would make those specific international agreements unacceptable to their parties. It was suggested that article 5 did not adequately prevent such negative consequences.

188. The Special Rapporteur agreed that the articles of this topic should not interfere with specific international agreements designed for certain types of activities also covered by this topic. He thought, however, that article 5, as drafted, was adequate for this purpose. The Spanish and French texts contained the expression: "sin perjuicio", "sans préjudice". The

Special Rapporteur was prepared to align these with the English text, which used the formula of paragraph 2 of article 30 of the Vienna Convention on the Law of Treaties: "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". 130/

6. Final form and the eventual nature of the draft articles on this topic

189. It was suggested that the schematic outline appeared to put too much emphasis on procedural rules as opposed to substantive rules. Without sufficient substantive rules, procedural rules could lack the strength necessary to compel compliance.

190. The Special Rapporteur believed that procedural rules play an important role in any régime-building exercise for prevention of harm. A main contribution of the provisions of this topic in addition to clarification of substantive rules would be the provision of procedural steps that States should follow in order to enable themselves to take sufficient account of each other's needs and concerns.

191. It was also suggested that if the Commission were not concerned about drafting rules for a convention which required acceptance by States, it could more easily accept certain hypotheses and draft articles. For example, if the Commission thought that it was drafting recommendations it would be less concerned about the existence of a normative basis for this topic in positive international law.

192. The Special Rapporteur did not believe that at the present time the Commission should even be concerned about the eventual form of the articles of this topic. Nor did he think that the eventual form of the articles should affect the method of work of the Commission. He did not believe that the standard of care in drafting should be changed, whatever the eventual nature of the topic. In his view, the Commission should be concerned with drafting coherent, reasonable, practical and politically acceptable articles. Factors or criteria should be scientific, identifiable and logical, with the aim of improving international law and inter-State relations. In the final analysis, the provisions of this topic would win support and compliance because of these factors and not necessarily because of the form in which they appeared.

130/ Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 287.

7. Conclusions

193. The Special Rapporteur did not ask the Commission to refer the six draft articles to the Drafting Committee. In view of the extensive debate in the Commission, he preferred to introduce new draft articles at the next session.

194. At the end of the debate, the Special Rapporteur drew the following conclusions:

(a) The International Law Commission must endeavour to fulfil the mandate of the General Assembly on this topic by regulating activities which have or may have transboundary physical consequences adversely affecting persons or things;

(b) The draft articles on this topic should not discourage the development of science and technology, for they are essential for the improvement of conditions of life in our national communities;

(c) The topic deals with both prevention and reparation. The régime of prevention must be linked to reparation to preserve the unity of the topic and enhance its usefulness;

(d) Certain general principles should apply in this area, in particular:

(i) Every State must have the maximum freedom of action within its territory compatible with respect for the sovereignty of other States;

(ii) States must respect the sovereignty and equality of other States;

(iii) The innocent victim of injurious transboundary effects should not be left to bear loss.

CHAPTER V

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

(SECOND PART OF THE TOPIC)

A. Introduction

195. The topic entitled "Relations beteen States and international organizations" has been studied by the Commission in two parts. The first part, relating to the status, privileges and immunities of the representatives of States to international organizations, was completed by the Commission at its twenty-third session, in 1971, when it adopted a set of draft articles and submitted them to the General Assembly. 131/

196. That set of draft articles on the first part of the topic was subsequently referred by the General Assembly to a diplomatic conference which was convened in Vienna in 1975 and which adopted the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. 132/

197. At its twenty-eighth session, in 1976, the Commission commenced its consideration of the second part of the topic, dealing with the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States. 133/

198. The second part of the topic was the subject of two previous reports submitted by the former Special Rapporteur, Mr. Abdullah El-Erian.

199. The former Special Rapporteur submitted his first (preliminary) report 134/ to the Commission at its twenty-ninth session, in 1977. At the conclusion of its debate, the Commission authorized the Special Rapporteur to continue his study of the second part of the topic along the lines indicated

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131/ Yearbook ... 1971, vol. II (Part One), pp. 284 et seq., document A/8410/Rev.1, chap. II, sects. C and D.

132/ Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations, vol. II, Documents of the Conference (United Nations publication, Sales No. E.75.V.12), p. 207, document A/CONF.67/16.

133/ Yearbook ... 1976, vol. II (Part Two), p. 164, para. 173.

134/ Yearbook ... 1977, vol. II (Part One), p. 139, document A/CN.4/304.

in the preliminary report. The Commission also decided that the Special Rapporteur should seek additional information and expressed the hope that he would carry out his research in the normal way, by examining inter alia the agreements concluded and the practices followed by international organizations, whether within or outside the United Nations system, and also the legislation and practice of States. Those conclusions of the Commission regarding its work on the second part of the topic were subsequently endorsed by the General Assembly, in paragraph 6 of its resolution 32/151 of 19 December 1977.

200. Pursuant to the authority to seek additional information to assist the Special Rapporteur and the Commission, the Legal Counsel of the United Nations, by a letter of 13 March 1978 addressed to the heads of the specialized agencies and IAEA, circulated a questionnaire aimed at eliciting information concerning the practice of the specialized agencies and IAEA relating to the status, privileges and immunities of those organizations, their officers, experts and other persons engaged in their activities, not being representatives of States. The replies to the questionnaire were intended to supplement the information gathered from a similar questionnaire circulated to the same organizations on 5 January 1965, which had formed the basis of a study prepared by the Secretariat in 1967 entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities". 135/

201. The former Special Rapporteur on the topic submitted his second report 136/ to the Commission at its thirtieth session, in 1978.

202. The Commission discussed the second report of the Special Rapporteur at that session. 137/ Among the questions raised in the course of the discussion

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135/ Yearbook ... 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

136/ Yearbook ... 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

137/ See Yearbook ... 1978, vol. I, pp. 260 et seq., 1522nd meeting (paras. 22 et seq.), 1523rd meeting (paras. 6 et seq.) and 1524th meeting (para. 1); and Yearbook ... 1978, vol. II (Part Two), pp. 146-147, paras. 155-156.

were: definition of the order of work on the topic and advisability of conducting the work in different stages, beginning with the legal status, privileges and immunities of international organizations; special position and regulatory functions of operational international organizations established by Governments for the express purpose of engaging in operational - and sometimes even commercial - activities, and difficulty of applying to them the general rules of international immunities; relationship between the privileges and immunities of international organizations and their responsibilities; responsibility of States to ensure respect by their nationals of their obligations as international officials; need to study the case-law of national courts in the sphere of international immunities; need to define the legal capacity of international organizations at the level of both internal and international law; need to study the proceedings of committees on host country relations, such as that functioning at the Headquarters of the United Nations in New York; need to analyse the relationship between the scope of the privileges and immunities of the organizations and their particular functions and objectives.

203. At the end of its debate, the Commission approved the conclusions and recommendations set out in the second report of the former Special Rapporteur. From those conclusions it was evident that:

(a) General agreement existed both in the Commission and in the Sixth Committee of the General Assembly on the desirability of the Commission taking up the study of the second part of the topic "Relations between States and international organizations";

(b) The Commission's work on the second part of the topic should proceed with great prudence;

(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in the eventual codification could be taken only when the study was completed;

(d) The same broad outlook should be adopted in connection with the subject-matter of the study, inasmuch as the question of priority would have to be deferred until the study was completed.

204. At its thirty-first session, in 1979, the Commission appointed Mr. Leonardo Díaz-González Special Rapporteur for the topic to succeed Mr. Abdullah El-Erian, who had resigned upon his election to the International Court of Justice. 138/

205. Owing to the priority that the Commission had assigned, upon the recommendation of the General Assembly, to the conclusion of its studies on a number of topics in its programme of work with respct to which the process of preparing draft articles was already advanced, the Commission did not take up the topic during its thirty-second session, in 1980, nor during its subsequent two sessions. It resumed its work on the topic only at its thirty-fifth session, in 1983.

206. The Commission resumed its consideration of the topic at its thirty-fifth session on the basis of a preliminary report 139/ submitted by the present Special Rapporteur.

207. In the preliminary report, the Special Rapporteur gave a concise history of the work done so far by the Commission on the topic, indicating the major questions that had been raised during the discussions on the previous reports, 140/ and outlining the major decisions taken by the Commission concerning its approach to the study of the topic. 141/

208. The report was designed to offer an opportunity to the Commission in its enlarged membership, and especially to its new members, to express views, opinions and suggestions on the lines the Special Rapporteur should follow in his study of the topic, having regard to the issues raised and the conclusions reached by the Commission during the discussion of the two previous reports mentioned above.

138/ Yearbook ... 1979, vol. II (Part Two), p. 189, document A/34/10, para. 196.

139/ Yearbook ... 1983, vol. II (Part One), p. 227, document A/CN.4/370.

140/ Ibid., p. 228, para. 9.

141/ Ibid., para. 11.

209. It emerged from the Commission's discussion of the Special Rapporteur's preliminary report 142/ that nearly all the members were in agreement with the conclusions endorsed by the Commission at its thirtieth session, in 1978 (see para. 202 above), and referred to in the preliminary report.

210. Virtually all the members of the Commission who spoke during the debate emphasized that the Special Rapporteur should be allowed considerable latitude and should proceed with great caution, endeavouring to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature.

211. In accordance with the Special Rapporteur's summing-up at the end of the discussion, the Commission reached the following conclusions:

"(a) The Commission should take up the study of the second part of the topic 'Relations between States and international organizations';

"(b) This work should proceed with great prudence;

"(c) For the purposes of its initial work on the second part of the topic, the Commission should adopt a broad outlook, since the study should include regional organizations. The final decision on whether to include such organizations in a future codification could be taken only when the study was completed.

"(d) The same broad outlook should be adopted in connection with the subject-matter, as regards determination of the order of work on the topic and the desirability of carrying out that work in several stages;

"(e) The Secretariat should be requested to revise the study prepared in 1967 on 'The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities' and to update that study in the light of replies to the further questionnaire which had been sent out on 13 March 1978 by letter of the Legal Counsel of the United Nations addressed to the legal counsels of the specialized agencies and IAEA in connection with the status, privileges and immunities of those organizations, except in matters pertaining to representatives of States, and which complemented the questionnaire on the same topic sent out on 5 January 1965;

"(f) The Legal Counsel of the United Nations should be requested to send the legal counsels of regional organizations a questionnaire similar to that circulated to the legal counsels of the specialized agencies and IAEA, with a view to gathering information of the same kind as that

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142/ See Yearbook ... 1983, vol. I, pp. 237 et seq., 1796th to 1798th meetings and 1799th meeting (paras. 1 to 11).

acquired through the two questionnaires sent to the United Nations specialized agencies and IAEA in 1965 and 1978." 143/

212. At its thirty-seventh session, in 1985, the Commission had before it the second report submitted by the Special Rapporteur. 144/ In his second 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, as well as the question of the legal personality of international organizations and the legal powers deriving therefrom. Regarding the latter question, the Special Rapporteur proposed to the Commission a draft article with two alternatives in regard to its presentation. 145/ The Commission also had before it a supplementary study prepared at the Commission's request (see paragraph 211 (e) above) by the Secretariat on the basis of replies received to the questionnaire sent 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 (A/CN.4/L.383 and Add.1-3).

213. The Commission considered the topic, focusing its discussion on the matters dealt with by the Special Rapporteur in his second report.

214. At the end of the discussion, the Commission reached the following conclusions:

"(a) The Commission held a very useful debate on the topic and expressed appreciation for the efforts made by the Special Rapporteur to enable the Commission to achieve substantial progress on the topic and for his flexibility in referring to the Commission the decisions on the next steps to be taken;

"(b) The short time available for the discussion of the topic at the present session did not enable the Commission to take a decision at that stage on the draft article submitted by the Special Rapporteur and made it advisable to resume the discussion at the Commission's thirty-eighth session to enable more members to express their views on the matter;

143/ Yearbook ... 1983, vol. II (Part Two), pp. 80-81, document A/38/10, para. 277.

144/ Yearbook ... 1985, vol. II (Part One), p. 103, document A/CN.4/391 and Add.1.

145/ For the text of this draft article, see Yearbook ... 1985, vol. II (Part Two), p. 67, footnote 252.

"(c) The Commission looks forward to the report which the Special Rapporteur has expressed the intention of presenting at its thirty-eighth session;

"(d) In this connection, 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.

"(f) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph [211 (f)] above." 146/

215. At its thirty-eighth session, in 1986, the Special Rapporteur submitted his third report (A/CN.4/401) on the topic to the Commission, which was unable to consider it because of lack of time.

B. Consideration of the topic at the present session

216. At its thirty-ninth session, in 1987, the Commission had before it the Special Rapporteur's third report (see para. 215, above). The Commission also had before it a document prepared by the Secretariat (ST/LEG/17) which set out, on a question-by-question basis, the replies received by the Secretariat from international organizations in response to the questionnaire concerning their status, privileges and immunities that the Legal Counsel of the United Nations sent to them on 5 January 1984 (see para. 211 (f), above).

217. In his third report, the Special Rapporteur analysed the debates on the topic in the Sixth Committee (fortieth session of the General Assembly) and in the International Law Commission at its thirty-seventh session and drew a number of conclusions from those debates. Similarly, he set out a number of considerations regarding the scope of the topic and submitted to the Commission, in compliance with its request, an outline of the subject-matter

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146/ Ibid., para. 267.

to be covered by the draft articles the Special Rapporteur intends to prepare on the topic. 147/

147/ The outline submitted by the Special Rapporteur read as follows:

"1. 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 its property and assets from search and from any other form of interference;

(d) Inviolability of its archives and documents;

(e) Privileges and immunities in respect of communication facilities (use of codes and dispatch of correspondence by courier or in bags, etc.);

B. Financial and fiscal privileges:

(a) Exemption from taxes;

(b) Exemption from Customs duties;

(c) Currency controls;

(d) Bank deposits.

"2. 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 executive and other senior officials; and

(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.

"3. Privileges and immunities of experts on mission for, or persons having official business with, the organization."

218. The Commission considered the Special Rapporteur's third report at its 2023rd to 2027th and 2029th meetings. After hearing the Special Rapporteur's introduction, the Commission held an exchange of views on various aspects of the topic, such as the scope of the future draft, the relevance of the outline submitted by the Special Rapporteur and the methodology to be followed in the future.

219. Further to the exchange of views, the Commission decided to request the Special Rapporteur to continue his study of the topic in accordance with the guidelines laid out in the schematic outline contained in his third report and in the light of the opinions expressed on the topic at the present session of the Commission, hoping that it would be possible for him to produce a set of draft articles in due course in the future. Regarding the methodology to be followed, the Special Rapporteur would be free to follow a combination of the approaches mentioned in the exchange of views, namely, the codification or systematization of the existing rules and practice in the various areas indicated in the outline and the identification, where possible, in each of those areas, of the existing normative lacunae or specific problems that call for legal regulation, for the purposes of the progressive development of international law on those points.

CHAPTER VI

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. State responsibility

220. At its 2016th meeting, on 17 June 1987, the Commission appointed Mr. Gaetano Arangio-Ruiz Special Rapporteur for the topic "State responsibility".

B. Jurisdictional immunities of States and their property

221. At its 2016th meeting, on 17 June 1987, the Commission appointed Mr. Motoo Ogiso Special Rapporteur for the topic "Jurisdictional immunities of States and their property".

222. The Commission wishes to recall that at its 1972nd meeting on 20 June 1986 it decided that in accordance with articles 16 and 21 of its Statute the draft articles provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to Governments for comments and observations. The Commission also wishes to recall that the General Assembly, in paragraph 9 of its resolution 41/81 adopted on 3 December 1986 urged Governments "to give full attention to the request of the International Law Commission, transmitted through the Secretary-General for comments and observations on the draft articles on jurisdictional immunities of States and their property ..., adopted on first reading by the Commission", and that the Secretary-General, by a note dated 13 February 1987 invited Governments to submit their comments and observations by 1 January 1988. The Commission wishes to emphasize the importance of this deadline for the continuation of its work on the topic.

C. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier

223. The Commission wishes to recall that at its 1980th meeting on 2 July 1986, it decided that in accordance with articles 16 and 21 of the Statute of the Commission, the draft articles provisionally adopted by the Commission on first reading should be transmitted through the Secretary-General to Governments for comments and observations. The Commission also wishes to recall that the General Assembly in paragraph 9 of its resolution 41/81 urged Governments "to give full attention to the request of the International Law Commission, transmitted through the Secretary-General, for comments and observations on the draft articles ... on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier adopted on first reading by the Commission and that the

Secretary-General, by letter dated 13 February 1987, invited Governments to submit their comments and observations by 1 January 1988. The Commission wishes to emphasize the importance of this deadline for the continuation of its work on the topic.

D. Programme, procedures and working methods of the Commission, and its documentation

224. At its 1990th meeting, the Commission noted that in paragraph 5 of resolution 41/81 of 3 December 1986, the General Assembly had requested it

> "(a) To consider thoroughly:
>
> (i) The planning of its activities for the term of office of its members, bearing in mind the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics;
>
> (ii) Its methods of work in all their aspects, bearing in mind the possibility of staggering the consideration of some topics;
>
> "(b) To indicate in its annual report those subjects and issues on which views expressed by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work;".

The Commission agreed that this request should be taken up under item 9 of its agenda entitled "Programme, procedures and working methods of the Commission, and its documentation", and that this agenda item should be considered in the Planning Group of the Enlarged Bureau.

225. The Planning Group of the Enlarged Bureau of the Commission was established by the Commission at its 1990th meeting on 4 May 1987. The Planning Group was composed of Mr. Leonardo Díaz-González (Chairman), Prince Bola Adesumbo Ajibola, Mr. Awn Al-Khasawneh, Mr. Riyadh Al-Qaysi, Mr. Julio Barboza, Mr. Juri G. Barsegov, Mr. John Alan Beesley, Mr. Mohamed Bennouna, Mr. Gudmundur Eiriksson, Mr. Laurel B. Francis, Mr. Jorge Illueca, Mr. Andreas J. Jacovides, Mr. Abdul G. Koroma, Mr. Paul Reuter, Mr. Emmanuel J. Roucounas, Mr. Doudou Thiam, Mr. Christian Tomuschat and Mr. Alexander Yankov. Members of the Commission not members of the Group were invited to attend and a number of them participated in the meetings.

226. The Planning Group held 11 meetings on 5, 6 and 14 May, 19 and 30 June and 8, 9, 13, 14 and 15 July 1987. It had before it, in addition to the section of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-first session entitled "Programme and

methods of work of the Commission" (A/CN.4/L.410, paras. 755 to 787), a number of proposals submitted by members of the Commission.

227. The Enlarged Bureau considered the report of the Planning Group on 16 July 1987. At its 2041st meeting, on 17 July 1987, the Commission adopted the following views on the basis of recommendations of the Enlarged Bureau resulting from the discussions in the Planning Group.

Planning of activities

228. At the beginning of the five-year term of office of the newly-constituted Commission, the current programme of work consisted of the following topics: State responsibility; jurisdictional immunities of States and their property; status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; draft Code of Offences against the Peace and Security of Mankind; the law of the non-navigational uses of international watercourses; international liability for injurious consequences arising out of acts not prohibited by international law; and relations between States and international organizations (second part of the topic).

229. In accordance with paragraph 5 (a) (i) of General Assembly resolution 41/81, the Commission considered extensively the planning of its activities for the term of office of its members. In doing so, it bore in mind, as requested by this resolution, the desirability of achieving as much progress as possible in the preparation of draft articles on specific topics.

230. As the Commission has already indicated, 148/ while the adoption of any rigid schedule of operation would be impracticable, the use of goals in planning its activities affords a helpful framework for decision-making.

231. The Commission noted that the Chairman of the Plannng Group had convened a meeting of Special Rapporteurs with a view to ascertaining their plans in relation to their respective topics and thereby facilitate the planning of the activities of the Commission for the term of office of its members. The intentions expressed by the Special Rapporteurs in the course of this meeting are reflected in the table annexed to the present report.

232. Taking into account the progress of work achieved on the topics in the current programme as well as the state of readiness for making further progress, and bearing in mind the different degrees of comp xity and delicacy

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148/ Yearbook ... 1975, vol. II, p. 184, document A/10010/Rev.1, para. 147.

of the various topics, the Commission concluded that it would endeavour to complete in the course of the five-year term the second reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (1988), and the second reading of the draft articles on jurisdictional immunities of States and their property (1989), provided, in both cases, that, as was desirable, the requested written comments and observations from Governments were available on time. The Commission furthermore concluded that it would endeavour to complete by 1991 the first reading of the draft articles on the Code of Offences against the Peace and Security of Mankind and the first reading of the draft articles on the law of the non-navigational uses of international watercourses. The Commission intends to make substantial progress, during the same period, on State responsibility, on international liability for injurious consequences arising out of acts not prohibited by international law and on the second part of the topic of relations between States and international organizations. It however considers it premature to set itself specific goals in relation to those topics.

233. With respect to State responsibility, the Special Rapporteur expressed the wish that, as for the other projects, the secretariat of the Commission provide the assistance of its experts. As regards in particular the programme he proposes to carry out for the 1988 session, he informed the Commission that he had officially called the attention of the Secretary of the Commission as well as of the Legal Counsel to the necessity that an exhaustive and analytical research be carried out on time on the substantive content of international responsibility (draft articles 6 and 7 of Part Two of the present draft), notably on the cessation of the wrongful conduct, restitutio in integrum, reparation stricto sensu, satisfaction, guarantees of non-repetition and the qualitative aspects of damage (injury).

234. In working out the above programme, the Commission bore in mind the possibility of staggering the consideration of some topics, as envisaged in paragraph 5 (a) (i) of General Assembly resolution 41/81. The Commission is of the view that decisions in this respect can best be taken on a year-to-year basis, as they must be based on parameters which are as yet unknown, such as timeliness of governmental responses to Commission requests for written comments and observations, and progress of work in the Drafting Committee.

Methods of work

235. The Commission gave serious attention to the request of the General Assembly that it should consider thoroughly its methods of work in all their aspects. To that end the Planning Group established a Working Group on Methods of Work which was composed of Mr. Leonardo Díaz-González (Chairman), Mr. Awn Al-Khasawneh, Mr. Riyadh Al-Qaysi, Mr. Julio Barboza, Mr. Juri G. Barsegov, Mr. Gudmundur Eiriksson, Mr. Abdul G. Koroma, Mr. Paul Reuter and Mr. Alexander Yankov. It was agreed that when the Working Group took up the matter of the Drafting Committee, members of the Commission having served as Chairman of the Drafting Committees who were not already included in the Group would be invited to attend. Those members included Mr. Carlos Calero-Rodrigues, Mr. Ahmed Mahiou and Mr. Edilbert Razafindralambo.

236. While being of the view that tested methods should not be radically or heedlessly altered, the Commission shares the opinion that some specific aspects of its procedures can usefully be reviewed.

237. The Commission strongly desires that the Drafting Committee, which plays a key role in harmonizing the various viewpoints and working out generally acceptable solutions, should work in optimum conditions.

238. As regards the composition of the Drafting Committee, the Commission is aware that a proper balance must be kept, notwithstanding practical constraints, between two legitimate concerns, namely that the principal legal systems and the various languages should be equitably represented in the Committee and that the size of the Committee should be kept within limits compatible with its drafting responsibilities. The Commission will continue to bear those concerns in mind in the future. A proposal was also discussed that the Drafting Committee should have a flexible composition depending on the questions before it, the number of members for any given topic varying from 12 to 16.

239. As a way of facilitating the task of the Drafting Committee, the Chairman of the Commission should, whenever possible, indicate the main trends of opinion revealed by the debate in plenary. The Commission bears in mind that premature referral of draft articles to the Drafting Committee, and excessive time-lags between such referral and actual consideration of draft articles in the Committee, have counter-productive effects.

240. The Commission recognizes that every possibility of facilitating the work of the Drafting Committee should be explored. The Commission considered in particular a suggestion that computerized assistance should be provided to the Drafting Committee. It intends to revert to the above suggestion at a later stage, in the light of more concrete information on its practical implementation and implications.

241. As regards the request in paragraph 5 (b) of General Assembly resolution 41/81, the Commission decided to take it duly into account, while bearing in mind the practice of the Commission in this regard. The Commission, at the present session, has already attempted to improve the existing ways and means of communication with the General Assembly. It will continue to look for a suitable method in order to satisfy the wishes of the General Assembly. The request of the General Assembly was discussed in particular in connection with the treatment of the topics "Draft Code of Offences against the Peace and Security of Mankind" (see para. 67, above) and "The law of the non-navigational uses of international watercourses" (see para. 118, above).

242. The Commission takes this opportunity to emphasize the importance for the effectiveness of its work of greater response from Governments of Member States to its questionnaires or requests for written comments and observations.

Duration of the session

243. The Commission noted with appreciation that notwithstanding the current financial crisis of the United Nations, its position as set out in paragraph 252 of its report on the work of its thirty-eighth session 149/ had been duly taken into account and that the competent services of the Secretariat had found it possible to reduce by one week only the normal duration of its session. The Commission, however, wishes to reiterate its view that the nature of its task of codification and progressive development of international law as envisaged in the Charter, as well as the magnitude and complexity of the subjects on its agenda, make it essential that its annual sessions be of the usual 12-week duration. In planning its activities for the term of office of its members, as requested by paragraph 5 (b) of General Assembly resolution 41/81, the Commission assumed that the full

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149/ Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10).

duration of its session would be restored. Should this not be done, the Commission would find it impossible to abide by the plan it agreed upon and some concentration of its efforts would have to take place, with the possible consequence that not every one of the topics on its agenda would be considered at any one session. The Commission wishes to emphasize that, had it not been for the exceptional circumstance that three of the items on its agenda were not considered at the present session for the reasons explained in paragraph 9 above, the type of difficulties referred to in paragraph 252 of last year's report would undoubtedly have been encountered at the present session, as well.

Documentation

244. The Commission wishes to emphasize that the reports of Special Rapporteurs are intended to lay the ground for a systematic and meaningful consideration of the topics on its agenda. An important condition for those reports to meet their purpose is that they should be submitted and distributed sufficiently early. It is therefore the intention of the Commission not to discuss at a given session any report made available to its members less than two weeks before the opening of that session, unless special circumstances dictate otherwise.

245. The Commission, in view of the fundamental importance which it attaches to the continuance of the present system of summary records for the reasons explained in paragraph 253 of its report on the work of its thirty-eighth session, noted with satisfaction that the General Assembly at its forty-first session had confirmed its previous decision whereby the Commission is entitled to summary records.

246. The Commission had before it various proposals concerning the format of its report to the General Assembly. Some of these proposals were: (a) that the report should open with a brief topical summary of its content; (b) that an introduction to the report by the Chairman of the Commission along the lines of his oral presentation to the Sixth Committee be circulated to Governments immediately following the conclusion of the session of the Commission. The Commission could not consider these proposals for lack of time. It may be anticipated that the Planning Group to be established at the next session will revert to those proposals and give them due consideration.

247. The Commission wishes to emphasize the usefulness of the booklet "The International Law Commission and its work", which is extensively used in diplomatic and academic circles as a basic work of reference. It notes with

satisfaction that measures have been taken to find the printing funds necessary for the issuance of an updated edition of the booklet in the near future.

248. The Commission expresses appreciation to the Codification Division of the United Nations Office of Legal Affairs for the valuable assistance provided in the preparation of background studies and pre-session documentation, the servicing of sessions of the Commission and the compilation of post-session documentation. The Commission, however, is concerned that the Codification Division has become so seriously understaffed - due in part to the non-replacement of two senior staff members who have been transferred - as to be unable to undertake research projects, and engage in the preparation of studies, which has negative implications for the carrying out of the Commission's function. The Commission feels that appropriate steps should be taken so that the Codification Division can perform its functions properly by providing, more particularly, the requisite assistance to Special Rapporteurs (see para. 233 above) and can play an increased role, as consistently envisaged by the General Assembly in its successive resolutions on the report of the International Law Commission.

249. The Commission also expresses its satisfaction at the overall quality of the interpretation, translation and other conference services placed at its disposal and hopes it will continue to enjoy the services of interpreters, précis-writers and translators familiar with its work. The Commission, however, noted with some concern that curtailment of précis-writing services had resulted in its being unable to hold plenary meetings in the afternoon throughout the present session. Another aspect of the question of summary records concerns the deadline within which corrections must be submitted. The Commission favours an extension of the present time-limit.

E. Co-operation with other bodies

250. The Commission was represented at the December 1986 session of the European Committee on Legal Co-operation, in Strasbourg, by Mr. Paul Reuter, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The European Committee on Legal Co-operation was represented at the present session of the Commission by Mr. Frits Hondius. Mr. Hondius addressed the Commission at its 2012th meeting on 10 June 1987 and his statement is recorded in the summary record of that meeting.

251. The Commission was represented at the January 1987 session of the Inter-American Juridical Committee, in Rio de Janeiro, by Mr. Doudou Thiam, as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Inter-American Juridical Committee was represented at the present session of the Commission by Mr. Roberto MacLean. Mr. MacLean addressed the Commission at its 2015th meeting on 16 June 1987 and his statement is recorded in the summary records of that meeting.

252. The Commission was represented at the January 1987 session of the Asian-African Legal Consultative Committee, in Bangkok, by Mr. Doudou Thiam, as Chairman of the Commission, who attended the session as observer for the Commission and addressed the Committee on behalf of the Commission. The Asian-African Legal Consultative Committee was represented at the present session of the Commission by the Secretary-General of the Committee, Mr. B. Sen. Mr. Sen addressed the Commission at its 1996th meeting on 13 May 1987 and his statement is recorded in the summary record of that meeting.

F. Date and place of the fortieth session

253. The Commission agreed that its next session, to be held at the United Nations Office at Geneva, should begin on 9 May and conclude on 29 July 1988.

G. Representation at the forty-second session of the General Assembly

254. The Commission decided that it should be represented at the forty-second session of the General Assembly by its Chairman, Mr. Stephen C. McCaffrey.

H. International Law Seminar

255. Pursuant to General Assembly resolution 41/81, the United Nations Office at Geneva organized the twenty-third session of the International Law Seminar during the present session of the Commission. The Seminar is intended for post-graduate students of international law and young professors or government officials who normally deal with questions of international law in the course of their work. Twenty-three candidates of different nationalities and mostly from developing countries, selected by a committee under the chairmanship of Mr. Edilbert Razafindralambo, participated in this session of the Seminar, as well as one observer.

256. The session of the Seminar was held at the Palais des Nations, from 1 to 19 June 1987, under the direction of Ms M. Noll-Wagenfeld.

257. During the three weeks of the session, the participants in the Seminar attended the meetings of the International Law Commission and lectures specifically organized for them. Several lectures were given by members of the Commission, as follows: Mr. Carlos Calero-Rodrigues: "Draft Code of Offences against the Peace and Security of Mankind"; Mr. Bernhard Graefrath: "Human Rights Committee"; Mr. Ahmed Mahiou: "Jurisdictional immunities of States and their property"; Mr. Stephen McCaffrey: "The law of the non-navigational uses of international watercourses"; Mr. Motoo Ogiso: "Some aspects of international law concerning space communication"; Mr. Paul Reuter: "Relations between States and international organizations"; Mr. Doudou Thiam: "The work of the International Law Commission". Members of the United Nations Secretariat spoke to the participants of the Seminar on questions related to the protection of refugees, human rights complaints procedures and legal aspects of emergency management.

258. The participants in the Seminar also met with representatives of the Canton of Geneva and were received at the headquarters of the International Committee of the Red Cross, following a lecture on "International humanitarian law and public international law".

259. The Seminar is funded by voluntary contributions of Member States and receives assistance rendered by the United Nations Secretariat and through national fellowships awarded by Governments to their own nationals. The Commission noted with particular appreciation that the Governments of Argentina, Austria, Cyprus, Denmark, Federal Republic of Germany, Finland, the Netherlands, New Zealand and Sweden had made fellowships available to participants from developing countries through voluntary contributions to the appropriate United Nations assistance programme. With the award of these fellowships it was possible to achieve adequate geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise have been prevented from participating in the session. This year, fellowships were awarded to 15 participants. Of the 518 participants, representing 121 nationalities, who have participated in the Seminar since it began in 1964, fellowships have been awarded to 255.

260. The Commission wishes to stress the importance it attaches to the sessions of the Seminar, which enable young lawyers and especially those from developing countries to familiarize themselves with the work of the Commission and the activities of the many international organizations which have their headquarters in Geneva. The Commission, therefore, appeals to all States to contribute, in order that the holding of the Seminar may continue.

261. At the end of the session of the Seminar, Mr. Stephen C. McCaffrey, Chairman of the International Law Commission, and Mr. Jan Martenson, Director-General of the United Nations Office at Geneva, presided over a ceremony in which each of the participants was presented with a certificate attesting to his or her participation in the twenty-third session of the Seminar.

I. Gilberto Amado Memorial Lecture

262. With a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission, it was decided in 1971 that a memorial should take the form of a lecture to which the members of the Commission, the participants in the session of the International Law Seminar and other experts in international law would be invited.

263. The 1987 Gilberto Amado Memorial Lecture marked the centenary of the birth of Gilberto Amado and a generous contribution was made by the Government of Brazil to celebrate this event. The Commission established an informal consultative committee, early in its session, composed of Mr. Carlos Calero-Rodrigues, Chairman, Mr. Abdul Koroma, Mr. Andreas Jacovides, Mr. Paul Reuter and Mr. Alexander Yankov, to advise on necessary arrangements. The eighth Gilberto Amado Memorial Lecture was accordingly arranged and took place on 16 June 1987, followed by a Gilberto Amado Memorial dinner. Mr. José Sette-Câmara, Judge of the International Court of Justice, spoke on "Gilberto Amado, the Man", and Mr. Cançado Trindade, Legal Adviser of the Ministry of Foreign Affairs, Brasilia, Brazil, spoke on "Gilberto Amado and the International Law Commission".

264. The Commission expressed its gratitude to the Government of Brazil for its contribution which enabled the Gilberto Amado Memorial Lecture to be held in 1987. The Commission requested its Chairman to convey its gratitude to the Government of Brazil.

ANNEX

TABLE PREPARED ON THE BASIS OF INDICATIONS PROVIDED BY THE SPECIAL RAPPORTEURS AT THE MEETING REFERRED TO IN PARAGRAPH 231 OF THE REPORT

	Draft Code of Offences against the Peace and Security of Mankind	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier	The law of the non-navigational uses of international watercourses	International liability for injurious consequences arising out of acts not prohibited by international law	State responsibility	Jurisdictional immunities of States and their property	Relations between States and international organizations (second part of the topic)
1988	Submission by the Special Rapporteur of draft articles on crimes against peace	Submission by the Special Rapporteur of a report for second reading of provisional draft 1/	Submission by the Special Rapporteur of a report covering Part IV (Exchange of data) and Part V (Environmental protection, pollution and related matters) 2/	Submission by the Special Rapporteur of revised general provisions and of articles on principles and on procedures of implementation	Submission by the Special Rapporteur of a report on the questions covered by articles 6 and 7, as proposed by the previous Special Rapporteur, 3/ and completion of the preparatory work for the second reading of Part I	Submission by the Special Rapporteur of a report for second reading of provisional draft 4/	Submission of a report by the Special Rapporteur
1989	Submission by the Special Rapporteur of draft articles on crimes against humanity		Submission by the Special Rapporteur of a report covering Part VI (Management of international watercourses and international mechanisms) and Part VII (Settlement of disputes)	Submission by the Special Rapporteur of the rest of the articles	Submission by the Special Rapporteur of a report covering counter-measures for ordinary delicts	See footnote 4/ below	Submission of a report by the Special Rapporteur
1990	Submission by the Special Rapporteur of draft articles on war crimes		Completion of draft in first reading depending on progress of work in Drafting Committee		Submission by the Special Rapporteur of a report covering counter-measures for crimes		Submission of a report by the Special Rapporteur
1991	Completion of draft in first reading				Submission by the Special Rapporteur of a report on Part III (Settlement of disputes)		Completion of draft in first reading

1/ Should there be, by 1 January 1988, an insufficient number of responses to the request for observations addressed to Governments, the second reading of the draft would have to take place in 1989.

2/ Submission of report might be deferred to following year, depending on the progress of work in the Drafting Committee, where articles 10 and 11 and 15 are pending.

3/ Subject to the Secretariat being able to provide the necessary assistance.

4/ Should there be, by 1 January 1988, an insufficient number of responses to the request for observations addressed to Governments, the second reading of the draft would have to take place in 1989. The Special Rapporteur is inclined to consider 1989 as a more realistic deadline, in view of the complexity of the topic.

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